



## COMPENDIUM OF EXHIBITS

### ***Exhibits Pertaining to .SPORTS***

<b><u>Ex #</u></b>	<b><u>Description</u></b>
1	Steel Edge, LLC June 13, 2012 application for .SPORTS, App. ID 1-1614-27785
2	SportAccord March 13, 2013 objection to Steel Edge application
3	Annex A-2 to SportAccord objection, list of SportAccord members
4	Annex A-3 to SportAccord objection, list of organizations supporting SA objection
5	Steel Edge May 22, 2013 response to SportAccord objection
6	SportAccord June 11, 2013 letter to ICC re panel selection
7	ICC June 25, 2013 letter nominating Jonathan Taylor for .SPORTS objection panel
8	Taylor ICC Decl. of Acceptance and Availability, Stmt. of Impartiality and Independence
9	Jonathan Taylor ICC and Professional <i>Curricula Vitae</i>
10	dot Sport June 25, 2013 request to remove Taylor from .SPORT panel
11	ICC July 16, 2013 letter announcing consideration of dot Sport request to remove Taylor
12	ICC July 16, 2013 letter confirming Taylor appointment to Donuts' .SPORTS panel
13	ICC July 25, 2013 letter granting dot Sport request to remove Taylor from .SPORT panel
14	January 22, 2014 ruling upholding SportAccord's objection to Donuts' .SPORTS application
15	<i>Robert Kendrick v. International Tennis Federation, CAS 2011/A/2518</i>
	EXHIBITS 16-17 INTENTIONALLY OMITTED

### ***Exhibits Pertaining to .SKI***

<b><u>Ex #</u></b>	<b><u>Description</u></b>
18	Wild Lake, LLC June 13, 2012 application for .SKI, App. ID 1-1636-27531
19	FIS March 13, 2013 objection to Wild Lake application
20	Wild Lake May 15, 2013 response to FIS objection
21	ICC June 19, 2013 letter nominating Jonathan Taylor to .SKI objection panel
22	Taylor Decl. of Acceptance and Availability, Stmt. of Impartiality and Independence

23	Jonathan Taylor ICC <i>Curriculum Vitae</i>
24	Donuts June 30, 2013 request to remove Taylor from .SKI panel
25	FIS July 1, 2013 response to Donuts request to remove Taylor from .SKI panel
26	ICC July 12, 2013 letter acknowledging request to remove Taylor from .SKI panel
27	Taylor July 16, 2013 response to request for removal from .SKI panel
28	ICC July 25, 2013 letter denying Donuts' request to remove Taylor from .SKI panel
29	FIS June 27, 2013 supplemental submission in support of community objection
30	Donuts July 3, 2013 objection to FIS supplemental filing
31	Panel August 2, 2013 acceptance of supplemental filing, inviting Donuts response
32	Donuts August 16, 2013 response to FIS supplemental filing
33	Panel September 19 email announcing September 20, 2013 draft ruling
34	January 22, 2014 final determination upholding community objection to .SKI
	EXHIBITS 35-38 INTENTIONALLY OMITTED

***Exhibits Pertaining to .RUGBY***

<b><u>Ex #</u></b>	<b><u>Description</u></b>
39	Atomic Cross, LLC June 13, 2012 Application for .RUGBY, ID No. 1-1612-2805
40	IRB March 13, 2013 objection to Atomic Cross application
41	Atomic Cross June 6, 2013 response to IRB objection
42	Atomic Cross July 23, 2013 request to remove Richard McLaren as panelist
43	Dot Rugby July 23, 2013 joinder in request to remove Richard McLaren as panelist
44	IRB August 1, 2013 opposition to request to remove Richard McLaren as panelist
45	McLaren August 1, 2013 opposition to request to remove him as panelist
46	ICC August 23, 2013 letter announcing removal of Richard McLaren as panelist
47	January 31, 2014 ruling upholding IRB community objection to .RUGBY
	EXHIBITS 48-50 INTENTIONALLY OMITTED

***Exhibits of General Applicability***

<b><u>Ex #</u></b>	<b><u>Description</u></b>
51	Donuts March 12, 2014 request for review procedure for community objections
52	Donuts <i>et al.</i> November 1, 2013 joint letter to ICANN

On behalf of Donuts, the undersigned represents that true and correct copies of the foregoing are attached hereto under dividers bearing the exhibit numbers corresponding with each item as listed above.

DATED: October 8, 2014

THE IP and TECHNOLOGY LEGAL GROUP, P.C.

By: /kan/

Khurram A. Nizami  
Attorneys for Claimant DONUTS INC.

# EXHIBIT 1



## New gTLD Application Submitted to ICANN by: Steel Edge, LLC

String: sports

Originally Posted: 13 June 2012

Application ID: 1-1614-27785

### Applicant Information

#### 1. Full legal name

Steel Edge, LLC

#### 2. Address of the principal place of business

Contact Information Redacted

#### 3. Phone number

Contact Information Redacted

#### 4. Fax number

Contact Information Redacted

## 5. If applicable, website or URL

# Primary Contact

### 6(a). Name

Daniel Schindler

### 6(b). Title

EVP, Donuts Inc.

### 6(c). Address

### 6(d). Phone Number

Contact Information Redacted

### 6(e). Fax Number

### 6(f). Email Address

Contact Information Redacted

# Secondary Contact

### 7(a). Name

Jonathon Nevett

### 7(b). Title

EVP, Donuts Inc.

### 7(c). Address

### 7(d). Phone Number

Contact Information Redacted

### 7(e). Fax Number

### 7(f). Email Address

Contact Information Redacted

## Proof of Legal Establishment

### 8(a). Legal form of the Applicant

Limited Liability Company

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

Delaware.

<http://delcode.delaware.gov/title6/c018/sc01/index.shtml>

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

Covered TLD, LLC

9(c). If the applying entity is a joint venture, list all joint venture partners.

## Applicant Background

11(a). Name(s) and position(s) of all directors

11(b). Name(s) and position(s) of all officers and partners

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Covered TLD, LLC	N/A
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11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Paul Stahura	CEO, Donuts Inc.
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## Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

sports

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables

submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Donuts has conducted technical analysis on the applied-for string, and concluded that there are no known potential operational or rendering issues associated with the string.

The following sections discuss the potential operational or rendering problems that can arise, and how Donuts mitigates them.

#### ## Compliance and Interoperability

The applied-for string conforms to all relevant RFCs, as well as the string requirements set forth in Section 2.2.1.3.2 of the Applicant Guidebook.

#### ## Mixing Scripts

If a domain name label contains characters from different scripts, it has a higher likelihood of encountering rendering issues. If the mixing of scripts occurs within the top-level label, any rendering issue would affect all domain names registered under it. If occurring within second level labels, its ill-effects are confined to the domain names with such labels.

All characters in the applied-for gTLD string are taken from a single script. In addition, Donuts's IDN policies are deliberately conservative and compliant with the ICANN Guidelines for the Implementation of IDN Version 3.0. Specifically, Donuts does not allow mixed-script labels to be registered at the second level, except for languages with established orthographies and conventions that require the commingled use of multiple scripts, e.g. Japanese.

#### ## Interaction Between Labels

Even with the above issue appropriately restricted, it is possible that a domain name composed of labels with different properties such as script and directionality may introduce unintended rendering behaviour.

Donuts adopts a conservative strategy when offering IDN registrations. In particular, it ensures that any IDN language tables used for offering IDN second level registrations involve only scripts and characters that would not pose a risk when combined with the top level label.

#### ## Immature Scripts

Scripts or characters added in Unicode versions newer than 3.2 (on which IDNA2003 was based) may encounter interoperability issues due to the lack of software support.

Donuts does not currently plan to offer registration of labels containing such scripts or characters.

## ## Other Issues

To further contain the risks of operation or rendering problems, Donuts currently does not offer registration of labels containing combining characters or characters that require IDNA contextual rules handling. It may reconsider this decision in cases where a language has a clear need for such characters.

Donuts understands that the following may be construed as operational or rendering issues, but considers them out of the scope of this question. Nevertheless, it will take reasonable steps to protect registrants and Internet users by working with vendors and relevant language communities to mitigate such issues.

- missing fonts causing string to fail to render correctly; and
- universal acceptance of the TLD;

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

## Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

Q18A CHAR: 7985

### ABOUT DONUTS

Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model. To achieve its objectives, Donuts has recruited seasoned executive management with proven track records of excellence in the industry. In addition to this business and operational experience, the Donuts team also has contributed broadly to industry policymaking and regulation, successfully launched TLDs, built industry-leading companies from the ground up, and brought innovation, value and choice to the domain name marketplace.

### DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:

1. to make sure that the Internet remains as safe, stable and secure as possible, while
2. helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits. While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1. Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;

2. Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3. Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4. Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

#### ABOUT DONUTS' RESOURCES

Donuts' financial resources are extensive. The company has raised more than US\$100 million from a number of capital sources including multiple multi-billion dollar venture capital and private equity funds, a top-tier bank, and other well-capitalized investors. Should circumstances warrant, Donuts is prepared to raise additional funding from current or new investors. Donuts also has in place pre-funded, Continued Operations Instruments to protect future registrants. These resource commitments mean Donuts has the capability and intent to launch, expand and operate its TLDs in a secure manner, and to properly protect Internet users and rights-holders from potential abuse.

Donuts firmly believes a capable and skilled organization will operate multiple TLDs and benefit Internet users by:

1. Providing the operational and financial stability necessary for TLDs of all sizes, but particularly for those with smaller volume (which are more likely to succeed within a shared resources and shared services model);
2. Competing more powerfully against incumbent gTLDs; and
3. More thoroughly and uniformly executing consumer and rights holder protections.

#### THIS TLD

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD 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.

This TLD 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 consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

#### DONUTS' APPROACH TO PROTECTIONS

No entity, or group of entities, has exclusive rights to own or register second level names in this TLD. There are superior ways to minimize the potential abuse of second level names, and in this application Donuts will describe and commit to an extensive array of protections against abuse, including protections against the abuse of trademark rights.

We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD. As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.

By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer

incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.

#### OUR PROTECTIONS

Donuts has consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs, and bring to the Internet namespace nearly two dozen new rights and protection mechanisms to raise user safety and protection to a new level.

These include eight, innovative and forceful mechanisms and resources that far exceed the already powerful protections in the applicant guidebook. These are:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

They also include fourteen new measures that were developed specifically by ICANN for the new TLD process. These are:

1. Controls to ensure proper access to domain management functions;
2. 24/7/365 abuse point of contact at registry;
3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;
4. Thick WhoIs;
5. Use of the Trademark Clearinghouse;
6. A Sunrise process;
7. A Trademark Claims process;
8. Adherence to the Uniform Rapid Suspension system;
9. Adherence to the Uniform Domain Name Dispute Resolution Policy;
10. Adherence to the Post Delegation Dispute Resolution Policy;
11. Detailed security policies and procedures;
12. Strong security controls for access, threat analysis and audit;
13. Implementation DNSSEC; and
14. Measures for the prevention of orphan glue records.

#### DONUTS' INTENTION FOR THIS TLD

As a senior government authority has recently said, "a successful applicant is entrusted with operating a critical piece of global Internet infrastructure." Donuts' plan and intent is for this TLD to serve the international community by bringing new users online through opportunities for economic growth, increased productivity, the exchange of ideas and information and greater self-expression.

## 18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Q18B CHAR: 6457

Donuts will be the industry leader in customer service, reputation and choice. The reputation of this, and other TLDs in the Donuts portfolio, will be built on:

1. Our successful launch and marketplace reach;
2. The stability of registry operations; and

### 3. The effectiveness of our protection mechanisms.

#### THE GOAL OF THIS TLD

This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences. In reviewing potential strings, we deeply researched discrete industries and sectors of human activity and consulted extensive data sources relevant to the online experience. Our methodology resulted in the selection of this TLD – one that offers a very high level of user utility, precision in content delivery, and ability to contribute positively to economic growth.

#### SERVICE LEVELS

Donuts will endeavor to provide a service level that is higher than any existing TLD. Donuts' commitment is to meet and exceed ICANN-mandated availability requirements, and to provide industry-leading services, including non-mandatory consumer and rights protection mechanisms (as described in answers to Questions 28, 29, and 30) for a beneficial customer experience.

#### REPUTATION

As noted, Donuts management enjoys a reputation of excellence as domain name industry contributors and innovators. This management team is committed to the successful expansion of the Internet, the secure operation of the DNS, and the creation of a new segment of the web that will be admired and respected.

The Donuts registry and its operations are built on the following principles:

1. More meaningful product choice for registrants and users;
2. Innovative services;
3. Competitive pricing; and
4. A more secure environment with better protections.

These attributes will flow to every TLD we operate. This string's reputation will develop as a compelling product choice, with innovative offerings, competitive pricing, and safeguards for consumers, businesses and other users.

Finally, the Donuts team has significant operational experience with registrars, and will collaborate knowledgeably with this channel to deliver new registration opportunities to end-users in way that is consistent with Donuts principles.

#### NAMESPACE COMPETITION

This TLD will contribute significantly to the current namespace. It will present multiple new domain name alternatives compared to existing generic and country code TLDs. The DNS today offers very limited addressing choices, especially for registrants who seek a specific identity.

#### INNOVATION

Donuts will provide innovative registration methods that allow registrants the opportunity to secure an important identity using a variety of easy-to-use tools that fit individual needs and preferences.

Consistent with our principle of innovation, Donuts will be a leader in rights protection, shielding those that deserve protection and not unfairly limiting or directing those that don't. As detailed in this application, far-reaching protections will be provided in this TLD. Nevertheless, the Donuts approach is inclusive, and second level registrations in this TLD will be available to any responsible registrant with an affinity for this string. We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility.

This TLD will contribute to the user experience by offering registration alternatives that better meet registrants' identity needs, and by providing more intuitive methods for users to locate products, services and information. This TLD also will contribute to marketplace diversity, an important element of user experience. In addition, Donuts will offer its sales channel a suite of innovative registration products that are inviting, practical and useful to registrants.

As noted, Donuts will be inclusive in its registration policies and will not limit registrant eligibility at the second level at the moment of registration. Restricting access to second level names in this broadly generic TLD would cause more harm than benefit by denying domain access to legitimate registrants. Therefore, rather than artificially limiting registrant access, we will control abuse by carefully and uniformly implementing our extensive range of user and rights protections.

Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behavior of registrants, not their identity.

Donuts will specifically adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies. Further, Donuts will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.

Donuts TLDs will comply with all applicable laws and regulations regarding privacy and data protection. Donuts will provide a highly secure registry environment for registrant and user data (detailed information on measures to protect data is available in our technical response).

Donuts will permit the use of proxy and privacy services for registrations in this TLD, as there are important, legitimate uses for such services (including free speech rights and the avoidance of spam). Donuts will limit how such proxy and privacy services are offered (details on these limitations are provided in our technical response). Our approach balances the needs of legitimate and responsible registrants with the need to identify registrants who illegally use second level domains.

Donuts will build on ICANN's outreach and media coverage for the new TLD Program and will initiate its own effort to educate Internet users and rights holders about the launch of this TLD. Donuts will employ three specific communications efforts. We will:

1. Communicate to the media, analysts, and directly to registrants about the Donuts enterprise.
2. Build on existing relationships to create an open dialogue with registrars about what to expect from Donuts, and about the protections required by any registrar selling this TLD.
3. Communicate directly to end-users, media and third parties interested in the attributes and benefits of this TLD.

## 18(c). What operating rules will you adopt to eliminate or minimize social costs?

Q18C Standard CHAR: 1440

Generally, during the Sunrise phase of this TLD, Donuts will conduct an auction if there are two or more competing applications from validated trademark holders for the same second level name. Alternatively, if there is a defined trademark classification reflective of this TLD, Donuts may give preference to second-level applicants with rights in that classification of goods and services. Post-Sunrise, requests for registration will generally be on a first-come, first-served basis.

Donuts may offer reduced pricing for registrants interested in long-term registration, and potentially to those who commit to publicizing their use of the TLD. Other advantaged pricing may apply in selective cases, including bulk purchase pricing.

Donuts will comply with all ICANN-related requirements regarding price increases: advance notice of any renewal price increase (with the opportunity for existing registrants to renew for up to ten years at their current pricing); and advance notice of any increase in initial registration pricing.

The company does not otherwise intend, at this time, to make contractual commitments regarding pricing. Donuts has made every effort to correctly price its offerings for end-user value prior to launch. Our objective is to avoid any disruption to our customers after they have registered. We do not plan or anticipate significant price increases over time.

## Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies

in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

## Geographic Names

21(a). Is the application for a geographic name?

No

## Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

Q22 CHAR: 4979

As previously discussed (in our response to Q18: Mission / Purpose) Donuts believes in an open Internet. Consistent with this we also believe in an open DNS, where second level domain names are available to all registrants who act responsibly.

The range of second level names protected by Specification 5 of the Registry Operator contract is extensive (approx. 2,000 strings are blocked). This list resulted from a lengthy process of collaboration and compromise between members of the ICANN community, including the Governmental Advisory Committee. Donuts believes this list represents a healthy balance between the protection of national naming interests and free speech on the Internet.

Donuts does not intend to block second level names beyond those detailed in Specification 5. Should a geographic name be registered in this TLD and used for illegal or abusive activity Donuts will remedy this by applying the array of protections implemented in this TLD. (For details about these protections please see our responses to Questions 18, 28, 29 and 30).

Donuts will strictly adhere to the relevant provisions of Specification 5 of the New gTLD Agreement. Specifically:

1. All two-character labels will be initially reserved, and released only upon agreement between Donuts and the relevant government and country code manager.
2. At the second level, country and territory names will be reserved at the second and other levels according to these standards:

- 2.1. Short form (in English) of country and territory names documented in the ISO 3166-1 list;
- 2.2. Names of countries and territories as documented by the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
- 2.3. The list of United Nations member states in six official UN languages, as prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Donuts will initially reserve country and territory names at the second level and at all other levels within the TLD. Donuts supports this requirement by using the following internationally recognized lists to develop a comprehensive master list of all geographic names that are initially reserved:

1. The short form (in English) of all country and territory names contained on the ISO 3166-1 list, including the European Union, which is exceptionally reserved on the ISO 3166-1 List, and its scope extended in August 1999 to any application needing to represent the name European Union [[http://www.iso.org/iso/support/country\\_codes/iso\\_3166\\_code\\_lists/iso-3166-1\\_decoding\\_table.htm#EU](http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU)].
2. The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World.
3. The list of UN member states in six official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names
4. The 2-letter alpha-2 code of all country and territory names contained on the ISO 3166-1 list, including all reserved and unassigned codes

This comprehensive list of names will be ineligible for registration. Only in consultation with the GAC and ICANN would Donuts develop a proposal for release of these reserved names, and seek approval accordingly. Donuts understands governmental processes require time-consuming, multi-department consultations. Accordingly, we will apportion more than adequate time for the GAC and its members to review any proposal we provide.

Donuts recognizes the potential use of country and territory names at the third level. We will address and mitigate attempted third-level use of geographic names as part of our operations.

Donuts' list of geographic names will be transmitted to Registrars as part of the onboarding process and will also be made available to the public via the TLD website. Changes to the list are anticipated to be rare; however, Donuts will regularly review and revise the list as changes are made by government authorities.

For purposes of clarity the following will occur for a domain that is reserved by the registry:

1. An availability check for a domain in the reserved list will result in a "not available" status. The reason given will indicate that the domain is reserved.
2. An attempt to register a domain name in the reserved list will result in an error.
3. An EPP info request will result in an error indicating the domain name was not found.
4. Queries for a reserved name in the WHOIS system will display information indicating the reserved status and indicate it is not registered nor is available for registration.
5. Reserved names will not be published or used in the zone in any way.
6. Queries for a reserved name in the DNS will result in an NXDOMAIN response.

# Registry Services

## 23. Provide name and full description of all the Registry Services to be provided.

Q23 CHAR: 22971

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

The following response describes our registry services, as implemented by Donuts and our partners. Such partners include Demand Media Europe Limited (DMEL) for back-end registry services; AusRegistry Pty Ltd. (ARI) for Domain Name System (DNS) services and Domain Name Service Security Extensions (DNSSEC); an independent consultant for abuse mitigation and prevention consultation; Equinix and SuperNap for datacenter facilities and infrastructure; and Iron Mountain Intellectual Property Management, Inc. (Iron Mountain) for data escrow services. For simplicity, the term “company” and the use of the possessive pronouns “we”, “us”, “our”, “ours”, etc., all refer collectively to Donuts and our subcontracted service providers.

DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD). DMEL is structured to operate a robust and reliable Shared Registration System by leveraging the infrastructure and expertise of DMIH and Demand Media, Inc., which includes years of experience in the operation side for domain names in both gTLDs and ccTLDs for over 10 years.

### 1.0. EXECUTIVE SUMMARY

We offer all of the customary services for proper operation of a gTLD registry using an approach designed to support the security and stability necessary to ensure continuous uptime and optimal registry functionality for registrants and Internet users alike.

### 2.0. REGISTRY SERVICES

#### 2.1. Receipt of Data from registrars

The process of registering a domain name and the subsequent maintenance involves interactions between registrars and the registry. These interactions are facilitated by the registry through the Shared Registration System (SRS) through two interfaces:

- EPP: A standards-based XML protocol over a secure network channel.
- Web: A web based interface that exposes all of the same functionality as EPP yet accessible through a web browser.

Registrants wishing to register and maintain their domain name registrations must do so through an ICANN accredited registrar. The XML protocol, called the Extensible Provisioning Protocol (EPP) is the standard protocol widely used by registrars to communicate provisioning actions. Alternatively, registrars may use the web interface to create and manage registrations.

The registry is implemented as a “thick” registry meaning that domain registrations must have contact information associated with each. Contact information will be collected by registrars

and associated with domain registrations.

### 2.1.1. SRS EPP Interface

The SRS EPP Interface is provided by a software service that provides network based connectivity. The EPP software is highly compliant with all appropriate RFCs including:

- RFC 5730 Extensible Provisioning Protocol (EPP)
- RFC 5731 Extensible Provisioning Protocol (EPP) Domain Name Mapping
- RFC 5732 Extensible Provisioning Protocol (EPP) Host Mapping
- RFC 5733 Extensible Provisioning Protocol (EPP) Contact Mapping
- RFC 5734 Extensible Provisioning Protocol (EPP) Transport over TCP
- RFC 5910 Domain Name System (DNS) Security Extensions for Extensible Provisioning Protocol (EPP)
- RFC 3915 Domain Registry Grace Period Mapping for EPP

#### 2.1.1.1. SRS EPP Interface Security Considerations

Security precautions are put in place to ensure transactions are received only from authorized registrars in a private, secure manner. Registrars must provide the registry with narrow subnet ranges, allowing the registry to restrict network connections that originate only from these pre-arranged networks. The source IP address is verified against the authentication data received from the connection to further validate the source of the connection. Registrars may only establish a limited number of connections and the network traffic is rate limited to ensure that all registrars receive the same quality of service. Network connections to the EPP server must be secured with TLS. The revocation status and validity of the certificate are checked.

Successful negotiation of a TLS session begins the process of authentication using the protocol elements of EPP. Registrars are not permitted to continue without a successful EPP session establishment. The EPP server validates the credential information passed by the registrar along with validation of:

- Certificate revocation status
- Certificate chain
- Certificate Common Name matches the Common Name the registry has listed for the source IP address
- User name and password are correct and match those listed for the source IP address

In the event a registrar creates a level of activity that threatens the service quality of other registrars, the service has the ability to rate limit individual registrars.

#### 2.1.1.2. SRS EPP Interface Stability Considerations

To ensure the stability of the EPP Interface software, strict change controls and access controls are in place. Changes to the software must be approved by management and go through a rigorous testing and staged deployment procedure.

Additional stability is achieved by carefully regulating the available computing resources. A policy of conservative usage thresholds leaves an equitable amount of computing resources available to handle spikes and service management.

### 2.1.2. SRS Web Interface

The SRS web interface is an alternative way to access EPP functionality using a web interface, providing the features necessary for effective operations of the registry. This interface uses the HTTPS protocol for secure web communication. Because users can be located worldwide, as with the EPP interface, the web interface is available to all registrars over multiple network paths.

Additional functionality is available to registrars to assist them in managing their account. For instance, registrars are able to view their account balance in near real time as well as

the status of the registry services. In addition, notifications that are sent out in email are available for viewing.

#### 2.1.2.1. Web Interface Security Considerations

Only registrars are authorized to use the SRS web interface, and therefore the web interface has several security measures to prevent abuse. The web interface requires an encrypted network channel using the HTTPS protocol. Attempts to access the interface through a clear channel are redirected to the encrypted channel.

The web interface restricts access by requiring each user to present authentication credentials before proceeding. In addition to the typical user name and password combinations, the web interface also requires the user to possess a hardware security key as a second factor of authentication.

Registrars are provided a tool to create and manage users that are associated with their account. With these tools, they can set access and authorization levels for their staff.

#### 2.1.2.2. Web Interface Stability Considerations

Both the EPP interface and web interface use a common service provider to perform the work required to fulfill their requests. This provides consistency across both interfaces and ensures all policies and security rules are applied.

The software providing services for both interfaces executes on a farm of servers, distributing the load more evenly ensuring stability is maintained.

### 2.2. Dissemination of TLD Zone Files

#### 2.2.1. Communication of Status Information of TLD Zone Servers to Registrars

The status of TLD zone servers and their ability to reflect changes in the SRS is of great importance to registrars and Internet users alike. We ensure that any change from normal operations is communicated to the relevant stakeholders as soon as is appropriate. Such communication might be prior to the status change, during the status change and/or after the status change (and subsequent reversion to normal) – as appropriate to the party being informed and the circumstance of the status change.

Normal operations are:

- DNS servers respond within SLAs for DNS resolution.
- Changes in the SRS are reflected in the zone file according to the DNS update time SLA.

The SLAs are those from Specification 10 of the Registry Agreement.

A deviation from normal operations, whether it is registry wide or restricted to a single DNS node, will result in the appropriate status communication being sent.

#### 2.2.2. Communication Policy

We maintain close communication with registrars regarding the performance and consistency of the TLD zone servers.

A contact database containing relevant contact information for each registrar is maintained. In many cases, this includes multiple forms of contact, including email, phone and physical mailing address. Additionally, up-to-date status information of the TLD zone servers is provided within the SRS Web Interface.

Communication using the registrar contact information discussed above will occur prior to any maintenance that has the potential to effect the access to, consistency of, or reliability of the TLD zone servers. If such maintenance is required within a short timeframe, immediate

communication occurs using the above contact information. In either case, the nature of the maintenance and how it affects the consistency or accessibility of the TLD zone servers, and the estimated time for full restoration, are included within the communication.

That being said, the TLD zone server infrastructure has been designed in such a way that we expect no downtime. Only individual sites will potentially require downtime for maintenance; however the DNS service itself will continue to operate with 100% availability.

### 2.2.3. Security and Stability Considerations

We restrict zone server status communication to registrars, thereby limiting the scope for malicious abuse of any maintenance window. Additionally, we ensure registrars have effective operational procedures to deal with any status change of the TLD nameservers and will seek to align its communication policy to those procedures.

### 2.3. Zone File Access Provider Integration

Individuals or organizations that wish to have a copy of the full zone file can do so using the Zone Data Access service. This process is still evolving; however the basic requirements are unlikely to change. All registries will publish the zone file in a common format accessible via secure FTP at an agreed URL.

DMEL will fully comply with the processes and procedures dictated by the Centralized Zone Data Access Provider (CZDA Provider or what it evolves into) for adding and removing Zone File access consumers from its authentication systems. This includes:

- Zone file format and location.
- Availability of the zone file access host via FTP.
- Logging of requests to the service (including the IP address, time, user and activity log).
- Access frequency.

### 2.4. Zone File Update

To ensure changes within the SRS are reflected in the zone file rapidly and securely, we update the zone file on the TLD zone servers following a staged but rapid propagation of zone update information from the SRS, outwards to the TLD zone servers - which are visible to the Internet. As changes to the SRS data occur, those changes are updated to isolated systems which act as the authoritative primary server for the zone, but remain inaccessible to systems outside our network. The primary servers notify the designated secondary servers, which service queries for the TLD zone from the public. Upon notification, the secondary servers transfer the incremental changes to the zone and publicly present those changes.

The mechanisms for ensuring consistency within and between updates are fully implemented in our TLD zone update procedures. These mechanisms ensure updates are quickly propagated while the data remains consistent within each incremental update, regardless of the speed or order of individual update transactions.

### 2.5. Operation of Zone Servers

ARI maintains TLD zone servers which act as the authoritative servers to which the TLD is delegated.

#### 2.5.1. Security and Operational Considerations of Zone Server Operations

The potential risks associated with operating TLD zone servers are recognized by us such that we will perform the steps required to protect the integrity and consistency of the information they provide, as well as to protect the availability and accessibility of those servers to hosts on the Internet. The TLD zone servers comply with all relevant RFCs for DNS and DNSSEC, as well as BCPs for the operation and hosting of DNS servers. The TLD zone servers will be updated to support any relevant new enhancements or improvements adopted by the IETF.

The DNS servers are geographically dispersed across multiple secure data centers in strategic locations around the world. By combining multi-homed servers and geographic diversity, ARI's zone servers remain impervious to site level, supplier level or geographic level operational disruption.

The TLD zone servers are protected from accessibility loss by malicious intent or misadventure, via the provision of significant over-capacity of resources and access paths. Multiple independent network paths are provided to each TLD zone server and the query servicing capacity of the network exceeds the extremely conservatively anticipated peak load requirements by at least 10 times, to prevent loss of service should query loads significantly increase.

As well as the authentication, authorization and consistency checks carried out by the registrar access systems and DNS update mechanisms, ARI reduces the scope for alteration of DNS data by following strict DNS operational practices:

- TLD zone servers are not shared with other services.
- The primary authoritative TLD zone server is inaccessible outside ARI's network.
- TLD zone servers only serve authoritative information.
- The TLD zone is signed with DNSSEC and a DNSSEC Practice/Policy Statement published.

## 2.6. Dissemination of Domain Registration Information

Domain name registration information is required for a variety of purposes. Our registry provides this information through the required WHOIS service through a standard text based network protocol on port 43. Whois also is provided on the registry's web site using a standard web interface. Both interfaces are publically available at no cost to the user and are reachable worldwide.

The information displayed by the Whois service consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use of it does not require prior authorization or permission.

### 2.6.1. Whois Port 43 Interface

The Whois port 43 interface consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted ASCII text. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

### 2.6.2. Whois Web Interface

The Whois web interface also uses clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 43 using the HTTPS protocol.

### 2.6.3. Security and Stability Considerations

Abuse of the Whois system through data mining is a concern as it can impact system performance and reduce the quality of service to legitimate users. The Whois system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

In addition, the Whois web interface adds a simple challenge-response CAPCHA that requires a user to type in the characters displayed in image format.

Both systems have blacklist functionality to provide a complete block to individual IPs or IP ranges.

## 2.7. Internationalized Domain Names (IDNs)

An Internationalized Domain Name (IDN) contains at least one label that is displayed in a specific language script in IDN aware software. We will offer registration of second level IDN labels at launch, IDNs are published into the TLD zone. The SRS EPP and Web Interfaces also support IDNs. The IDN implementation is fully compliant with the IDNA 2008 suite of standards (RFC 5890, 5891, 5892 and 5893) as well as the ICANN Guidelines for the Implementation of IDN Version 3.0 (<http://www.icann.org/en/resources/idn/implementation-guidelines>). To ensure stability and security, we have adopted a conservative approach in our IDN registration policies, as well as technical implementation.

All IDN registrations must be requested using the A-label form, and accompanied by an RFC 5646 language tag identifying the corresponding language table published by the registry. The candidate A-label is processed according to the registration protocol as specified in Section 4 of RFC 5891, with full U-label validation. Specifically, the "Registry Restrictions" steps specified in Section 4.3 of RFC 5891 are implemented by validating the U-label against the identified language table to ensure that the set of characters in the U-label is a proper subset of the character repertoire listed in the language table.

### 2.7.1. IDN Stability Considerations

To avoid the intentional or accidental registration of visually similar characters, and to avoid identity confusion between domains, there are several restrictions on the registration of IDNs.

Domains registered within a particular language are restricted to only the characters of that language. This avoids the use of visually similar characters within one language which mimic the appearance of a label within another language, regardless of whether that label is already within the DNS or not.

Child domains are restricted to a specific language and registrations are prevented in one language being confused with a registration in another language; for example Cyrillic a (U+0430) and Latin a (U+0061).

## 2.8. DNSSEC

DNSSEC provides a set of extensions to the DNS that allow an Internet user (normally the resolver acting on a user's behalf) to validate that the DNS responses they receive were not manipulated en-route.

This type of fraud, commonly called 'man in the middle', allows a malicious party to misdirect Internet users. DNSSEC allows a domain owner to sign their domain and to publish the signature, so that all DNS consumers who visit that domain can validate that the responses they receive are as the domain owner intended.

Registries, as the operators of the parent domain for registrants, must publish the DNSSEC material received from registrants, so that Internet users can trust the material they receive from the domain owner. This is commonly referred to as a "chain of trust." Internet users trust the root (operated by IANA), which publishes the registries' DNSSEC material, therefore registries inherit this trust. Domain owners within the TLD subsequently inherit trust from the parent domain when the registry publishes their DNSSEC material.

In accordance with new gTLD requirements, the TLD zone will be DNSSEC signed and the receipt of DNSSEC material from registrars for child domains is supported in all provisioning systems.

### 2.8.1. Stability and Operational Considerations for DNSSEC

#### 2.8.1.1. DNSSEC Practice Statement

ARI's DNSSEC Practice Statement is included in our response to Question 43. The DPS following

the guidelines set out in the draft IETF DNSOP DNSSEC DPS Framework document.

#### 2.8.1.2. Resolution Stability

DNSSEC is considered to have made the DNS more trustworthy; however some transitional considerations need to be taken into account. DNSSEC increases the size and complexity of DNS responses. ARI ensures the TLD zone servers are accessible and offer consistent responses over UDP and TCP.

The increased UDP and TCP traffic which results from DNSSEC is accounted for in both network path access and TLD zone server capacity. ARI will ensure that capacity planning appropriately accommodates the expected increase in traffic over time.

ARI complies with all relevant RFCs and best practice guides in operating a DNSSEC-signed TLD. This includes conforming to algorithm updates as appropriate. To ensure Key Signing Key Rollover procedures for child domains are predictable, DS records will be published as soon as they are received via either the EPP server or SRS Web Interface. This allows child domain operators to rollover their keys with the assurance that their timeframes for both old and new keys are reliable.

### 3.0. APPROACH TO SECURITY AND STABILITY

Stability and security of the Internet is an important consideration for the registry system. To ensure that the registry services are reliably secured and remain stable under all conditions, DMEL takes a conservative approach with the operation and architecture of the registry system.

By architecting all registry services to use the least privileged access to systems and data, risk is significantly reduced for other systems and the registry services as a whole should any one service become compromised. By continuing that principal through to our procedures and processes, we ensure that only access that is necessary to perform tasks is given. ARI has a comprehensive approach to security modeled of the ISO27001 series of standards and explored further in the relevant questions of this response.

By ensuring all our services adhering to all relevant standards, DMEL ensures that entities which interact with the registry services do so in a predictable and consistent manner. When variations or enhancements to services are made, they are also aligned with the appropriate interoperability standards.

## Demonstration of Technical & Operational Capability

### 24. Shared Registration System (SRS) Performance

Q24 CHAR: 19964

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

#### 1.0. INTRODUCTION

Our Shared Registration System (SRS) complies fully with Specification 6, Section 1.2 and the SLA Matrix provided with Specification 10 in ICANN's Registry Agreement and is in line with the projections outlined in our responses to Questions 31 and 46. The services provided by the SRS are critical to the proper functioning of a TLD registry.

We will adhere to these commitments by operating a robust and reliable SRS founded on best practices and experience in the domain name industry.

## 2.0. TECHNICAL OVERVIEW

A TLD operator must ensure registry services are available at all times for both registrants and the Internet community as a whole. To meet this goal, our SRS was specifically engineered to provide the finest levels of service derived from a long pedigree of excellence and experience in the domain name industry. This pedigree of excellence includes a long history of technical excellence providing long running, highly available and high-performing services that help thousands of companies derive their livelihoods.

Our SRS services will give registrars standardized access points to provision and manage domain name registration data. We will provide registrars with two interfaces: an EPP protocol over TCP/IP and a web site accessible from any web browser (note: throughout this document, references to the SRS are inclusive of both these interfaces).

Initial registration periods will comply with Specification 6 and will be in one (1) year increments up to a maximum of ten (10) years. Registration terms will not be allowed to exceed ten (10) years. In addition, renewal periods also will be in one-year increments and renewal periods will only allow an extension of the registration period of up to ten years from the time of renewal.

The performance of the SRS is critical for the proper functioning of a TLD. Poor performance of the registration systems can adversely impact registrar systems that depend on its responsiveness. Our SRS is committed to exceeding the performance specifications described in Specification 10 in all cases. To ensure that we are well within specifications for performance, we will test our system on a regular basis during development to ensure that changes have not impacted performance in a material way. In addition, we will monitor production systems to ensure compliance. If internal thresholds are exceeded, the issue will be escalated, analyzed and addressed.

Our SRS will offer registry services that support Internationalized Domain Names (IDNs). Registrations can be made through both the EPP and web interfaces.

## 3.0. ROBUST AND RELIABLE ARCHITECTURE

To ensure quality of design, the SRS software was designed and written by seasoned and experienced software developers. This team designed the SRS using modern software architecture principles geared toward ensuring flexibility in its design not only to meet business needs but also to make it easy to understand, maintain and test.

A classic 3-tier design was used for the architecture of the system. 3-tier is a well-proven architecture that brings flexibility to the system by abstracting the application layer from the protocol layer. The data tier is isolated and only accessible by the services tier. 3-tier adds an additional layer of security by minimizing access to the data tier through possible exploits of the protocol layer.

The protocol and services layers are fully redundant. A minimum of three physical servers is in place in both the protocol and services layers. Communications are balanced across the servers. Load balancing is accomplished with a redundant load balancer pair.

## 4.0. SOFTWARE QUALITY

The software for the SRS, as well as other registry systems, was developed using an approach that ensures that every line of source code is peer reviewed and source code is not checked

into the source code repository without the accompanying automated tests that exercise the new functionality. The development team responsible for building the SRS and other registry software applies continuous integration practices to all software projects; all developers work on an up-to-date code base and are required to synchronize their code base with the master code base and resolve any incompatibilities before checking in. Every source code check-in triggers an automated build and test process to ensure a minimum level of quality. Each day an automated "daily build" is created, automatically deployed to servers and a fully-automated test suite run against it. Any failures are automatically assigned to developers to resolve in the morning when they arrive.

When extensive test passes are in order for release candidates, these developers use a test harness designed to run usability scenarios that exercise the full gamut of use cases, including accelerated full registration life cycles. These scenarios can be entered into the system using various distributions of activity. For instance, the test harness can be run to stress the system by changing the distribution of scenarios or to stress the system by exaggerating particular scenarios to simulate land rushes or, for long running duration scenarios, a more common day-to-day business distribution.

#### 5.0. SOFTWARE COMPLIANCE

The EPP interface to our SRS is compliant with current RFCs relating to EPP protocols and best practices. This includes RFCs 5910, 5730, 5731, 5732, 5733 and 5734. Since we are also supporting Registry Grace Period functionality, we are also compliant with RFC 3915. Details of our compliance with these specifications are provided in our response to Question 25. We are also committed to maintaining compliance with future RFC revisions as they apply as documented in Section 1.2 of Specification 6 of the new gTLD Agreement.

We strive to be forward-thinking and will support the emerging standards of both IPv6 and DNSSEC on our SRS platform. The SRS was designed and has been tested to accept IPv6 format addresses for nameserver glue records and provision them to the gTLD zone. In addition, key registry services will be accessible over both IPv4 and IPv6. These include both the SRS EPP and SRS web-based interfaces, both port 43 and web-based WHOIS interfaces and DNS, among others. For details regarding our IPv6 reachability plans, please refer to our response to Question 36.

DNSSEC services are provided, and we will comply with Specification 6. Additionally, our DNSSEC implementation complies with RFCs 4033, 4034, 4035, and 4509; and we commit to complying with the successors of these RFCs and following the best practices described in RFC 4641. Additional compliance and commitment details on our DNSSEC services can be found in our response to Question 43.

#### 6.0. DATABASE OPERATIONS

The database for our gTLD is Microsoft SQL Server 2008 R2. It is an industry-leading database engine used by companies requiring the highest level of security, reliability and trust. Case studies highlighting SQL Server's reliability and use indicate its successful application in many industries, including major financial institutions such as Visa, Union Bank of Israel, KeyBank, TBC Bank, Paymark, Coca-Cola, Washington State voter registration and many others. In addition, Microsoft SQL Server provides a number of features that ease the management and maintenance of the system. Additional details about our database system can be found in our response to Question 33.

Our SRS architecture ensures security, consistency and quality in a number of ways. To prevent eavesdropping, the services tier communicates with the database over a secure channel. The SRS is architected to ensure all data written to the database is atomic. By convention, leave all matters of atomicity are left to the database. This ensures consistency of the data and reduces the chance of error. So that we can examine data versions at any point in time, all changes to the database are written to an audit database. The audit data contains all previous and new values and the date/time of the change. The audit data is saved as part of each atomic transaction to ensure consistency.

To minimize the chance of data loss due to a disk failure, the database uses an array of redundant disks for storage. In addition, maintain an exact duplicate of the primary site is maintained in a secondary datacenter. All hardware is fully duplicated and set up to take over operations at any time. All database operations are replicated to the secondary datacenter via synchronous replication. The secondary datacenter always maintains an exact copy of our live data as the transactions occur.

#### 7.0. REDUNDANT HARDWARE

The SRS is composed of several pieces of hardware that are critical to its proper functioning, reliability and scale. At least two of each hardware component comprises the SRS, making the service fully redundant. Any component can fail, and the system is designed to use the facility of its pair. The EPP interface to the SRS will operate with more than two servers to provide the capacity required to meet our projected scale as described in Question 46: Projections Template.

#### 8.0. HORIZONTALLY SCALABLE

The SRS is designed to scale horizontally. That means that, as the needs of the registry grow, additional servers can be easily added to handle additional loads.

The database is a clustered 2-node pair configured for both redundancy and performance. Both nodes participate in serving the needs of the SRS. A single node can easily handle the transactional load of the SRS should one node fail. In addition, there is an identical 2-node cluster in our backup datacenter. All data from the primary database is continuously replicated to the backup datacenter.

Not only is the registry database storage medium specified to provide the excess of capacity necessary to allow for significant growth, it is also configured to use techniques, such as data sharing, to achieve horizontal scale by distributing logical groups of data across additional hardware. For further detail on the scalability of our SRS, please refer to our response to Question 31.

#### 9.0. REDUNDANT HOT FAILOVER SITE

We understand the need for maximizing uptime. As such, our plan includes maintaining at all times a warm failover site in a separate datacenter for the SRS and other key registry services. Our planned failover site contains an exact replica of the hardware and software configuration contained in the primary site. Registration data will be replicated to the failover site continuously over a secure connection to keep the failover site in sync.

Failing over an SRS is not a trivial task. In contrast, web site failover can be as simple as changing a DNS entry. Failing over the SRS, and in particular the EPP interface, requires careful planning and consideration as well as training and a well-documented procedure. Details of our failover procedures as well as our testing plans are detailed in our response to Question 41.

#### 10.0. SECURE ACCESS

To ensure security, access to the EPP interface by registrars is restricted by IP/subnet. Access Control Lists (ACLs) are entered into our routers to allow access only from a restricted, contiguous subnet from registrars. Secure and private communication over mutually authenticated TLS is required. Authentication credentials and certificate data are exchanged in an out-of-band mechanism. Connections made to the EPP interface that successfully establish an EPP session are subject to server policies that dictate connection maximum lifetime and minimal activity to maintain the session.

To ensure fair and equal access for all registrars, as well as maintain a high level of service, we will use traffic shaping hardware to ensure all registrars receive an equal number of resources from the system.

To further ensure security, access to the SRS web interface is over the public Internet via an encrypted HTTPS channel. Each registrar will be issued master credentials for accessing the web interface. Each registrar also will be required to use 2-factor authentication when logging in. We will issue a set of Yubikey (<http://yubico.com>) 2-factor, one-time password USB keys for authenticating with the web site. When the SRS web interface receives the credentials plus the one-time password from the Yubikey, it communicates with a RADIUS authentication server to check the credentials.

## 11.0. OPERATING A ROBUST AND RELIABLE SRS

### 11.1. AUTOMATED DEPLOYMENT

To minimize human error during a deployment, we use a fully-automated package and deployment system. This system ensures that all dependencies, configuration changes and database components are included every time. To ensure the package is appropriate for the system, the system also verifies the version of system we are upgrading.

### 11.2. CHANGE MANAGEMENT

We use a change management system for changes and deployments to critical systems. Because the SRS is considered a critical system, it is also subject to all change management procedures. The change management system covers all software development changes, operating system and networking hardware changes and patching. Before implementation, all change orders entered into the system must be reviewed with careful scrutiny and approved by appropriate management. New documentation and procedures are written; and customer service, operations, and monitoring staff are trained on any new functionality added that may impact their areas.

### 11.3. PATCH MANAGEMENT

Upon release, all operating system security patches are tested in the staging environment against the production code base. Once approved, patches are rolled out to one node of each farm. An appropriate amount of additional time is given for further validation of the patch, depending on the severity of the change. This helps minimize any downtime (and the subsequent roll back) caused by a patch of poor quality. Once validated, the patch is deployed on the remaining servers.

### 11.4. REGULAR BACKUPS

To ensure that a safe copy of all data is on hand in case of catastrophic failure of all database storage systems, backups of the main database are performed regularly. We perform full backups on both a weekly and monthly basis. We augment these full backups with differential backups performed daily. The backup process is monitored and any failure is immediately escalated to the systems engineering team. Additional details on our backup strategy and procedures can be found in our response to Question 37.

### 11.5. DATA ESCROW

Data escrow is a critical registry function. Escrowing our data on a regular basis ensures that a safe, restorable copy of the registration data is available should all other attempts to restore our data fail. Our escrow process is performed in accordance with Specification 2. Additional details on our data escrow procedures can be found in our response to Question 38.

### 11.6. REGULAR TRAINING

Ongoing security awareness training is critical to ensuring users are aware of security threats and concerns. To sustain this awareness, we have training programs in place designed to ensure corporate security policies pertaining to registry and other operations are understood by all personnel. All employees must pass a proficiency exam and sign the Information Security Policy as part of their employment. Further detail on our security awareness training can be found in our response to Question 30a.

We conduct failover training regularly to ensure all required personnel are up-to-date on failover process and have the regular practice needed to ensure successful failover should it be necessary. We also use failover training to validate current policies and procedures. For additional details on our failover training, please refer to our response to Question 41.

#### 11.7. ACCESS CONTROL

User authentication is required to access any network or system resource. User accounts are granted the minimum access necessary. Access to production resources is restricted to key IT personnel. Physical access to production resources is extremely limited and given only as needed to IT-approved personnel. For further details on our access control policies, please refer to our response to Question 30a.

#### 11.8. 24/7 MONITORING AND REGISTRAR TECHNICAL SUPPORT

We employ a full-time staff trained specifically on monitoring and supporting the services we provide. This staff is equipped with documentation outlining our processes for providing first-tier analysis, issue troubleshooting, and incident handling. This team is also equipped with specialty tools developed specifically to safely aid in diagnostics. On-call staff second-tier support is available to assist when necessary. To optimize the service we provide, we conduct ongoing training in both basic and more advanced customer support and conduct additional training, as needed, when new system or tool features are introduced or solutions to common issues are developed.

#### 12.0. SRS INFRASTRUCTURE

As shown in Attachment A, Figure 1, our SRS infrastructure consists of two identically provisioned and configured datacenters with each served by multiple bandwidth providers.

For clarity in Figure 1, connecting lines through the load balancing devices between the Protocol Layer and the Services Layer are omitted. All hardware connecting to the Services Layer goes through a load-balancing device. This device distributes the load across the multiple machines providing the services. This detail is illustrated more clearly in subsequent diagrams in Attachment A.

#### 13.0 RESOURCING PLAN

Resources for the continued development and maintenance of the SRS and ancillary services have been carefully considered. We have a significant portion of the required personnel on hand and plan to hire additional technical resources, as indicated below. Resources on hand are existing full time employees whose primary responsibility is the SRS.

For descriptions of the following teams, please refer to the resourcing section of our response to Question 31, Technical Review of Proposed Registry. Current and planned allocations are below.

##### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, two, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

##### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

##### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 25. Extensible Provisioning Protocol (EPP)

Q25 CHAR: 20822

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

### 1.0. INTRODUCTION

Our SRS EPP interface is a proprietary network service compliant with RFC 3735 and RFCs 5730-4. The EPP interface gives registrars a standardized programmatic access point to provision and manage domain name registrations.

### 2.0. IMPLEMENTATION EXPERIENCE

The SRS implementation for our gTLD leverages extensive experience implementing long-running, highly available network services accessible. Our EPP interface was written by highly experienced engineers focused on meeting strict requirements developed to ensure quality of service and uptime. The development staff has extensive experience in the domain name industry.

### 3.0. TRANSPORT

The EPP core specification for transport does not specify that a specific transport method be used and is, thus, flexible enough for use over a variety of transport methods. However, EPP is most commonly used over TCP/IP and secured with a Transport Layer Security (TLS) layer for domain registration purposes. Our EPP interface uses the industry standard TCP with TLS.

### 4.0. REGISTRARS' EXPERIENCE

Registrars will find our EPP interface familiar and seamless. As part of the account creation process, a registrar provides us with information we use to authenticate them. The registrar provides us with two subnets indicating the connection's origination. In addition, the registrar provides us with the Common Name specified in the certificate used to identify and

validate the connection.

Also, as part of the account creation process, we provide the registrar with authentication credentials. These credentials consist of a client identifier and an initial password and are provided in an out-of-band, secure manner. These credentials are used to authenticate the registrar when starting an EPP session.

Prior to getting access to the production interfaces, registrars have access to an Operational Test and Evaluation (OT&E) environment. This environment is an isolated area that allows registrars to develop and test against registry systems without any impact to production. The OT&E environment also provides registrars the opportunity to test implementation of custom extensions we may require.

Once a registrar has completed testing and is prepared to go live, the registrar is provided a Scripted Server Environment. This environment contains an EPP interface and database pre-populated with known data. To verify that the registrar's implementations are correct and minimally suitable for the production environment, the registrar is required to run through a series of exercises. Only after successful performance of these exercises is a registrar allowed access to production services.

## 5.0. SESSIONS

The only connections that are allowed are those from subnets previously communicated during account set up. The registrar originates the connection to the SRS and must do so securely using a Transport Layer Security (TLS) encrypted channel over TCP/IP using the IANA assigned standard port of 700.

The TLS protocol establishes an encrypted channel and confirms the identity of each machine to its counterpart. During TLS negotiation, certificates are exchanged to mutually verify identities. Because mutual authentication is required, the registrar certificate must be sent during the negotiation. If it is not sent, the connection is terminated and the event logged.

The SRS first examines the Common Name (CN). The SRS then compares the Common Name to the one provided by the registrar during account set up. The SRS then validates the certificate by following the signature chain, ensures that the chain is complete, and terminates against our store of root Certificate Authorities (CA). The SRS also verifies the revocation status with the root CA. If these fail, the connection is terminated and the event logged.

Upon successful completion of the TLS handshake and the subsequent client validation, the SRS automatically sends the EPP greeting. Then the registrar initiates a new session by sending the login command with their authentication credentials. The SRS passes the credentials to the database for validation over an encrypted channel. Policy limits the number of failed login attempts. If the registrar exceeds the maximum number of attempts, the connection to the server is closed. If authentication was successful, the EPP session is allowed to proceed and a response is returned indicating that the command was successful.

An established session can only be maintained for a finite period. EPP server policy specifies the timeout and maximum lifetime of a connection. The policy requires the registrar to send a protocol command within a given timeout period. The maximum lifetime policy for our registry restricts the connection to a finite overall timespan. If a command is not received within the timeout period or the connection lifetime is exceeded, the connection is terminated and must be reestablished. Connection lifecycle details are explained in detail in our Registrar Manual.

The EPP interface allows pipelining of commands. For consistency, however, the server only processes one command at a time per session and does not examine the next command until a response to the previous command is sent. It is the registrar's responsibility to track both the commands and their responses.

## 6.0. EPP SERVICE SCALE

Our EPP service is horizontally scalable. Its design allows us to add commodity-grade hardware at any time to increase our capacity. The design employs a 3-tier architecture which consists of protocol, services and data tiers. Servers for the protocol tier handle the loads of SSL negotiation and protocol validation and parsing. These loads are distributed across a farm of numerous servers balanced by load-balancing devices. The protocol tier connects to the services tier through load-balancing devices.

The services tier consists of a farm of servers divided logically based on the services provided. Each service category has two or more servers. The services tier is responsible for registry policy enforcement, registration lifecycle and provisioning, among other services. The services tier connects to the data tier which consists of Microsoft SQL Server databases for storage.

The data tier is a robust SQL Server installation that consists of a 2-node cluster in an active/active configuration. Each node is designed to handle the entire load of the registry should the alternate node go offline.

Additional details on scale and our plans to service the load we anticipate are described in detail on questions 24: SRS Performance and 32: Architecture.

## 7.0. COMPLIANCE WITH CORE AND EPP EXTENSION RFCs

The EPP interface is highly compliant with the following RFCs:

- RFC 5730 Extensible Provisioning Protocol
- RFC 5731 EPP Domain Name Mapping
- RFC 5732 EPP Host Mapping
- RFC 5733 EPP Contact Mapping
- RFC 5734 EPP Transport over TCP
- RFC 3915 Domain Registry Grace Period Mapping
- RFC 5910 Domain Name System (DNS) Security Extensions Mapping

The implementation is fully compliant with all points in each RFC. Where an RFC specifies optional details or service policy, they are explained below.

### 7.1. RFC 5730 EXTENSIBLE PROVISIONING PROTOCOL

Section 2.1 Transport Mapping Considerations - ack.

Transmission Control Protocol (TCP) in compliance with RFC 5734 with TLS.

Section 2.4 Greeting Format - compliant

The SRS implementation responds to a successful connection and subsequent TLS handshake with the EPP Greeting. The EPP Greeting is also transmitted in response to a `<hello/>` command. The server includes the EPP versions supported which at this time is only 1.0. The Greeting contains namespace URIs as `<objURI/>` elements representing the objects the server manages.

The Greeting contains a `<svcExtension>` element with one `<extURI>` element for each extension namespace URI implemented by the SRS.

Section 2.7 Extension Framework - compliant

Each mapping and extension, if offered, will comply with RFC 3735 Guidelines for Extending EPP.

Section 2.9 Protocol Commands - compliant

Login command's optional `<options>` element is currently ignored. The `<version>` is verified and 1.0 is currently the only acceptable response. The `<lang>` element is also ignored because we currently only support English (en). This server policy is reflected in the greeting.

The client mentions `<objURI>` elements that contain namespace URIs representing objects to be managed during the session inside `<svcs>` element of Login request. Requests with unknown

⟨objURI⟩ values are rejected with error information in the response. A ⟨logout⟩ command ends the client session.

#### Section 4 Formal syntax - compliant

All commands and responses are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against base schema (epp-1.0), common elements schema (eppcom-1.0) and object-specific schema.

#### Section 5 Internationalization Considerations - compliant

EPP XML recognizes both UTF-8 and UTF-16. All date-time values are presented in Universal Coordinated Time using Gregorian calendar.

### 7.2. RFC 5731 EPP DOMAIN NAME MAPPING

#### Section 2.1 Domain and Host names - compliant

The domain and host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

#### Section 2.2 Contact and Client Identifiers - compliant

All EPP contacts are identified by a server-unique identifier. Contact identifiers conform to “clIDType” syntax described in RFC 5730.

#### Section 2.3 Status Values - compliant

A domain object always has at least one associated status value. Status value can only be set by the sponsoring client or the registry server where it resides. Status values set by server cannot be altered by client. Certain combinations of statuses are not permitted as described by RFC.

#### Section 2.4 Dates and Times - compliant

Date and time attribute values are represented in Universal Coordinated Time (UTC) using Gregorian calendar, in conformance with XML schema.

#### Section 2.5 Validity Periods - compliant

Our SRS implementation supports validity periods in unit year (“y”). The default period is 1y.

#### Section 3.1.1 EPP ⟨check⟩ Command - compliant

A maximum of 5 domains can be checked in a single command request as defined by server policy.

#### Section 3.1.2 EPP ⟨info⟩ Command - compliant

EPP ⟨info⟩ command is used to retrieve information associated with a domain object. If the querying Registrar is not the sponsoring registrar and the registrar does not provide valid authorization information, the server does not send any domain elements in response per server policy.

#### Section 3.1.3 EPP ⟨transfer⟩ Query Command - compliant

EPP ⟨transfer⟩ command provides a query operation that allows a client to determine the real-time status of pending and completed transfer requests. If the authInfo element is not provided or authorization information is invalid, the command is rejected for authorization.

#### Section 3.2.4 EPP ⟨transfer⟩ Command - compliant

All subordinate host objects to the domain are transferred along with the domain object.

### 7.3. RFC 5732 EPP HOST MAPPING

#### Section 2.1 Host Names - compliant

The host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

#### Section 2.2 Contact and Client Identifiers - compliant

All EPP clients are identified by a server-unique identifier. Client identifiers conform to “clIDType” syntax described in RFC 5730.

### Section 2.5 IP Addresses - compliant

The syntax for IPv4 addresses conform to RFC0791. The syntax for IPv6 addresses conform to RFC4291.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of five host names can be checked in a single command request set by server policy.

#### Section 3.1.2 EPP <info> Command - compliant

If the querying client is not a sponsoring client, the server does not send any host object elements in response and the request is rejected for authorization according to server policy.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the host is not delegated.

#### Section 3.2.2 EPP <update> Command - compliant

Any request to change host name of an external host that has associations with objects that are sponsored by a different client fails.

## 7.4. RFC 5733 EPP CONTACT MAPPING

### Section 2.1 Contact and Client Identifiers - compliant

Contact identifiers conform to "clIDType" syntax described in RFC 5730.

### Section 2.6 Email Addresses - compliant

Email address validation conforms to syntax defined in RFC5322.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of 5 contact id can be checked in a single command request.

#### Section 3.1.2 EPP <info> Command - compliant

If querying client is not sponsoring client, server does not send any contact object elements in response and the request is rejected for authorization.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the contact object is not associated with other known objects.

## 7.5. RFC 5734 EPP TRANSPORT OVER TCP

### Section 2 Session Management - compliant

The SRS implementation conforms to the required flow mentioned in the RFC for initiation of a connection request by a client, to establish a TCP connection. The client has the ability to end the session by issuing an EPP <logout> command, which ends the session and closes the TCP connection. Maximum life span of an established TCP connection is defined by server policy. Any connections remaining open beyond that are terminated. Any sessions staying inactive beyond the timeout policy of the server are also terminated similarly. Policies regarding timeout and lifetime values are clearly communicated to registrars in documentation provided to them.

### Section 3 Message Exchange - compliant

With the exception of EPP server greeting, EPP messages are initiated by EPP client in the form of EPP commands. Client-server interaction works as a command-response exchange where the client sends one command to the server and the server returns one response to the client in the exact order as received by the server.

### Section 8 Security considerations - ack.

TLS 1.0 over TCP is used to establish secure communications from IP restricted clients. Validation of authentication credentials along with the certificate common name, validation of revocation status and the validation of the full certificate chain are performed. The ACL only allows connections from subnets prearranged with the Registrar.

## Section 9 TLS Usage Profile - ack.

The SRS uses TLS 1.0 over TCP and matches the certificate common name. The full certificate chain, revocation status and expiry date is validated. TLS is implemented for mutual client and server authentication.

## 8.0. EPP EXTENSIONS

### 8.1. STANDARDIZED EXTENSIONS

Our implementation includes extensions that are accepted standards and fully documented. These include the Registry Grace Period Mapping and DNSSEC.

### 8.2. COMPLIANCE WITH RFC 3735

RFC 3735 are the Guidelines for Extending the Extensible Provisioning Protocol. Any custom extension implementations follow the guidance and recommendations given in RFC 3735.

### 8.3. COMPLIANCE WITH DOMAIN REGISTRY GRACE PERIOD MAPPING RFC 3915

#### Section 1 Introduction - compliant

Our SRS implementation supports all specified grace periods particularly, add grace period, auto-renew grace period, renew grace period, and transfer grace period.

#### Section 3.2 Registration Data and Supporting Information - compliant

Our SRS implementation supports free text and XML markup in the restore report.

#### Section 3.4 Client Statements - compliant

Client can use free text or XML markup to make 2 statements regarding data included in a restore report.

#### Section 5 Formal syntax - compliant

All commands and responses for this extension are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against RGP specific schema (rgp-1.0).

### 8.4. COMPLIANCE WITH DOMAIN NAME SYSTEM (DNS) SECURITY EXTENSIONS MAPPING RFC 5910

RFC 5910 describes an Extensible Provisioning Protocol (EPP) extension mapping for the provisioning and management of Domain Name System Security Extensions (DNSSEC) for domain names stored in a shared central repository. Our SRS and DNS implementation supports DNSSEC.

The information exchanged via this mapping is extracted from the repository and used to publish DNSSEC Delegate Signer (DS) resource records (RR) as described in RFC 4034.

#### Section 4 DS Data Interface and Key Data Interface - compliant

Our SRS implementation supports only DS Data Interface across all commands applicable with DNSSEC extension.

#### Section 4.1 DS Data Interface - compliant

The client can provide key data associated with the DS information. The collected key data along with DS data is returned in an info response, but may not be used in our systems.

#### Section 4.2 Key Data Interface - compliant

Since our gTLD's SRS implementation does not support Key Data Interface, when a client sends a command with Key Data Interface elements, it is rejected with error code 2306.

#### Section 5.1.2 EPP <info> Command - compliant

This extension does not add any elements to the EPP <info> command. When an <info> command is processed successfully, the EPP <resData> contains child elements for EPP domain mapping. In addition, it contains a child <secDNS:infData> element that identifies extension namespace if the domain object has data associated with this extension. It is conditionally based on

whether or the client added the `<extURI>` element for this extension in the `<login>` command. Multiple DS data elements are supported.

#### Section 5.2.1 EPP `<create>` Command - compliant

The client must add an `<extension>` element, and the extension element MUST contain a child `<secDNS:create>` element if the client wants to associate data defined in this extension to the domain object. Multiple DS data elements are supported. Since the SRS implementation does not support `maxSigLife`, it returns a 2102 error code if the command included a value for `maxSigLife`.

#### Section 5.2.5 EPP `<update>` Command - compliant

Since the SRS implementation does not support the `<secDNS:update>` element's optional "urgent" attribute, an EPP error result code of 2102 is returned if the "urgent" attribute is specified in the command with value of Boolean true.

### 8.5. PROPRIETARY EXTENSION DOCUMENTATION

We are not proposing any proprietary EPP extensions for this TLD.

### 8.6. EPP CONSISTENT WITH THE REGISTRATION LIFECYCLE DESCRIBED IN QUESTION 27

Our EPP implementation makes no changes to the industry standard registration lifecycle and is consistent with the lifecycle described in Question 27.

### 9.0. RESOURCING PLAN

For descriptions of the following teams, please refer to our response to Question 31. Current and planned allocations are below.

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, 2 Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 26. Whois

Q26 CHAR: 19908

### 1.0. INTRODUCTION

Our registry provides a publicly available Whois service for registered domain names in the top-level domain (TLD). Our planned registry also offers a searchable Whois service that includes web-based search capabilities by domain name, registrant name, postal address, contact name, registrar ID and IP addresses without an arbitrary limit. The Whois service for our gTLD also offers Boolean search capabilities, and we have initiated appropriate precautions to avoid abuse of the service. This searchable Whois service exceeds requirements and is eligible for a score of 2 by providing the following:

- Web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit.
- Boolean search capabilities.
- Appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users).
- Compliance with any applicable privacy laws or policies.

The Whois service for our planned TLD is available via port 43 in accordance with RFC 3912. Also, our planned registry includes a Whois web interface. Both provide free public query-based access to the elements outlined in Specification 4 of the Registry Agreement. In addition, our registry includes a searchable Whois service. This service is available to authorized entities and accessible from a web browser.

### 2.0. HIGH-LEVEL WHOIS SYSTEM DESCRIPTION

The Whois service for our registry provides domain registration information to the public. This information consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use does not require prior authorization or permission. To maximize accessibility to the data, Whois service is provided over two mediums, as described below. Where the medium is not specified, any reference to Whois pertains to both mediums. We describe our searchable Whois solution in Section 11.0.

One medium used for our gTLD's Whois service is port 43 Whois. This consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted text. If no query is received by the server within the allotted time or a malformed query is detected, the connection is closed. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

The other medium used for Whois is via web interface using clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 443 using the HTTPS protocol.

The steps for accessing the web-based Whois will be prominently displayed on the registry home

page. The web-based Whois is for interactive use by individual users while the port 43 Whois system is for automated use by computers and lookup clients.

Both Whois service offerings comply with Specification 4 of the New GTLD Agreement. Although the Whois output is free text, it follows the output format as described for domain, registrar and nameserver data in Sections 1.4, 1.5 and 1.6 of Specification 4 of the Registry Agreement.

Our gTLD's WHOIS service is mature, and its current implementation has been in continuous operation for seven years. A dedicated support staff monitors this service 24/7. To ensure high availability, multiple redundant servers are maintained to enable capacity well above normal query rates.

Most of the queries sent to the port 43 Whois service are automated. The Whois service contains mechanisms for detecting abusive activity and, if abuse is detected, reacts appropriately. This capability contributes to a high quality of service and availability for all users.

## 2.1. PII POLICY

The services and systems for this gTLD do not collect, process or store any personally identifiable information (PII) as defined by state disclosure and privacy laws. Registry systems collect the following Whois data types: first name, last name, address and phone numbers of all billing, administration and technical contacts. Any business conducted where confidential PII consisting of customer payment information is collected uses systems that are completely separate from registry systems and segregated at the network layer.

## 3.0. RELEVANT NETWORK DIAGRAM(S)

Our network diagram (Q 26 - Attachment A, Figure 1) provides a quick-reference view of the Whois system. This diagram reflects the Whois system components and compliance descriptions and explanations that follow in this section.

### 3.1. NARRATIVE FOR Q26 - FIGURE 1 OF 1 (SHOWN IN ATTACHMENT A)

The Whois service for our gTLD operates from two datacenters from replicated data. Network traffic is directed to either of the datacenters through a global load balancer. Traffic is directed to an appropriate server farm, depending on the service interface requested. The load balancer within the datacenter monitors the load and health of each individual server and uses this information to select an appropriate server to handle the request.

The protocol server handling the request communicates over an encrypted channel with the Whois service provider through a load-balancing device. The WHOIS service provider communicates directly with a replicated, read-only copy of the appropriate data from the registry database. The Whois service provider is passed a sanitized and verified query, such as a domain name. The database attempts to locate the appropriate records, then format and return them. Final output formatting is performed by the requesting server and the results are returned back to the original client.

## 4.0. INTERCONNECTIVITY WITH OTHER REGISTRY SYSTEMS

The Whois port 43 interface runs as an unattended service on servers dedicated to this task. As shown in Attachment A, Figure 1, these servers are delivered network traffic by redundant load-balancing hardware, all of which is protected by access control methods. Balancing the load across many servers helps distribute the load and allows for expansion. The system's design allows for the rapid addition of new servers, typically same-day, should load require them.

Both our port 43 Whois and our web-based Whois communicate with the Whois service provider in the middle tier. Communication to the Whois service provider is distributed by a load balancing pair. The Whois service provider calls the appropriate procedures in the database to search for the registration records.

The Whois service infrastructure operates from both datacenters, and the global load balancer distributes Whois traffic evenly across the two datacenters. If one datacenter is not responding, the service sends all traffic to the remaining datacenter. Each datacenter has sufficient capacity to handle the entire load.

To avoid placing an abnormal load on the Shared Registration System (SRS), both service installations read from replicated, read-only database instances (see Figure 1). Because each instance is maintained via replication from the primary SRS database, each replicated database contains a copy of the authoritative data. Having the Whois service receive data from this replicated database minimizes the impact of services competing for the same data and enables service redundancy. Data replication is also monitored to prevent detrimental impact on the primary SRS.

#### 5.0. FREQUENCY OF SYNCHRONIZATION BETWEEN SERVERS

As shown in Figure 1, the system replicates WHOIS services data continuously from the authoritative database to the replicated database. This persistent connection is maintained between the databases, and each transaction is queued and published as an atomic unit. Delays, if any, in the replication of registration information are minimal, even during periods of high load. At no time will the system prioritize replication over normal operations of the SRS.

#### 6.0. POTENTIAL FORMS OF ABUSE

Potential forms of abuse of this feature, and how they are mitigated, are outlined below. For additional information on our approach to preventing and mitigating Whois service abuse, please refer to our response to Question 28.

##### 6.1. DATA MINING ABUSE

This type of abuse consists primarily of a user using queries to acquire all or a significant portion of the registration database.

The system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate-limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

##### 6.2. INVALID DATA INJECTION

This type of abuse is mitigated by 1) ensuring that all Whois systems are strictly read-only; and 2) ensuring that any input queries are properly sanitized to prevent data injection.

##### 6.3. DISCLOSURE OF PRIVATE INFORMATION

The Whois system mitigates this type of abuse by ensuring all responses, while complete, only contain information appropriate to Whois output and do not contain any private or non-public information.

#### 7.0. COMPLIANCE WITH WHOIS SPECIFICATIONS FOR DATA OBJECTS, BULK ACCESS, AND LOOKUPS

Whois specifications for data objects, bulk access, and lookups for our gTLD are fully compliant with Specifications 4 and 10 to the Registry Agreement, as explained below.

##### 7.1. COMPLIANCE WITH SPECIFICATION 4

Compliance of Whois specifications with Specification 4 is as follows:

- Registration Data Directory Services Component: Specification 4.1 is implemented as described. Formats follow the outlined semi-free text format. Each data object is represented

as a set of key/value pairs with lines beginning with keys followed by a colon and a space as delimiters, followed by the value. Fields relevant to RFCs 5730-4 are formatted per Section 1.7 of Specification 4.

- Searchability compliance is achieved by implementing, at a minimum, the specifications in section 1.8 of specification 4. We describe this searchability feature in Section 11.0.
- Co-operation, ICANN Access and Emergency Operator Access: Compliance with these specification components is assured.
- Bulk Registration Data Access to ICANN: Compliance with this specification component is assured.

Evidence of Whois system compliance with this specification consists of:

- Matching existing Whois output with specification output to verify that it is equivalent.

## 7.2. COMPLIANCE WITH SPECIFICATION 10 FOR WHOIS

Our gTLD's Whois complies fully with Specification 10. With respect to Section 4.2, the approach used ensures that Round-Trip Time (RTT) remains below five times the corresponding Service Level Requirement (SLR).

### 7.2.1. Emergency Thresholds

To achieve compliance with this Specification 10 component, several measures are used to ensure emergency thresholds are never reached:

- 1) Provide staff training as necessary on Registry Transition plan components that prevent Whois service interruption in case of emergency (see the Question 40 response for details).
- 2) Conduct regular failover testing for Whois services as outlined in the Question 41 response.
- 3) Adhere to recovery objectives for Whois as outlined in the Question 39 response.

### 7.2.2. Emergency Escalation

Compliance with this specification component is achieved by participation in escalation procedures as outlined in this section.

## 8.0. COMPLIANCE WITH RFC 3912

Whois service for our gTLD is fully compliant with RFC 3912 as follows:

- RFC 3912 Element, "A Whois server listens on TCP port 43 for requests from Whois clients": This requirement is properly implemented, as described in Section 1 above. Further, running Whois on ports other than port 43 is an option.
- RFC 3912 Element, "The Whois client makes a text request to the Whois server, then the Whois server replies with text content": The port 43 Whois service is a text-based query and response system. Thus, this requirement is also properly implemented.
- RFC 3912 Element, "All requests are terminated with ASCII CR and then ASCII LF. The response might contain more than one line of text, so the presence of ASCII CR or ASCII LF characters does not indicate the end of the response": This requirement is properly implemented for our TLD.
- RFC 3912 Element, "The Whois server closes its connection as soon as the output is finished": This requirement is properly implemented for our TLD, as described in Section 1 above.
- RFC 3912 Element, "The closed TCP connection is the indication to the client that the response has been received": This requirement is properly implemented.

## 9.0. RESOURCING PLAN

Resources for the continued development and maintenance of the Whois have been carefully considered. Many of the required personnel are already in place. Where gaps exist, technical resource addition plans are outlined below as "First Year New Hires." Resources now in place,

shown as "Existing Department Personnel", are employees whose primary responsibility is the registry system.

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

### 11.0. PROVISION FOR SEARCHABLE WHOIS CAPABILITIES

The searchable Whois service for our gTLD provides flexible and powerful search ability for users through a web-based interface. This service is provided only to entities with a demonstrated need for it. Where access to registration data is critical to the investigation of cybercrime and other potentially unlawful activity, we authorize access for fully vetted law enforcement and other entities as appropriate. Search capabilities for our gTLD's searchable Whois meet or exceed the requirements indicated in section 1.8 of specification 4.

Once authorized to use the system, a user can perform exact and partial match searches on the following fields:

- Domain name
- Registrant name
- Postal address including street, city and state, etc., of all registration contacts
- Contact names
- Registrant email address
- Registrar name and ID
- Nameservers
- Internet Protocol addresses

In addition, all other EPP Contact Object fields and sub-fields are searchable as well. The following Boolean operators are also supported: AND, OR, NOT. These operators can be used for

joining or excluding results.

Certain types of registry related abuse are unique to the searchable Whois function. Providing searchable Whois warrants providing protection against this abuse. Potential problems include:

- Attempts to abuse Whois by issuing a query that essentially returns the entire database in the result set.
- Attempts to run large quantities of queries sufficient to reduce the performance of the registry database.

Precautions for preventing and mitigating abuse of the Whois search service include:

- Limiting access to authorized users only.
- Establishing legal agreements with authorized users that clearly define and prohibit system abuse.
- Queuing search queries into a job processing system.
- Executing search queries against a replicated read-only copy of the database.
- Limiting result sets when the query is clearly meant to cause a wholesale dump of registration data.

Only authorized users with a legitimate purpose for searching registration data are permitted to use the searchable Whois system. Examples of legitimate purpose include the investigation of terrorism or cybercrime by authorized officials, or any of many other official activities that public officials must conduct to fulfill their respective duties. We grant access for these and other purposes on a case-by-case basis.

To ensure secure access, a two-factor authentication device is issued to each authorized user of the registry. Subsequent access to the system requires the user name, password and a one-time generated password from the issued two-factor device.

Upon account creation, users are provided with documentation describing our terms of service and policies for acceptable use. Users must agree to these terms to use the system. These terms clearly define and illustrate what constitutes legitimate use and what constitutes abuse. They also inform the user that abuse of the system is grounds for limiting or terminating the user's account.

For all queries submitted, the searchable Whois system first sanitizes the query to deter potential harm to our internal systems. The system then submits the query to a queue for job processing. The system processes each query one by one and in the order received. The number of concurrent queries executed varies, depending on the current load.

To ensure Whois search capabilities do not affect other registry systems, the system executes queries against a replicated read-only version of the database. The system updates this database frequently as registration transactions occur. These updates are performed in a manner that ensures no detrimental load is placed on the production SRS.

To process successfully, each query must contain the criteria needed to filter its results down to a reasonable result set (one that is not excessively large). If the query does not meet this, the user is notified that the result set is excessive and is asked to verify the search criteria. If the user wishes to continue without making the indicated changes, the user must contact our support team to verify and approve the query. Each successful query submitted results in immediate execution of the query.

Query results are encrypted using the unique shared secret built into each 256-bit Advanced Encryption Standard (AES) two-factor device. The results are written to a secure location dedicated for result storage and retrieval. Each result report has a unique file name in the user's directory. The user's directory is assigned the permissions needed to prevent unauthorized access to report files. For the convenience of Registrars and other users, each query result is stored for a minimum of 30 days. At any point following this 30-day period, the query result may be purged by the system.

## 27. Registration Life Cycle

Q27 CHAR: 19951

### 1.0. INTRODUCTION

To say that the lifecycle of a domain name is complex would be an understatement. A domain name can traverse many states throughout its lifetime and there are many and varied triggers that can cause a state transition. Some states are triggered simply by the passage of time. Others are triggered by an explicit action taken by the registrant or registrar. Understanding these is critical to the proper operation of a gTLD registry. To complicate matters further, a domain name can contain one or more statuses. These are set by the registrar or registry and have a variety of uses.

When this text discusses EPP commands received from registrars, with the exception of a transfer request, the reader can assume that the command is received from the sponsoring registrar and successfully processed. The transfer request originates from the potential gaining registrar. Transfer details are explicit for clarity.

### 2.0. INDUSTRY STANDARDS

The registration life cycle approach for our gTLD follows industry standards for registration lifecycles and registration statuses. By implementing a registration life cycle that adheres to these standards, we avoid compounding an already confusing topic for registrants. In addition, since registrar systems are already designed to manage domain names in a standard way, a standardized registration lifecycle also lowers the barrier to entry for registrars.

The registration lifecycle for our gTLD follows core EPP RFCs including RFC 5730 and RFC 5731 and associated documentation of lifecycle information. To protect registrants, EPP Grace Period Mapping for domain registrations is implemented, which affects the registration lifecycle and domain status. EPP Grace Period Mapping is documented in RFC 3915.

### 3.0. REGISTRATION STATES

For a visual guide to this registration lifecycle discussion, please refer to the attachment, Registration Lifecycle Illustrations. Please note that this text makes many references to the status of a domain. For brevity, we do not distinguish between the domain mapping status `<domain:status>` and the EPP Grace Period Mapping status `<rgp:rgpStatus>` as making this differentiation in every case would make this document more difficult to read and in this context does not improve understanding.

### 4.0. AVAILABILITY

The lifecycle for any domain registration begins with the Available state. This is not necessarily a registration state, per se, but indicates the lack of domain registration implied and provides an entry and terminal point for the state diagram provided. In addition to the state diagram, please refer to Fig. 2 - Availability Check for visual representation of the process flow.

Before a user can register a new domain name, the registry performs an availability check. Possible outcomes of this availability check include:

1. Domain name is available for registration.
2. Domain name is already registered, regardless of the current state and not available for registration.
3. Domain name has been reserved by the registry.
4. Domain name string has been blocked because of a trademark claim.

### 5.0. INITIAL REGISTRATION

The first step in domain registration is the availability check as described above and shown in Fig. 2 - Availability Check. A visual guide to the description for domain registration in this section can be found in Fig. 3 - Domain Registration. If the domain is available for

registration, a registrar submits a registration request.

With this request, the registrar can include zero or more nameserver hosts for zone delegation. If the registrar includes zero or one nameserver host(s), the domain is registered but the EPP status of the domain is set to inactive. If the registrar includes two or more, the EPP status of the domain is set to ok.

The request may also include a registration period (the number of years the registrar would like the domain registered). If this time period is omitted, the registry may use a default initial registration period. The policy for this aligns with the industry standard of one year as the default period. If the registrar includes a registration period, the value must be between one and ten years as specified in the gTLD Registry Agreement.

Once the registration process is complete within the registry, the domain registration is considered to be in the REGISTERED state but within the Add Grace Period.

#### 6.0. REGISTERED STATE - ADD GRACE PERIOD

The Add Grace Period is a status given to a new domain registration. The EPP status applied in this state is addPeriod. The Add Grace Period is a state in which the registrar is eligible for a refund of the registration price should the registration be deleted while this status is applied. The status is removed and the registration transitions from the Add Grace Period either by an explicit delete request from the registrar or by the lapse of five days. This is illustrated in Fig. 1 and Fig. 3 of the illustrations attachment.

If the registrar deletes the domain during the Add Grace Period, the domain becomes immediately available for registration. The registrar is refunded the original cost of the registration.

If the five-day period lapses without receiving a successful delete command, the addPeriod status is removed from the domain.

#### 7.0. REGISTERED STATE

A domain registration spends most of its time in the REGISTERED state. A domain registration period can initially be between one year and ten years in one-year increments as specified in the new gTLD Registry Agreement. At any time during the registration's term, several things can occur to either affect the registration period or transition the registration to another state. The first three are the auto-renew process, an explicit renew EPP request and a successful completion of the transfer process.

#### 8.0. REGISTRATION PERIOD EXTENSION

The registration period for a domain is extended either through a successful renew request by the registrar, through the successful completion of the transfer process or through the auto-renew process. This section discusses each of these three options.

##### 8.1. EXTENSION VIA RENEW REQUEST

One way that a registrar can extend the registration period is by issuing a renew request. Each renew request includes the number of years desired for extension of the registration up to ten years. Please refer to the flow charts found in both Fig. 4 - Renewal and Fig. 5 - Renewal Grace Period for a visual representation of the following.

Because the registration period cannot extend beyond ten years, any request for a registration period beyond ten years fails. The domain must not contain the status renewProhibited. If this status exists on the domain, the request for a renewal fails.

Upon a successful renew request, the registry adds the renewPeriod status to the domain. This status remains on the domain for a period of five days. The number of years in the renew request is added to the total registration period of the domain. The registrar is charged for each year of the additional period.

While the domain has the `renewPeriod` status, if the sponsoring registrar issues a successful delete request, the registrar receives a credit for the renewal. The `renewPeriod` status is removed and the domain enters the Redemption Grace Period (RGP) state. The status `redemptionPeriod` is added to the status of the domain.

## 8.2. EXTENSION VIA TRANSFER PROCESS

The second way to extend the registration is through the Request Transfer process. A registrar may transfer sponsorship of a domain name to another registrar. The exact details of a transfer are explained in the Request Transfer section below. The successful completion of the Request Transfer process automatically extends the registration for one year. The registrar is not charged separately for the addition of the year; it comes automatically with the successful transfer. The `transferPeriod` status is added to the domain.

If the gaining registrar issues a successful delete request during the `transferPeriod`, the gaining registrar receives a credit for the transfer. The status `redemptionPeriod` is added to the status of the domain and `transferPeriod` is removed. The domain then enters the RGP state.

## 8.3. EXTENSION VIA AUTO-RENEW

The last way a registration period can be extended is passive and is the simplest way because it occurs without any action by the Registrar. When the registration period expires, for the convenience of the registrar and registrant, the registration renews automatically for one year. The registrar is charged for the renewal at this time. This begins the Auto Renew Grace Period. The `autoRenewPeriod` status is added to the domain to represent this period.

The Auto Renew Grace Period lasts for 45 days. At any time during this period, the Registrar can do one of four things: 1) passively accept the renewal; 2) actively renew (to adjust renewal options); 3) delete the registration; or 4) transfer the registration.

To passively accept the renewal, the registrar need only allow the 45-day time span to pass for the registration to move out of the Auto Renew Grace Period.

Should the registrar wish to adjust the renewal period in any way, the registrar can submit a renew request via EPP to extend the registration period up to a maximum of ten years. If the renew request is for a single year, the registrar is not charged. If the renew request is for more than a single year, the registrar is charged for the additional years that the registration period was extended. If the command is a success, the `autoRenewPeriod` status is removed from the domain.

Should the registrar wish to delete the registration, the registrar can submit a delete command via EPP. Once a delete request is received, the `autoRenewPeriod` status is removed from the domain and the `redemptionPeriod` status is added. The registrar is credited for the renewal fees. For illustration of this process, please refer to Fig. 6 - Auto Renew Grace Period.

The last way move a domain registration out of the Auto Renew state is by successful completion of the Request Transfer process, as described in the following section. If the transfer completes successfully, the `autoRenewPeriod` status is removed and the `transferPeriod` status is added.

## 9.0. REQUEST TRANSFER

A customer can change the sponsoring registrar of a domain registration through the Request Transfer process. This process is an asynchronous, multi-step process that can take many as five days but may occur faster, depending on the level of support from participating Registrars.

The initiation of the transfer process is illustrated in Fig. 8 - Request Transfer. The transfer process begins with a registrar submitting a transfer request. To succeed, the request must meet several criteria. First, the domain status must not contain `transferProhibited` or `pendingTransfer`. Second, the initial domain registration must be at least 60 days old or, if transferred prior to the current transfer request, must not have been

transferred within the last 60 days. Lastly, the transfer request must contain the correct authInfo (authorization information) value. If all of these criteria are met, the transfer request succeeds and the domain moves into the Pending Transfer state and the pendingTransfer status is added to the domain.

There are four ways to complete the transfer (and move it out of Pending Transfer status):

1. The transfer is auto-approved.
2. The losing registrar approves the transfer.
3. The losing registrar rejects the transfer.
4. The requesting registrar cancels the transfer.

After a successful transfer request, the domain continues to have the pendingTransfer status for up to five days. During this time, if no other action is taken by either registrar, the domain successfully completes the transfer process and the requesting registrar becomes the new sponsor of the domain registration. This is illustrated in Fig. 9 - Auto Approve Transfer.

At any time during the Pending Transfer state, either the gaining or losing registrar can request the status of a transfer provided they have the correct domain authInfo. Querying for the status of a transfer is illustrated in Fig. 13 - Query Transfer.

During the five-day Pending Transfer state, the losing registrar can accelerate the process by explicitly accepting or rejecting the transfer. If the losing registrar takes either of these actions, the pendingTransfer status is removed. Both of these actions are illustrated in Fig. 10 - Approve Transfer and Fig. 11 - Reject Transfer.

During the five-day Pending Transfer state, the requesting registrar may cancel the transfer request. If the registrar sends a cancel transfer request, the pendingTransfer status is removed. This is shown in Fig. 12 - Cancel Transfer.

If the transfer process is a success, the registry adds the transferPeriod status and removes the pendingTransfer status. If the domain was in the Renew Period state, upon successful completion of the transfer process, this status is removed.

The transferPeriod status remains on the domain for five days. This is illustrated in Fig. 14 - Transfer Grace Period. During this period, the gaining Registrar may delete the domain and obtain a credit for the transfer fees. If the gaining registrar issues a successful delete request during the transferPeriod, the gaining registrar receives a credit for the transfer. The status redemptionPeriod is added to the status of the domain and transferPeriod is removed. The domain then enters the RGP state.

#### 10.0. REDEMPTION GRACE PERIOD

The Redemption Grace Period (RGP) is a service provided by the registry for the benefit of registrars and registrants. The RGP allows a registrar to recover a deleted domain registration. The only way to enter the RGP is through a delete command sent by the sponsoring registrar. A domain in RGP always contains a status of redemptionPeriod. For an illustrated logical flow diagram of this, please refer to Fig. 15 - Redemption Grace Period.

The RGP lasts for 30 days. During this time, the sponsoring registrar may recover the domain through a two-step process. The first step is to send a successful restore command to the registry. The second step is to send a restore report to the registry.

Once the restore command is processed, the registry adds the domain status of pendingRestore to the domain. The domain is now in the Pending Restore state, which lasts for seven days. During this time, the registry waits for the restore report from the Registrar. If the restore report is not received within seven days, the domain transitions back to the RGP state. If the restore report is successfully processed by the registry, the domain registration is restored back to the REGISTERED state. The statuses of pendingRestore and redemptionPeriod are removed from the domain.

After 30 days in RGP, the domain transitions to the Pending Delete state. A status of

pendingDelete is applied to the domain and all other statuses are removed. This state lasts for five days and is considered a quiet period for the domain. No commands or other activity can be applied for the domain while it is in this state. Once the five days lapse, the domain is again available for registration.

#### 11.0. DELETE

To delete a domain registration, the sponsoring registrar must send a delete request to the registry. If the domain is in the Add Grace Period, deletion occurs immediately. In all other cases, the deleted domain transitions to the RGP. For a detailed visual diagram of the delete process flow, please refer to Fig. 7 - Delete.

For domain registration deletion to occur successfully, the registry must first ensure the domain is eligible for deletion by conducting two checks. The registry first checks to verify that the requesting registrar is also the sponsoring registrar. If this is not the case, the registrar receives an error message.

The registry then checks the various domain statuses for any restrictions that might prevent deletion. If the domain's status includes either the transferPending or deleteProhibited, the name is not deleted and an error is returned to the registrar.

If the domain is in the Add Grace Period, the domain is immediately deleted and any registration fees paid are credited back to the registrar. The domain is immediately available for registration.

If the domain is in the Renew Grace Period, the Transfer Grace Period or the Auto Renew Grace Period, the respective renewPeriod, transferPeriod or autoRenewPeriod statuses are removed and the corresponding fees are credited to the Registrar. The domain then moves to the RGP as described above.

#### 12.0. ADDITIONAL STATUSES

There are additional statuses that the registry or registrar can apply to a domain registration to limit what actions can be taken on it or to limit its usefulness. This section addresses such statuses that have not already addressed in this response.

Some statuses are applied by the registrar and others are exclusively applied by the registry. Registry-applied statuses cannot be altered by registrars. Status names that registrars can add or remove begin with "client". Status names that only the registry can add or remove begin with "server". These statuses can be applied by a registrar using the EPP domain update request as defined in RFC 5731.

To prevent a domain registration from being deleted, the status values of clientDeleteProhibited or serverDeleteProhibited may be applied by the appropriate party.

To withhold delegation of the domain to the DNS, clientHold or serverHold is applied. This prevents the domain name from being published to the zone file. If it is already published, the domain name is removed from the zone file.

To prevent renewal of the domain registration clientRenewProhibited or serverRenewProhibited is applied by the appropriate party.

To prevent the transfer of sponsorship of a registration, the states clientTransferProhibited or serverTransferProhibited is applied to the domain. When this is done, all requests for transfer are rejected by the registry.

If a domain registration contains no host objects, the registry applies the status of inactive. Since there are no host objects associated with the domain, by definition, it cannot be published to the zone. The inactive status cannot be applied by registrars.

If a domain has no prohibitions, restrictions or pending operations and the domain also contains sufficient host object references for zone publication, the registry assigns the status of ok if there is no other status set.

There are a few statuses defined by the domain mapping RFC 5731 that our registry does not use. These statuses are: pendingCreate, pendingRenew and pendingUpdate. RFC 5731 also defines some status combinations that are invalid. We acknowledge these and our registry system disallows these combinations.

### 13.0. RESOURCING

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, 2 Sr. Systems Administrators, 2 Systems Administrators, 2 Sr. Systems Engineers, 2 Systems Engineers
- New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, 2 Network Engineers
- New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

#### Network Operations Center:

- Existing Department Personnel: Manager, 2 NOC Supervisors, 12 NOC Analysts
- New Hires: Eight NOC Analysts

## 28. Abuse Prevention and Mitigation

Q28 Standard CHAR: 29545

### 1.0. INTRODUCTION

Donuts will employ strong policies and procedures to prevent and mitigate abuse. Our intention is to ensure the integrity of this top-level domain (TLD) and maintain it as a trusted space on the Internet. We will not tolerate abuse and will use professional, consistent, and fair policies and procedures to identify and address abuse in the legal, operational, and technical realms

Our approach to abuse prevention and mitigation includes the following:

- An Anti-Abuse Policy that clearly defines malicious and abusive behaviors;
- An easy-to-use single abuse point of contact (APOC) that Internet users can use to report the malicious use of domains in our TLD;
- Procedures for investigating and mitigating abuse;
- Procedures for removing orphan glue records used to support malicious activities;
- Dedicated procedures for handling legal requests, such as inquiries from law enforcement bodies, court orders, and subpoenas;
- Measures to deter abuse of the Whois service; and
- Policies and procedures to enhance Whois accuracy, including compliance and monitoring programs.

Our abuse prevention and mitigation solution leverages our extensive domain name industry experience and was developed based on extensive study of existing gTLDs and ccTLDs for best registry practices. This same experience will be leveraged to manage the new TLD.

### 2.0. ANTI-ABUSE POLICY

The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants,

registrars, and resellers. This policy will also be posted on the registry web site and accompanied by abuse point-of-contact contact information (see below). Internet users can report suspected abuse to the registry and sponsoring registrar, and report an orphan glue record suspected of use in connection with malicious conduct (see below).

The policy is especially designed to address the malicious use of domain names. Its intent is to:

1. Make clear that certain types of behavior are not tolerated;
2. Deter both criminal and non-criminal but harmful use of domain names; and
3. Provide the registry with clearly stated rights to mitigate several types of abusive behavior when found.

This policy does not take the place of the Uniform Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism.

Below is a policy draft based on the anti-abuse policies of several existing TLD registries with exemplary practices (including .ORG, .CA, and .INFO). We plan to adopt the same, or a substantially similar version, after the conclusion of legal reviews.

### 3.0. TLD ANTI-ABUSE POLICY

The registry reserves the right, at its sole discretion and at any time and without limitation, to deny, suspend, cancel, redirect, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status as it determines necessary for any of the following reasons:

- (1) to protect the integrity and stability of the registry;
- (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process;
- (3) to avoid any liability, civil or criminal, on the part of the registry operator, its affiliates, subsidiaries, officers, directors, or employees;
- (4) to comply with the terms of the registration agreement and the registry's Anti-Abuse Policy;
- (5) registrant fails to keep Whois information accurate and up-to-date;
- (6) domain name use violates the registry's acceptable use policies, or a third party's rights or acceptable use policies, including but not limited to the infringement of any copyright or trademark;
- (7) to correct mistakes made by the registry operator or any registrar in connection with a domain name registration; or
- (8) as needed during resolution of a dispute.

Abusive use of a domain is an illegal, malicious, or fraudulent action and includes, without limitation, the following:

- Distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include computer viruses, worms, keyloggers, trojans, and fake antivirus products;
- Phishing: attempts to acquire sensitive information such as usernames, passwords, and credit card details by masquerading as a trustworthy entity in an electronic communication;
- DNS hijacking or poisoning;
- Spam: The use of electronic messaging systems to send unsolicited bulk messages. This includes but is not limited to email spam, instant messaging spam, mobile messaging spam, and the spamming of Internet forums;
- Use of botnets, including malicious fast-flux hosting;
- Denial-of-service attacks;
- Child pornography/child sexual abuse images;
- The promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law; and
- Illegal access of computers or networks.

#### 4.0. SINGLE ABUSE POINT OF CONTACT

Our prevention and mitigation plan includes use of a single abuse point of contact (APOC). This contact will be a role-based e-mail address in the form of "abuse@registry.tld". This e-mail address will allow multiple staff members to monitor abuse reports. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered an Internet abuse desk best practice.

The APOC e-mail address will be listed on the registry web site. We also will provide a convenient web form for complaints. This form will prompt complainants to provide relevant information. (For example, complainants who wish to report spam will be prompted to submit the full header of the e-mail.) This will help make their reports more complete and accurate.

Complaints from the APOC e-mail address and web form will go into a ticketing system, and will be routed to our abuse handlers (see below), who will evaluate the tickets and execute on them as needed.

The APOC is mainly for complaints about malicious use of domain names. Special addresses may be set up for other legal needs, such as civil and criminal subpoenas, and for Sunrise issues.

#### 5.0. ABUSE INVESTIGATION AND MITIGATION

Our designated abuse handlers will receive and evaluate complaints received via the APOC. They will decide whether a particular issue merits action, and decide what action is appropriate.

Our designated abuse handlers have domain name industry experience receiving, investigating and resolving abuse reports. Our registry implementation plan will leverage this experience and deploy additional resources in an anti-abuse program tailored to running a registry.

We expect that abuse reports will be received from a wide variety of parties, including ordinary Internet users; security researchers and Internet security companies; institutions, such as banks; and law enforcement agencies.

Some of these parties typically provide good forensic data or supporting evidence of the alleged malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide evidence. It is not unusual, in the Internet industry, that a certain percentage of abuse reports are not actionable because there is insufficient evidence to support the complaint, even after additional investigation.

The abuse handling function will be staffed with personnel who have experience handling abuse complaints. This group will function as an abuse desk to "triage" and investigate reports. Over the past several years, this group has investigated allegations about a variety of problems, including malware, spam, phishing, and child pornography/child sexual abuse images.

#### 6.0. POLICIES, PROCEDURES, AND SERVICE LEVELS

Our abuse prevention and mitigation plan includes development of an internal manual for assessing and acting upon abuse complaints. Our designated abuse handlers will use this to ensure consistent and fair processes. To prevent exploitation of internal procedures by malefactors, these procedures will not be published publicly.

Assessing abuse reports requires great care. The goals are accuracy, a zero false-positive rate to prevent harm to innocent registrants, and good documentation.

Different types of malicious activities require different methods of investigation and documentation. The procedures we deploy will address all the abuse types listed in our Anti-Abuse Policy (above). This policy will also contain procedures for assessing complaints about orphan nameservers used for malicious activities.

One of the first steps in addressing abusive or harmful activities is to determine the type of

domain involved. Two types of domains may be involved: 1) a “compromised domain”; and/or 2) a maliciously registered domain.

A “compromised” domain is one that has been hacked or otherwise compromised by criminals; the registrant is not responsible for the malicious activity taking place on the domain. For example, most domain names that host phishing sites are compromised. The goal in such cases is to inform the registrant of the problem via the registrar. Ideally, such domains are not suspended, since suspension disrupts legitimate activity on the domain.

The second type of potentially harmful domain, the maliciously registered domain, is one registered by a bad actor for the purpose of abuse. Since it has no legitimate use, this type of domain is a candidate for suspension.

In general, we see the registry as the central entity responsible for monitoring abuse of the TLD and passing any complaints received to the domains’ sponsoring registrars. In an alleged (though credible) case of malicious use, the case will be communicated to the domain’s sponsoring registrar requesting that the registrar investigate, act appropriately, and report on it within a defined time period. Our abuse handlers will also provide any evidence they collect to the registrar.

There are several good reasons for passing a case of malicious domain name use on to the registrar. First, the registrar has a direct relationship and contract with the registrant. It is important to respect this relationship as it pertains both to business in general and any legal perspectives involved. Second, the registrar holds a better position to evaluate and act because the registrar typically has vital information the registry operator does not, including domain purchase details and payment method (i.e., credit card, etc.); the identity of a proxy-protected registrant; the IP address from which the domain purchase was made; and whether a reseller is involved. Finally, it is important the registrar know if a registrant is in violation of registry or registrar policies and terms—the registrar may wish to suspend the registrant’s account, or investigate other domains the registrar has registered in this TLD or others.

The registrar is also often best for determining if questionable registrant activity violates the registrar’s legal terms of service or the registry Anti-Abuse Policy, and deciding whether to take any action. Registrars will be required to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action and allows the registrar to suspend or cancel a domain name.

If a registrar does not take action within the time indicated by us in the report (i.e., 24 hours), we may take action ourselves. In some cases, we may suspend the domain name(s), and we reserve the right to act directly and immediately. We plan to take action directly if time is of the essence, such as with a malware attack that may cause significant harm to Internet users.

It is important to note that strict service level agreements (SLAs) for abuse response and mitigation are not always appropriate, additional tailoring of any SLAs may be required, depending on the problem. For example, suspending a domain within 24 hours may not be the best course of action when working with law enforcement or a national clearinghouse to address reports of child pornography. Officials may need more than 24 hours to investigate and gather evidence.

## 7.0. ABUSE MONITORING AND METRICS

In addition to addressing abuse complaints, we will actively monitor the overall abuse status of the TLD, gather intelligence and track abuse metrics to address criminal use of domains in the TLD.

To enable active reporting of problems to the sponsoring registrars, our plan includes proactive monitoring for malicious use of the domains in the TLD. Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors

such as LegitScript (www.legitscript.com) may be used to identify and close down illegal “rogue” Internet pharmacies.

Our approach also incorporates recordkeeping and metrics regarding abuse and abuse reports. These may include:

- The number of abuse reports received by the registry’s abuse point of contact described above and the domains involved;
- The number of cases and domains referred to registrars for resolution;
- The number of cases and domains for which the registry took direct action;
- Resolution times (when possible or relevant, as resolution times for compromised domains are difficult to measure).

We expect law enforcement to be involved in only a small percentage of abuse cases and will call upon relevant law enforcement as needed.

#### 8.0. HANDLING REPORTS FROM LAW ENFORCEMENT, COURT ORDERS

The new gTLD Registry Agreement contains this requirement: “Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.” (Article 2.8)

We will be responsive as required by Article 2.8. Our abuse handling team will comply with legal processes and leverage both experience and best practices to work effectively with law enforcement and other government agencies. The registry will post a Criminal Subpoena Policy and Procedure page, which will detail how law enforcement and government agencies may submit criminal and civil subpoenas. When we receive valid court orders or seizure warrants from courts or law enforcement agencies of relevant jurisdiction, we will expeditiously review and comply with them.

#### 9.0. PROHIBITING DOMAIN HIJACKINGS AND UNAPPROVED UPDATES

Our abuse prevention and mitigation plan also incorporates registrars that offer domain protection services and high-security access and authentication controls. These include services designed to prevent domain hijackings and inhibit unapproved updates (such as malicious changes to nameserver settings). Registrants will then have the opportunity to obtain these services should they so elect.

#### 10.0. ABUSE POLICY: ADDRESSING INTELLECTUAL PROPERTY INFRINGEMENT

Intellectual property infringement involves three distinct but sometimes intertwined problems: cybersquatting, piracy, and trademark infringement:

- Cybersquatting is about the presence of a trademark in the domain string itself.
- Trademark infringement is the misuse or misappropriation of trademarks – the violation of the exclusive rights attached to a trademark without the authorization of the trademark owner or any licensees. Trademark infringement sometimes overlaps with piracy.
- Piracy involves the use of a domain name to sell unauthorized goods, such as copyrighted music, or trademarked physical items, such as fake brand-name handbags. Some cases of piracy involve trademark infringement.

The Uniform Dispute Resolution Process (UDRP) and the new Uniform Rapid Suspension System (URS) are anti-cybersquatting policies. They are mandatory and all registrants in the new TLD will be legally bound to them. Please refer to our response to Question #29 for details on our plans to respond to URS orders.

The Anti-Abuse Policy for our gTLD will be used to address phishing cases that involve trademarked strings in the domain name. The Anti-Abuse Policy prohibits violation of copyright or trademark; such complaints will be routed to the sponsoring Registrar.

## 11.0. PROPOSED MEASURES FOR REMOVAL OF ORPHAN GLUE RECORDS

Below are the policies and procedures to be used for our registry in handling orphan glue records. The anti-abuse documentation for our gTLD will reflect these procedures.

By definition, a glue record becomes an "orphan" when the delegation point Name Server (NS) record referencing it is removed without also removing the corresponding glue record. The delegation point NS record is sometimes referred to as the parent NS record.

As ICANN's SSAC noted in its Advisory SAC048 "SSAC Comment on Orphan Glue Records in the Draft Applicant Guidebook" (<http://www.icann.org/en/committees/security/sac048.pdf>), "Orphaned glue can be used for abusive purposes; however, the dominant use of orphaned glue supports the correct and ordinary operation of the Domain Name System (DNS)." For example, orphan glue records may be created when a domain (example.tld) is placed on Extensible Provisioning Protocol (EPP) ServerHold or ClientHold status. This use of Hold status is an essential tool for suspending malicious domains. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve.

We will use the following procedure—used by several existing registries and considered a generally accepted DNS practice—to manage orphan glue records.. When a registrar submits a request to delete a domain, the registry first checks for the existence of glue records. If glue records exist, the registry checks to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records, then registrar EPP requests to delete the domain will fail until no other domains are using the glue records. (This functionality is currently in place for the .ORG registry.) However, if a registrar submits a complaint that orphan glue is being used maliciously and the malicious conduct is confirmed, the registry operator will remove the orphan glue record from the zone file via an exceptional process.

## 12.0. METHODS TO PROMOTE WHOIS ACCURACY

### 12.1. ENFORCING REQUIRED CONTACT DATA FIELDS

We will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows for better access to domain data and provides uniformity in storing the information.

As per the EPP specification, certain contact data fields are mandatory. Our registry will enforce those, plus certain other fields as necessary. This ensures that registrars are providing required domain registration data. The following fields (indicated as "MANDATORY") will be mandatory at a minimum:

Contact Name [MANDATORY]  
Street1 [MANDATORY]  
City [MANDATORY]  
State/Province [optional]  
Country [MANDATORY]  
Postal Code [optional]  
Registrar Phone [MANDATORY]  
Phone Ext [optional]  
Fax [optional]  
Fax Ext [optional]  
Email [MANDATORY]

In addition, our registry will verify formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers) and will reject any improperly formatted submissions. Only valid country codes will be allowed, as defined by the ISO 3166 code list.

We will reject entries that are clearly invalid. For example, a contact that contains phone numbers such as 555.5555, or registrant names that consist only of hyphens, will be rejected.

## 12.2. POLICIES AND PROCEDURES TO ENHANCE WHOIS ACCURACY COMPLIANCE

We generally will rely on registrars to enforce WHOIS accuracy measures, but will also rely on review and audit procedures to enhance compliance.

As part of our RRA (Registry-Registrar Agreement), we will require each registrar to be responsible for ensuring the input of accurate Whois data by its registrants. The Registrar/Registered Name Holder Agreement will include specific clauses to ensure accuracy of Whois data, as per ICANN requirements, and to give the registrar the right to cancel or suspend registrations if the registered name holder fails to respond to the registrar's query regarding accuracy of data. In addition, the Anti-Abuse Policy for our registry will give the registry the right to suspend, cancel, etc., domains that have invalid Whois data.

As part of our RRA (Registry-Registrar Agreement), we will include a policy similar to the one below, currently used by the Canadian Internet Registration Authority (CIRA), the operator of the .CA registry. It will require the registrar to help us verify contact data.

"CIRA is entitled at any time and from time to time during the Term...to verify: (a) the truth, accuracy and completeness of any information provided by the Registrant to CIRA, whether directly, through any of the Registrars of Record or otherwise; and (b) the compliance by the Registrant with the provisions of the Agreement and the Registry PRP. The Registrant shall fully and promptly cooperate with CIRA in connection with such verification and shall give to CIRA, either directly or through the Registrar of Record such assistance, access to and copies of, such information and documents as CIRA may reasonably require to complete such verification. CIRA and the Registrant shall each be responsible for their own expenses incurred in connection with such verification."

<http://www.cira.ca/assets/Documents/Legal/Registrants/registratoragreement.pdf>

On a periodic basis, we will perform spot audits of the accuracy of Whois data in the registry. Questionable data will be sent to the sponsoring registrars as per the above policy.

All accredited registrars have agreed with ICANN to obtain contact information from registrants, and to take reasonable steps to investigate and correct any reported inaccuracies in contact information for domain names registered through them. As part of our RRA (Registry-Registrar Agreement), we will include a policy that allows us to de-accredit any registrar who a) does not respond to our Whois accuracy requests, or b) fails to update Whois data or delete the name within 15 days of our report of invalid WHOIS data. In order to allow for inadvertent and unintentional mistakes by a registrar, this policy may include a "three strikes" rule under which a registrar may be de-accredited after three failures to comply.

## 12.3. PROXY/PRIVACY SERVICE POLICY TO CURB ABUSE

In our TLD, we will allow the use of proxy/privacy services. We believe that there are important, legitimate uses for such services. (For example, to protect free speech rights and avoid receiving spam.)

However, we will limit how proxy/privacy services are offered. The goal of this policy is to make proxy/privacy services unattractive to abusers, namely the spammers and e-criminals who use such services to hide their identities. We believe the policy below will enhance WHOIS accuracy, will help deter the malicious use of domain names in our TLD, and will aid in the investigation and mitigation of abuse complaints.

Registry policy will require the following, and all registrars and their registrants and resellers will be bound to it contractually:

a. Registrants must provide complete and accurate contact information to their registrar (or reseller, if applicable).. Domains that do not meet this policy may be suspended.

b. Registrars and resellers must provide the underlying registrant information to the registry operator, upon written request, during an abuse investigation. This information will be held in confidence by the registry operator.

c. The registrar or reseller must publish the underlying registrant information in the Whois if it is determined by the registry operator or the registrar that the registrant has breached any terms of service, such as the TLD Anti-Abuse Policy.

The purpose of the above policy is to ensure that, in case of an abuse investigation, the sponsoring registrar has access to the registrant's true identity, and can provide that data to the registry. If it is clear the registrant has violated the TLD's Anti-Abuse Policy or other terms of service, the registrant's identity will be published publicly via the Whois, where it can be seen by the public and by law enforcement.

### 13.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO ABUSE

Donuts does not currently intend to become a registrar for this TLD. Donuts and our back-end technical operator will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. For abuse issues, we will comply by establishing an adequate "firewall" between our registry operations and the operations of any affiliated registrar. As the Code requires, the registry will not "directly or indirectly show any preference or provide any special consideration to any Registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps to be taken to enforce this:

- Abuse complaints and cases will be evaluated and executed upon using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Registry personnel will not discuss abuse cases with non-registry personnel or personnel from separate entities operating under the company. This policy is designed to both enhance security and prevent conflict of interest.
- If a compliance function is involved, the compliance staff will have responsibilities to the registry only, and not to a registrar we may be "affiliated" with at any point in the future. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that person will have no duty to any registrar business we may be operating at the time. The person will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry impartially and effectively.

### 14.0. CONTROLS TO ENSURE PROPER ACCESS TO DOMAIN FUNCTIONS

Our registry incorporates several measures to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, SSL certificates, and proper authentication will be used to control registrar access to the registry system. Registrars will be given access only to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code as per EPP RFCs. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. (It is the "password" to the domain name.) Registrars must use the domain's password to initiate a Registrar-to-Registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are undertaken by the proper registrant, and that this registrant is adequately notified of domain update activity. Only the sponsoring Registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Our Registry-Registrar contract will require that each registrar assign a unique AUTH-INFO code to every domain it creates. Due to security risk, registrars should not assign the same AUTH-INFO code to multiple domains.

Information about other registry security measures such as encryption and security of Registrar channels are confidential to ensure the security of the registry system. Details can be found in our response to Question #30(b).

## 15.0. RESOURCING PLAN

Our back-end registry operator will perform the majority of Abuse Prevention and Mitigation services for this TLD, as required by our agreement with them. Donuts staff will supervise the activity of the provider. In some cases Donuts staff will play a direct role in the handling of abuse cases.

The compliance department of our registry operator has two full time staff members who are trained in DNS, the investigation of abuse complaints, and related specialties. The volume of abuse activity will be gauged and additional staff hired by our back-end registry operator as required to meet their SLA commitments. In addition to the two full-time members, they expect to retain the services of one or more outside contractors to provide additional security and anti-abuse expertise - including advice on the effectiveness of our policies and procedures.

Finally, Donuts' Legal Department will have one attorney whose role includes the oversight of legal issues related to abuse, and interaction with courts and law enforcement.

## 29. Rights Protection Mechanisms

Q29 Standard CHAR: 25023

### 1.0. INTRODUCTION

To minimize abusive registrations and other activities that affect the legal rights of others, our approach includes well-developed policies for rights protection, both during our TLD's rollout period and on an ongoing basis. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods, we will use the Trademark Clearinghouse, and we will implement Uniform Rapid Suspension (URS) on an ongoing basis. In addition to these newly mandated ICANN protections, we will implement two other trademark protections that were developed specifically for the new TLD program. These additional protections are: (i) a Domain Protected Marks List (DPML) for the blocking of trademarked strings across multiple TLDs; and (ii) a Claims Plus product to alert registrars to registrations that potentially infringe existing marks.

Below we detail how we will fulfill these requirements and further meet or exceed ICANN's requirements. We also describe how we will provide additional measures specific to rights protection above ICANN's minimum, including abusive use policies, takedown procedures, and other covenants.

Our RPM approach leverages staff with extensive experience in a large number of gTLD and ccTLD rollouts, including the Sunrises for .CO, .MOBI, .ASIA, .EU, .BIZ, .US., .TRAVEL, TEL, .ME, and .XXX. This staff will utilize their first-hand, practical experience and will effectively manage all aspects of Sunrise, including domain application and domain dispute processes.

The legal regime for our gTLD will include all of the ICANN-mandated protections, as well as some independently developed RPMs proactively included in our Registry-Registrar Agreement. Our RPMs exceed the ICANN-required baseline. They are:

- Reserved names: to protect names specified by ICANN, including the necessary geographic names.

- A Sunrise Period: adhering to ICANN requirements, and featuring trademark validation via the Trademark Clearinghouse.
- A Trademark Claims Service: offered as per ICANN requirements, and active after the Sunrise period and for the required time during wider availability of the TLD.
- Universal Rapid Suspension (URS)
- Uniform Dispute Resolution Process (UDRP)
- Domain Protected Marks List (DPML)
- Claims Plus
- Abusive Use and Takedown Policies

## 2.0. NARRATIVE FOR Q29 FIGURE 1 OF 1

Attachment A, Figure 1, shows Rollout Phases and the RPMs that will be used in each. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods. In addition, we will use the Trademark Clearinghouse to implement URS on an ongoing basis.

## 3.0. PRE-SUNRISE: RESERVED AND PREMIUM NAMES

Our Pre-sunrise phase will include a number of key practices and procedures. First, we will reserve the names noted in the gTLD Registry Agreement Specification 5. These domains will not be available in Sunrise or subsequent registration periods. As per Specification 5, Section 5, we will provide national governments the opportunity to request the release of their country and territory names for their use. Please also see our response to Question 22, "Protection of Geographic Names."

We also will designate certain domains as "premium" domains. These will include domains based on generic words and one-character domains. These domains will not be available in Sunrise, and the registry may offer them via special means such as auctions and RFPs.

As an additional measure, if a trademark owner objects to a name on the premium name list, the trademark owner may petition to have the name removed from the list and made available during Sunrise. The trademark must meet the Sunrise eligibility rules (see below), and be an exact match for the domain in question. Determinations of whether such domains will be moved to Sunrise will be at the registry's sole discretion.

## 4.0. SUNRISE

### 4.1. SUNRISE OVERVIEW

Sunrise registration services will be offered for a minimum of 30 days during the pre-launch phase. We will notify all relevant trademark holders in the Trademark Clearinghouse if any party is seeking a Sunrise registration that is an identical match to the name to be registered during Sunrise.

As per the Sunrise terms, affirmed via the Registry-Registrar Agreement and the Registrar-Registrant Agreement, the domain applicant will assert that it is qualified to hold the domain applied for as per the Sunrise Policy and Rules.

We will use the Trademark Clearinghouse to validate trademarks in the Sunrise.

If there are multiple valid Sunrise applications for the same domain name string, that string will be subject to auction between only the validated applicants. After receipt of payment from the auction winning bidder, that party will become the registrant of the domain name. (note: in the event one of the identical, contending marks is in a trademark classification reflective of the TLD precedence to that mark may be given during Sunrise).

Sunrise applicants may not use proxy services during the application process.

#### 4.2. SUNRISE: ELIGIBLE RIGHTS

Our Sunrise Eligibility Requirements (SERs) are:

##### 1. Ownership of a qualifying mark.

a. We will honor the criteria in ICANN's Trademark Clearinghouse document section 7.2, number (i): The registry will recognize and honor all word marks that are nationally or regionally [see Endnote 1] registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.

b. In addition, we may accept marks that are not found in the Trademark Clearinghouse, but meet other criteria, such as national trademark registrations or common law rights.

##### 2. Representation by the applicant that all provided information is true and correct; and

3. Provision of data sufficient to document rights in the trademark. (See information about required Sunrise fields, below).

#### 4.3. SUNRISE TRADEMARK VALIDATION

Our goal is to award Sunrise names only to applicants who are fully qualified to have them. An applicant will be deemed to be qualified if that applicant has a trademark that meets the Sunrise criteria, and is seeking a domain name that matches that trademark, as per the Sunrise rules.

Accordingly, we will validate applications via the Trademark Clearinghouse. We will compare applications to the Trademark Clearinghouse database, and those that match (as per the Sunrise rules) will be considered valid applications.

An application validated according to Sunrise rules will be marked as “validated,” and will proceed. (See “Contending Applications,” below.) If an application does not qualify, it will be rejected and will not proceed.

To defray the costs of trademark validation and the Trademark Claims Service, we will charge an application and/or validation fee for every application.

In January 2012, the ICANN board was briefed that “An ICANN cross-functional team is continuing work on implementation of the Trademark Clearinghouse according to a project plan providing for a launch of clearinghouse operations in October 2012. This will allow approximately three months for rights holders to begin recording trademark data in the Clearinghouse before any new gTLDs begin accepting registrations (estimated in January 2013).” (<http://www.icann.org/en/minutes/board-briefing-materials-4-05jan12-en.pdf>) The Clearinghouse Implementation Assistance Group (IAG), which Donuts is participating in, is working through a large number of process and technical issues as of this writing. We will follow the progress of this work, and plan our implementation details based on the final specifications.

Compliant with ICANN policy, our registry software is designed to properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

#### 4.5. CONTENDING APPLICATIONS, SUNRISE AUCTIONS

After conclusion of the Sunrise Period, the registry will finish the validation process. If there is only one valid application for a domain string, the domain will be awarded to that applicant. If there are two or more valid applications for a domain string, only those applicants will be invited to participate in a closed auction for the domain name. The domain will be awarded to the auction winner after payment is received.

After a Sunrise name is awarded to an applicant, it will then remain under a "Sunrise lock" status for a minimum of 60 days in order to allow parties to file Sunrise Challenges (see below). Locked domains cannot be updated, transferred, or deleted.

When a domain is awarded and granted to an applicant, that domain will be available for lookup in the public Whois. Any party may then see what domains have been awarded, and to which registrants. Parties will therefore have the necessary information to consider Sunrise Challenges.

Auctions will be conducted by very specific rules and ethics guidelines. All employees, partners, and contractors of the registry are prohibited from participating in Sunrise auctions.

#### 4.6. SUNRISE DISPUTE RESOLUTION PROCESS (SUNRISE CHALLENGES)

We will retain the services of a well-known dispute resolution provider (such as WIPO) to help formulate the language of our Sunrise Dispute Resolution Process (SDRP, or "Sunrise Challenge") and hear the challenges filed under it. All applicants and registrars will be contractually obligated to follow the decisions handed down by the dispute resolution provider.

Our SDRP will allow challenges based on the following grounds, as required by ICANN. These will be part of the Sunrise eligibility criteria that all registrants (applicants) will be bound to contractually:

- (i) at the time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty;
- (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration;
- (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or
- (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Our SDRP will be based generally on some SDRPs that have been used successfully in past TLD launches. The Sunrise Challenge Policies and Rules used in the .ASIA and .MOBI TLDs (minus their unique eligibility criteria) are examples.

We expect that that there will be three possible outcomes to a Sunrise Challenge:

1. Original registrant proves his/her right to the domain. In this case the registrant keeps the domain and it is unlocked for his/her use.
2. Original registrant is not eligible or did not respond, and the challenger proved his/her right to the domain. In this case the domains is awarded to the complainant.
3. Neither the original registrant nor the complainant proves rights to the domain. In this case the domain is cancelled and becomes available at a later date via a mechanism to be determined by the registry operator.

After any Sunrise name is awarded to an applicant, it will remain under a "Sunrise Lock" status for at least 60 days so that parties can file Sunrise Challenges. During this Sunrise Lock period, the domain will not resolve and cannot be modified, transferred, or deleted by the sponsoring registrar. A domain name will be unlocked at the end of that lock period only if it is not subject to a Sunrise Challenge. Challenged domains will remain locked until the dispute resolution provider has issued a decision, which the registry will promptly execute.

## 5.0. TRADEMARK CLAIMS SERVICES

The Trademark Claims Service requirements are well-defined in the Applicant Guidebook, in Section 6 of the “Trademark Clearinghouse” attachment. We will comply with the details therein. We will provide Trademark Claims services for marks in the Trademark Clearinghouse post-Sunrise and then for at least the first 60 days that the registry is open for general registration (i.e. during the first 60 days in the registration period(s) after Sunrise). The Trademark Claims service will provide clear notice to a prospective registrant that another party has a trademark in the Clearinghouse that matches the applied-for domain name—this is a notice to the prospective registrant that it might be infringing upon another party’s rights.

The Trademark Clearinghouse database will be structured to report to registries when registrants are attempting to register a domain name that is considered an “Identical Match” with the mark in the Clearinghouse. We will build, test, and implement an interface to the Trademark Clearinghouse before opening our Sunrise period. As domain name applications come into the registry, those strings will be compared to the contents of the Clearinghouse.

If the domain name is registered in the Clearinghouse, the registry will promptly notify the applicant. We will use the notice form specified in ICANN’s Module 4, “Trademark Clearinghouse” document. The specific statement by the prospective registrant will warrant that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant’s knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

The Trademark Claims Notice will provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice. The notice will be provided in real time (or as soon as possible) without cost to the prospective registrant or to those notified.

“Identical Match” is defined in ICANN’s Module 4, “Trademark Clearinghouse” document, paragraph 6.1.5. We will examine the Clearinghouse specifications and protocol carefully when they are published. To comply with ICANN policy, the software for our registry will properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

## 6.0. GENERAL REGISTRATION

This is the general registration period open to all registrants. No trademark or other qualification will be necessary in order to apply for a domain in this period.

Domain names awarded via the Sunrise process, and domain strings still being contended via the Sunrise process cannot be registered in this period. This will protect the interests of all Sunrise applicants.

## 7.0. UNIFORM RAPID SUSPENSION (URS)

We will implement decisions rendered under the URS on an ongoing basis. (URS will not apply to Sunrise names while they are in Sunrise Lock period; during that time those domains are subject to Sunrise policy and Sunrise Challenge instead.)

As per URS policy, the registry will receive notice of URS actions from ICANN-approved URS providers. As per ICANN’s URS requirements, we will lock the domain within 24 hours of receipt of the Notice of Complaint from the URS Provider. Locking means that the registry restricts all changes to the registration data, including transfer and deletion of domain names, though names will continue to resolve.

Our registry’s compliance team will oversee URS procedures. URS e-mails from URS providers will be directed immediately to the registry’s Support staff, which is on duty 24/7/365. Support staff will be responsible for executing the directives from the URS provider, and all support staff will receive training in the proper procedures.

Support staff will notify the URS Provider immediately upon locking the domain name, via e-mail.

Support staff for the registry will retain all copies of e-mails from the URS providers. Each case or order will be assigned a tracking or ticket number. This number will be used to track the status of each opened URS case through to resolution via a database.

Registry staff will then execute further operations upon notice from the URS providers. Each URS provider is required to specify the remedy and required actions of the registry, with notification to the registrant, the complainant, and the sponsoring registrar.

The guidelines provide that if the complainant prevails, the registry "shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration." We will execute the DNS re-pointing required by the URS guidelines, and the domain and its WHOIS data will remain unaltered until the domain expires, as per the ICANN requirements.

#### 8.0. ONGOING RIGHTS PROTECTION MECHANISMS - UDRP

As per ICANN policy, all domains in the TLD will be subject to a Uniform Dispute Resolution Process (UDRP). (Sunrise domains will first be subject to the ICANN-mandated Sunrise SDRP until the Sunrise Challenge period is over, after which those domains will then be subject to UDRP.)

#### 9.0 ADDITIONAL RIGHTS PROTECTION MECHANISMS NOT REQUIRED BY ICANN

All Donuts TLDs have two new trademark protection mechanisms developed specifically for the new TLD program. These mechanisms exceed the extensive protections mandated by ICANN. These new protections are:

9.1 Claims Plus: This service will become available at the conclusion of the Trademark Claims service, and will remain available for at least the first five years of registry operations. Trademark owners who are fully registered in the Trademark Clearinghouse may obtain Claims Plus for their marks. We expect the service will be at low or no cost to trademark owners (contingent on Trademark Clearinghouse costs to registries). Claims Plus operates much like Trademark Claims with the exception that notices of potential trademark infringement are sent by the registry to any registrar whose customer performs a check-command or Whois query for a string subject to Claims Plus. Registrars may then take further implementation steps to advise their customers, or use this data to better improve the customer experience. In addition, the Whois at the registry website will output a full Trademark Claims notice for any query of an unregistered name that is subject to Claims Plus. (Note: The ongoing availability of Claims Plus will be contingent on continued access to a Trademark Clearinghouse. The technical viability of some Claims Plus features will be affected by eventual Trademark Clearinghouse rules on database caching).

9.2 Domain Protected Marks List: The DPML is a rights protection mechanism to assist trademark holders in protecting their intellectual property against undesired registrations of strings containing their marks. The DPML prevents (blocks) registration of second level domains that contain a trademarked term (note: the standard for DPML is "contains"—the protected string must contain the trademarked term). DPML requests will be validated against the Trademark Clearinghouse and the process will be similar to registering a domain name so the process will not be onerous to trademark holders. An SLD subject to DPML will be protected at the second level across all Donuts TLDs (i.e. all TLDs for which this SLD is available for registration). Donuts may cooperate with other registries to extend DPML to TLDs that are not operated by Donuts. The cost of DPML to trademark owners is expected to be significantly less than the cost of actually registering a name.

## 10.0 ABUSIVE USE POLICIES AND TAKEDOWN PROCEDURES

In our response to Question #28, we describe our anti-abuse program, which is designed to address malware, phishing, spam, and other forms of abuse that may harm Internet users. This program is designed to actively discover, verify, and mitigate problems without infringing upon the rights of legitimate registrants. This program is designed for use in the open registration period. These procedures include the reporting of compromised websites/domains to registrars for cleanup by the registrants and their hosting providers. It also describes takedown procedures, and the timeframes and circumstances that apply for suspending domain names used improperly. Please see the response to Question #28 for full details.

We will institute a contractual obligation that proxy protection be stripped away if a domain is proven to be used for malicious purposes. For details, please see "Proxy/Privacy Service Policy to Curb Abuse" in the response to Question 28.

## 11.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO RIGHTS PROTECTION

We will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. In rights protection matters, we will comply by establishing an adequate "firewall" between the operations of any registrar we establish and the operations of the registry. As the Code requires, we will not "directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps we will take to accomplish this:

- We will evaluate and execute upon all rights protection tasks impartially, using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Any registrar we establish or have established at the time of registry launch will not receive preferential access to any premium names, any auctions, etc. Registry personnel and any registrar personnel that we may employ in the future will be prohibited from participating as bidders in any auctions for Landrush names.
- Any registrar staff we may employ in the future will have access to data and records relating only to the applications and registrations made by any registrar we establish, and will not have special access to data related to the applications and registrations made by other registrars.
- If a compliance function is involved, the compliance staffer will be responsible to the registry only, and not to a registrar we own or are "affiliated" with. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that staffer will not have duties with the registrar business. The staffer will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry effectively and impartially, regardless of the consequences to the registrar.

## 12.0. RESOURCING PLAN

Overall management of RPMs is the responsibility of Donuts' VP of Business Operations. Our back-end registry operator will perform the majority of operational work associated with RPMs, as required by our agreement with them. Donuts VP of Business Operations will supervise the activity of this vendor.

Resources applied to RPMs include:

### 1. Legal team

- a. We will have at least one legal counsel who will be dedicated to the registry with previous experience in domain disputes and Sunrise periods and will oversee the compliance and support teams with regard to the legal issues related to Sunrise and RPM's
- b. We have outside counsel with domain and rights protection experience that is available to us as necessary

2. Dispute Resolution Provider (DRP): The DRP will help formulate Sunrise Rules and Policy, Sunrise Dispute Resolution Policy. The DRP will also examine challenges, but the challenger will be required to pay DRP fees directly to the DRP.

3. Compliance Department and Tech Support: There will be three dedicated personnel assigned to these areas. This staff will oversee URS requests and abuse reports on an ongoing basis.
4. Programming and technical operations. There are four dedicated personnel assigned to these functions.
5. Project Manager: There will be one person to coordinate the technical needs of this group with the registry IT department.

#### 13.0. ENDNOTES

1 "Regional" is understood to be a trans-national trademark registry, such as the European Union registry or the Benelux Office for Intellectual Property.

## 30(a). Security Policy: Summary of the security policy for the proposed registry

Q30A Standard CHAR: 19646

### 1.0. INTRODUCTION

Our Information Security (IS) Program and associated IS Policy, Standards and Procedures apply to all Company entities, employees, contractors, temps, systems, data, and processes. The Security Program is managed and maintained by the IS Team, supported by Executive Management and the Board of Directors.

Data and systems vary in sensitivity and criticality and do not unilaterally require the same control requirements. Our security policy classifies data and systems types and their applicable control requirements. All registry systems have the same data classification and are all managed to common security control framework. The data classification applied to all registry systems is our highest classification for confidentiality, availability and integrity, and the supporting control framework is consistent with the technical and operational requirements of a registry, and any supporting gTLD string, regardless of its nature or size. We have the experienced staff, robust system architecture and managed security controls to operate a registry and TLD of any size while providing reasonable assurance over the security, availability, and confidentiality of the systems supporting critical registry functions (i.e., registration services, registry databases, zone administration, and provision of domain name resolution services).

This document describes the governance of our IS Program and the control frameworks our security program aligns to (section 1.0), Security Policy requirements (section 2.0); security assessments conducted (see section 3.0), our process for executive oversight and visibility of risks to ensure continuous improvement (section 4.0), and security commitments to registrants (section 5). Details regarding how these control requirements are implemented, security roles and responsibilities and resources supporting these efforts are included in Security Policy B response.

### 2.0. INFORMATION SECURITY PROGRAM

The IS Program for our registry is governed by an IS Policy aligned to the general clauses of ISO 27001 requirements for an Information Security Management System (ISMS) and follows the control objectives where appropriate, given the data type and resulting security requirements. (ISO 27001 certification for the registry is not planned, however, our DNS/DNSSEC solution is 27001 certified). The IS Program follows a Plan-Do-Check-Act (PDCA) model of continuous improvement to ensure that the security program grows in maturity and that we provide reasonable assurance to our shareholders and Board of Directors that our systems and data are secure.

The High Security Top Level Domain (HSTLD) control framework incorporates ISO 27002, the code of practice for implementing an ISO 27001 ISMS. Therefore, our security program is already closely aligned HSTLD control framework. Furthermore, we agree to abide by the HSTLD Principle 1 and criteria 1.1 - 1.3. (See specifics in Security Policy B response):

Registry systems will be in-scope for Sarbanes-Oxley (SOX) compliance and will follow the SOX control framework governing access control, account management, change management, software development life cycle (SDLC), and job monitoring of all systems. Registry systems will be tested frequently by the IS team for compliance and audited by our internal audit firm, Protiviti, and external audit firm, Price Waterhouse Coopers (PWC), for compliance.

## 2.1. SECURITY PROGRAM GOVERNANCE

Our Information Security Program is governed by IS Policy, supported by standards, and guided by procedures to ensure uniformed compliance to the program. Standards and associated procedures in support of the policy are shown in Attachment A, Figure 1. Security Program documents are updated annually or upon any system or environment change, new legal or regulatory requirements, and/or findings from risk assessments. Any updates to security program are reviewed and approved by the Executive Vice President (EVP) of Information Technology (IT), EVP of Legal & General Counsel, and the EVP of People Operations before dissemination to all employees.

All employees are required to sign the IS Policy upon hire, upon any major changes, and/or annually. By signing the IS Policy, employees agree to abide by the supporting Standards and Procedures applicable to their job roles. To enable signing of the IS Policy, employees must pass a test to ensure competent understanding of the IS Policy and its key requirements.

## 3.0. INFORMATION SECURITY POLICY

### 3.1. INFORMATION ASSET CLASSIFICATION

The following data classification is applied to registry systems: High Business Impact (HBI): Business Confidential in accordance with the integrity, availability and confidentiality requirements of registry operations. All registry systems will follow Security Policy requirements for HBI systems regardless of the nature of the TLD string, financial materiality or size. HBI data if not properly secured, poses a high degree of risk to the Company and includes data pertaining to the Company's adherence to legal, regulatory and compliance requirements, mergers and acquisitions (M&A), and confidential data inclusive of, but is not limited to: Personally Identifiable Information (PII) (credit card data, Social Security Numbers (SSN) and account numbers); materially important financial information (before public disclosure), and information which the Board of Directors/Executive team deems to be a trade secret, which, if compromised, would cause grave harm to the execution of our business model.

HBI safeguards are designed, implemented and measured in alignment with confidentiality, integrity, availability and privacy requirements characterized by legal, regulatory and compliance obligations, or through directives issued by the Board of Directors (BOD) and Executive team. Where guidance is provided, such as the Payment Card Industry (PCI) Data Security Standard (DSS) Internal Audit Risk Control Matrices (RCMs), local, state and federal laws, and other applicable regulations, we put forth the appropriate level of effort and resources to meet those obligations. Where there is a lack of guidance or recommended safeguards, Risk Treatment Plans (RTP's) are designed in alignment with our standard risk management practices.

Other data classifications for Medium Business Impact (MBI): Business Sensitive and Low Business Impact (LBI): Public do not apply to registry systems.

### 3.2. INFORMATION ASSET MANAGEMENT

All registry systems have a designated owner and/or custodian who ensures appropriate security classifications are implemented and maintained throughout the lifecycle of the asset and that

a periodic review of that classification is conducted. The system owner is also responsible for approving access and the type of access granted. The IS team, in conjunction with Legal, is responsible for defining the legal, regulatory and compliance requirements for registry system and data.

### 3.3. INFORMATION ASSET HANDLING, STORAGE & DISPOSAL

Media and documents containing HBI data must adhere to their respective legal, regulatory and compliance requirements and follow the HBI Handling Standard and the retention requirements within the Document Retention Policy.

### 3.4. ACCESS CONTROL

User authentication is required to access our network and system resources. We follow a least-privileged role based access model. Users are only provided access to the systems, services or information they have specifically been authorized to use by the system owner based on their job role. Each user is uniquely identified by an ID associated only with that user. User IDs must be disabled promptly upon a user's termination, or job role change.

Visitors must sign-in at the front desk of any company office upon arrival and escorted by an employee at all times. Visitors must wear a badge while on-site and return the badge when signing out at the front desk. Dates and times of all visitors as well as the name of the employee escorting them must be tracked for audit purposes.

Individuals permitted to access registry systems and HBI information must follow the HBI Identity & Access Management Standard. Details of our access controls are described in Part B of Question 30 response including; technical specifications of access management through Active Directory, our ticketing system, physical access controls to systems and environmental conditions at the datacenter.

### 3.5. COMMUNICATIONS & OPERATIONAL SECURITY

#### 3.5.1. MALICIOUS CODE

Controls shall be implemented to protect against malicious code including but not limited to:

- Identification of vulnerabilities and applicable remediation activities, such as patching, operating system & software upgrades and/or remediation of web application code vulnerabilities.
- File-integrity monitoring shall be used, maintained and updated appropriately.
- An Intrusion Detection Solution (IDS) must be implemented on all HBI systems, maintained & updated continuously.
- Anti-virus (AV) software must be installed on HBI classified web & application systems and systems that provide access to HBI systems. AV software and virus definitions are updated on a regular basis and logs are retained for no less than one year.

#### 3.5.2. THREAT ANALYSIS & VULNERABILITY MANAGEMENT

On a regular basis, IS personnel must review newly identified vulnerability advisories from trusted organizations such as the Center for Internet Security, Microsoft, SANS Institute, SecurityFocus, and the CERT at Carnegie-Mellon University. Exposure to such vulnerabilities must be evaluated in a timely manner and appropriate measures taken to communicate vulnerabilities to the system owners, and remediate as required by the Vulnerability Management Standard. Internal and external network vulnerability scans, application & network layer penetration testing must be performed by qualified internal resource or an external third party at least quarterly or upon any significant network change. Web application vulnerability scanning is to be performed on a continual basis for our primary web properties applicable to their release cycles.

#### 3.5.3. CHANGE CONTROL

Changes to HBI systems including operating system upgrades, computing hardware, networks and

applications must follow the Change Control Standard and procedures described in Security Policy question 30b.

#### 3.5.4. BACKUP & RESTORATION

Data critical to our operations shall be backed up according to our Backup and Restoration Standard. Specifics regarding Backup and Restoration requirements for registry systems are included in questions 37 & 38.

#### 3.6. NETWORK CONTROLS

- Appropriate controls must be established for ensuring the network is operated consistently and as planned over its entire lifecycle.
- Network systems must be synchronized with an agreed upon time source to ensure that all logs correctly reflect the same accurate time.
- Networked services will be managed in a manner that ensures connected users or services do not compromise the security of the other applications or services as required in the HBI Network Configuration Standard. Additional details are included in Question 32: Architecture response.

#### 3.7. DISASTER RECOVERY & BUSINESS CONTINUITY

The SVP of IT has responsibility for the management of disaster recovery and business continuity. Redundancy and fault-tolerance shall be built into systems whenever possible to minimize outages caused by hardware failures. Risk assessments shall be completed to identify events that may cause an interruption and the probability that an event may occur. Details regarding our registry continuity plan are included in our Question 39 response.

#### 3.8 SOFTWARE DEVELOPMENT LIFECYCLE

Advance planning and preparation is required to ensure new or modified systems have adequate security, capacity and resources to meet present and future requirements. Criteria for new information systems or upgrades must be established and acceptance testing carried out to ensure that the system performs as expected. Registry systems must follow the HBI Software Development Lifecycle (SDLC) Standard.

#### 3.9. SECURITY MONITORING

Audit logs that record user activities, system errors or faults, exceptions and security events shall be produced and retained according to legal, regulatory, and compliance requirements. Log files must be protected from unauthorized access or manipulation. IS is responsible for monitoring activity and access to HBI systems through regular log reviews.

#### 3.10. INVESTIGATION & INCIDENT MANAGEMENT RESPONSE

Potential security incidents must be immediately reported to the IS Team, EVP of IT, the Legal Department and/or the Incident Response. The Incident Response Team (IRT) is required to investigate: any real or suspected event that could impact the security of our network or computer systems; impose significant legal liabilities or financial loss, loss of proprietary data/trade secret, and/or harm to our goodwill. The Director of IS is responsible for the organization and maintenance of the IRT that provides accelerated problem notification, damage control, investigation and incident response services in the event of security incidents. Investigation and response processes follow the requirements of the Investigation and Incident Management Standard and supporting Incident Response Procedure (see Question 30b for details).

#### 3.11. LEGAL & REGULATORY COMPLIANCE

All relevant legal, regulatory and contractual requirements are defined, documented and maintained within the IS Policy. Critical records are protected from loss, destruction and falsification, in accordance with legal, contractual and business requirements as described in our Document Retention Policy. Compliance programs implemented that are applicable to Registry

Services include:

- Sarbanes Oxley (SOX): All employees managing and accessing SOX systems and/or data are required to follow SOX compliance controls.
- Data Privacy and Disclosure of Personally Identifiable Information (PII): data protection and privacy shall be ensured as required by legal and regulatory requirements, which may include state breach and disclosure laws, US and EU Safe Harbor compliance directives.

Other compliance programs implemented but not applicable to Registry systems include the Payment Card Industry (PCI) Data Security Standard (DSS), Office of Foreign Assets Control (OFAC) requirements, Copyright Infringement & DMCA.

#### 4.0. SECURITY ASSESSMENTS

Our IS team conducts frequent security assessments to analyze threats, vulnerabilities and risks associated with our systems and data. Additionally, we contract with several third parties to conduct independent security posture assessments as described below. Details of these assessments are provided in our Security Policy B response.

##### 4.1. THIRD PARTY SECURITY ASSESSMENTS

We outsource the following third party security assessments (scope, vendor, frequency and remediation requirements of any issues found are detailed in our Security Policy B response); Web Application Security Vulnerability testing, quarterly PCI ASV scans, Sarbanes-Oxley (SOX) control design and operating effectiveness testing and Network and System Security Analysis.

##### 4.2. INTERNAL SECURITY ASSESSMENTS

The IS team conducts routine and continual internal testing (scope, frequency, and remediation requirements of any issues found are detailed in our Security Policy B response) including; web application security vulnerability testing, external and internal vulnerability scanning, system and network infrastructure penetration testing, access control appropriateness reviews, wireless access point discovery, network security device configuration analysis and an annual comprehensive enterprise risk analysis.

#### 5.0. EXECUTIVE OVERSIGHT & CONTINUOUS IMPROVEMENT

In addition to the responsibility for Information Security residing within the IS team and SVP of IT, risk treatment decisions are also the responsibility of the executive of the business unit responsible for the risk. Any risk with potential to impact the business financially or legally in a material way is overseen by the Incident Response Management team and/or the Audit Committee. See Figure 2 in Attachment A. The Incident Response Management Team or Audit Committee will provide assistance with management action plans and remediation.

##### 5.1. GOVERNANCE RISK & COMPLIANCE

We have deployed RSA's Archer Enterprise Governance Risk and Compliance (eGRC) Tool to provide an independent benchmarking of risk, compliance and security metrics, assist with executive risk reporting and reduce risk treatment decision making time, enforcing continuous improvement. The eGRC provides automated reporting of registry systems compliance with the security program as a whole, SOX Compliance, and our Vulnerability Management Standard. The eGRC dashboard continuously monitors risks and threats (through automated feeds from our vulnerability testing tools and third party data feeds such as Microsoft, CERT, WhiteHat, etc.) that are actionable. See Attachment A for more details on the GRC solutions deployed.

#### 6.0. SECURITY COMMITMENTS TO REGISTRANTS

We operate all registry systems in a highly secured environment with appropriate controls for protecting HBI data and ensuring all systems remain confidential, have integrity, and are highly available. Registrants can assume that:

1. We safeguard the confidentiality, integrity and availability of registrant data through access control and change management:
  - Access to data is restricted to personnel based on job role and requires 2 factors of authentication.
  - All system changes follow SOX-compliant controls and adequate testing is performed to ensure production pushes are stable and secure.
2. The network and systems are deployed in high availability with a redundant hot datacenter to ensure maximum availability.
3. Systems are continually assessed for threats and vulnerabilities and remediated as required by the Vulnerability Management Standard to ensure protection from external malicious acts.
  - We conduct continual testing for web code security vulnerabilities (cross-site scripting, SQL Injection, etc.) during the development cycle and in production.
4. All potential security incidents are investigated and remediated as required by our Incident Investigation & Response Standard, any resulting problems are managed to prevent any recurrence throughout the registry.

We believe the security measures detailed in this application are commensurate with the nature of the TLD string being applied for. In addition to the system/ infrastructure security policies and measures described in our response to this Q30, we also provide additional safety and security measures for this string.

These additional measures, which are not required by the applicant guidebook are:

1. Periodic audit of Whois data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

7.0 RESPONSIBILITY OF INFORMATION SECURITY  
See Question B Response Section 10.

© Internet Corporation For Assigned Names and Numbers.

## EXHIBIT 2



Dispute Resolution Services - ADR • Services de règlement des différends - ADR

International Centre for Expertise □ Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or Objections based on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to Contact Information Redacted*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

**Identification of the Parties, their Representatives and related entities**

**Objector**

Name	SPORTACCORD
Contact	Pierre Germeau
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Objector, file separate Objections.*

**Objector's Representative(s)**

Name	SPORTACCORD
Contact	Pierre Germeau
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative or in-house counsel.*

**Applicant**

Name	Steel Edge LLC
Contact	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Applicant, file separate Objections.*

### Other Relevant Entities

Name	International Olympic Committee
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional relevant related entity*

### Disputed gTLD

#### gTLD Objector objects to [.example]

Name	.sports (Application ID 1-1614-27785)
------	---------------------------------------

*If there is more than one gTLD you wish to object to, file separate Objections.*

### Objection

#### What is the ground for the Objection (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

*Check one of the two boxes as appropriate. If the Objection concerns more than one ground, file a separate Objection.*

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## **Objector's Standing to object (Article 3.2.2 of the Guidebook and Article 8 of the Procedure)**

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*(Statement of the Objector's basis for standing to object, that is, why the Objector believes it meets the requirements to object.)*

### **Summary on SportAccord's standing to Object**

SportAccord has standing to object to applications for the .sport(s) TLD because it is an established international representative institution of the Sport community and because the Sport community is impacted by the ".sports" and the ".sport" TLD applications.

The Sport Community is highly organized on local, national and international level. It is clearly delineated by way of its organizational structures and its values.

### **S1. Established Institution**

SportAccord is an established institution of the Sport community. It has been in existence since 1967 and was reorganized several times.

SportAccord's formal existence is documented by way of its registration as an Association under Articles 60-79 of the Swiss Civil Code.

### **S2. Ongoing Relationship with the Sport community**

#### **S2a. Role and Organization of SportAccord**

SportAccord is a not-for-profit association constituted according to article 60 of the Swiss Civil Code, composed of autonomous and independent international sports federations and other international organisations contributing to sport in various fields.

SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events.

SportAccord's mission (Article 2 of SportAccord Statutes; Appendix 1) is to:

- promote sport at all levels, as a means to contribute to the positive development of society;
- assist its Full Members in strengthening their position as world leaders in their respective sports;
- increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport,
- coordinate and protect the common interests of its Members;
- collaborate with organisations having as their objective the promotion of sport on a worldwide basis.

SportAccord members include (full list available at Appendix 2)

- 91 Full Members: international sports federations governing specific sports worldwide; and

- 16 Associate Members: organisations which conduct activities closely related to the international sports federations.

See SportAccord History [Annex A8]

## **S2b. Sport Accord Governance**

### **S2b1. General Assembly**

Each member of SportAccord has one vote, as required for Associations under Swiss Law. (SportAccord is an Association under Articles 60Y79 of the Swiss Civil Code.) The legal framework ensures that membership cannot be sold and that the Association cannot be acquired or controlled by anyone, member or otherwise. All key decisions are reserved to the General Assembly, defined as the meeting attended by all the Members of SportAccord. [See <http://www.sportaccord.com>]

### **S2b2. SportAccord Council**

The Council is the executive organ of SportAccord. It consists of:

- the President, elected by the General Assembly; and
- 7 (seven) members:
  - o 2 (two) members designated by the Association of Summer Olympic International Federations (ASOIF);
  - o 1 (one) member designated by the Association of International Olympic Winter Sport Federations (AIOWF);
  - o 2 (two) members designated by the Association of IOCRecognised International Sports Federations (ARISF);
  - o 1 (one) member designated by the Full Members that do not belong to the above
  - o 1 (one) member designated by the Associate Members.

## **S2c. SportAccord Programs and Mechanism of Community Participation**

SportAccord's programs include International Federation (IF) recognition, IF relations, doping-free sport, fighting illegal betting, governance, sports' social responsibility, multi-sports games, the .sport initiative, The Sports Hub, the annual SportAccord Convention and the annual IF Forum.

## **Description of the basis for the Objection (Article 3.3.1 of the Guidebook and Article 8 of the Procedure) - Factual and Legal Grounds**

*(Description of the basis for the Objection, including: a statement giving the specific ground upon which the Objection is being filed, and a detailed explanation of the validity of the Objection and why it should be upheld.)*

### **Summary of SportAccord's Objection**

**Community.** The Sport community is organized, delineated, of long-standing establishment and impacted by Sport-related domain names [IG P c)].

**Substantial Opposition.** There is substantial opposition to the application [IG P (a)]. The bodies expressing opposition represent a significant portion of the Sport community, as shown in the statements of opposition by SportAccord, by many International Sports Federations, and by other globally recognized Sport organizing bodies. There is no evidence of community support for any of the non-community-based applications [IG P (b)] for “.sport” or “.sports”.

In addition, the IOC supports the community-based application for “.sport” by SportAccord.

**Targeting.** The Sport community is the implicit target of the “.sport”/“.sports” TLD strings and the respective applications [IG P (d)]. The Sport community is the explicit target of the “.sport”/“.sports” TLD strings and the respective applications [IG P (e)].

**Detriment.** There is overwhelming evidence of the likelihood of material detriment to the rights and legitimate interests of the Sport community and to users more widely [IG P (h)] if this application is allowed to proceed.

See [Annex A6]

### **T1. Community**

#### **T1a. Definition of the Sport Community**

The Sport community is the community of individuals and organizations who associate themselves with Sport. Sport is activity by individuals or teams of individuals, aiming at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

#### **T1b. Organization of the Sport Community**

The Sport community is highly organized. At the base level, the Sport community is structured into local clubs and event organizers. At higher levels, Sport community governance is by regional, national, and international Sport federations. The Federations collaborate at the local, national and international levels in Sport events or with event organizers, governments, the various bodies of the Olympic Movement, and within associations of federations. SportAccord

itself, the objector, is an association comprising 107 International Sport Federations. Individual practitioners of sport, sport spectators, sport fans and sport sponsors are part of the Sport community and share its values and objectives.

Above all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with.

#### T1c. Delineation of the Sport Community

The Sport community is clearly delineated. It has formal lines of accountability on all levels. There is near universal awareness of the organizational structure of the Sport community.

The keyword “delineated” does not imply a focus on rigid edges of a community, in the sense of card-carrying membership. Any person in the world can be a member of the Sport community, and any person or organization can place herself/himself/itself outside of the Sport community by disregarding its rules, principles, and values.

## T2. Substantial Opposition

### ***T2a. Expression of Opposition by SportAccord on Behalf of its Member International Federations***

SportAccord is a not-for-profit association accountable to its members, the 107 International Federations listed in [Annex A2]. The General Assembly of Members is the highest authority in SportAccord’s governance model and appoints all bodies of the association, including the SportAccord Council. Hence, in objecting, SportAccord’s Executive Committee acts on behalf of the entire membership.

### ***T2b. Individual Expressions of Opposition by Key Sport Organizations***

In addition to SportAccord’s objection, the following key international sport bodies, International Sport Federations and specialized agencies have expressed opposition individually. Their statements confirm the validity of SportAccord’s objection. [See Appendix A3]

- The International Olympic Committee (IOC)
- SportAccord on behalf of 107 member International Federations
- 21 International Federations having submitted individual statements of opposition
- World Anti Doping Agency (WADA)
- United Nations Office on Sport for Development and Peace (UNOSDP)

### ***T2c. Absence of Community Support for Applicant’s Operation of “.sports” TLD***

There is no evidence of community support in favour of application 1Y1614Y27785 for “.sports” by “Steel Edge, LLC”.

There is no evidence of community support in favour of application 1Y1174Y59954 for “.sport” by “dot Sport Limited”.

By contrast, there is significant evidence of support, in the form of statements by key community stakeholders, of application 1Y1012Y71460 for a “.sport” TLD by SportAccord.

***T2d. Significance of Opposition Proportionate to Targeting by Applicant***

The portion of the community expressing opposition through its representative organization is not just significant, but overwhelming. The Sport community also matches the segments of the community targeted by applications 1Y1614Y27785 (.sports) and 1Y1174Y59954 (.sport).

As a matter of fact, both applications effectively target the most visible segments of the Sport community, namely those associated with Sport events. Those are also the most highly organized segments of the Sport community, represented by national and international sport events and their federations.

The bulk of the expressions of opposition come from the highly organized segment of the Sport community. The applicants may argue that the Sport community also involves individual practitioners who do not need organization, however, these individuals have not come forward with objections or public comments, despite the publicity surrounding the new gTLD program and the huge number of public comments from individuals regarding other applications.

It is natural that the organized segment has been able to react, and it is natural that primarily the international federations and their joint bodies have expressed opposition on behalf of their stakeholders.

***T3. Targeting***

***T3a. Explicit Targeting***

The two non-community-based applications against which SportAccord objects on behalf of the Sport Community clearly say that Sport is the target of the TLD.

Both artificially avoid associating the word “community” with “Sport”. However, each of them speaks of the “ICANN community” in the respective application. For anyone who argues that there is an ICANN community, it would be contradictory to pretend that there is no such thing as a Sport community.

Hence there cannot be any doubt that the “.sport”/“.sports” TLD applications explicitly target the Sport community.

***T3b. Implicit Targeting***

The modern usage of the word “sport” or “sports” is almost exclusively associated with organized sport, sport for leisure and sport for health, in line with the definition supplied under in [Annex A7] .

This means that both the “.sport” TLD string and the “.sports” TLD string implicitly target the Sport community.

The criterion of “strong association” between the Sport community and the TLD string “.sport” or “.sports” is therefore completely satisfied.

## **T4. Detriment**

### **T4a. Detriment to Sport Community Members**

Both the .sports TLD application by Donuts / “Steel Edge, LLC” and the .sport application by Famous Four Media / “dot Sport Limited” lack accountability to the Sport community. The TLD policies described in the applications are devoid of any oversight mechanism specific to the Sport community.

#### **T4a1. Ambush marketing**

Ambush marketing is the practice of profiteering from sport events by marketers who have not paid to sponsor the events, and are not associated with the events. An unaccountable registry will give domain names to any party, without acceptable use policies, without validation of legitimacy and without limits. Ambush marketing can thus become so systematic that federations, events and clubs will lose substantial revenue. For example, many unauthorized parties have registered domain names containing Olympic words in existing TLDs, in an stratagem to mislead the public into believing that they are affiliated with the Olympic Movement and its events. Many more of these ambush domains can be expected in sports-related gTLDs such as .Sport or .Sports unless they are properly vetted.

#### **T4a2. Cybersquatting**

If an unaccountable registry maximises the number of domain registrations at low prices with zero registration policy, the cost of suspension and dispute procedures is too high for most infringing names. The result is the dual damage of (1) legal cost to take down the worst infringing domains and (2) the combined theft of advertising space of infringing domain names whose damage is individually below the cost of redress, but which cause substantial damage through their high number. [See Annex A11.]

#### **T4a3. Typo-squatting**

Same as cybersquatting except that the domains are deliberately misspelled, matching common typing errors.

In the aggregate, typo-squatting causes considerable detriment because it occurs in large numbers of domains, as evidenced by the reports of unauthorized registered domain names targeting the International Olympic Committee (the “IOC”) in existing TLDs. Substantial increases in typosquatting in new gTLDs is forecast. Even if each case is below the threshold for action, the overall effect is substantial.

The victims of typo-squatters include online advertisers. Most typo-squatting domains run on automated pay-per-click monetization tools. Unsuspecting users who enter search keywords are targeted by these typo-squatters. Such users are misled to click on advertising they believe to be part of the site they were looking for.

#### **T4a4. Brand-jacking**

The Sport community and especially its celebrities, athletes, event locations and local community brands are particularly exposed to the practice of brand-jacking.

Brandjacking is the practice of attempting to use a brand identity illegitimately, either for profit or in order to damage the reputation of the brand.

The potential victim brand may not be a registered trademark, a very frequent situation in the sport community as events or athletes do not generally register a brand, and as place names alone frequently cannot be registered as trademarks in their own jurisdictions.

Since the 1990's, the IOC has been the victim of massive brandjacking, as illustrated by the watch reports attached as exhibits to this objection. This brandjacking has taken place primarily in the .com, .net, and .org TLDs. The introduction of hundreds of new gTLDs will likely cause a massive increase in brandjacking in sports-related gTLDs.

The juxtaposition of a brand and the word "sport(s)" necessarily creates a degree of specificity. Unless the assignment of domain names is controlled, sport-specific brandjacking will be exacerbated and impossible to eradicate.

***T4a5. Misuse of Sport Themes for Pornography***

Online pornography relies on extremely large numbers of domain names, largely for reasons of competition between providers of such content. Competition in this case focuses on highly memorable names linked to specific fantasies. With astonishing frequency, unrelated social themes like schools or sport are purposely used as domain names carrying pornographic content.

A lack of supervision would lead to a proliferation of domains in .sport carrying pornographic content, domain names belonging to fastflux link farms to pornography, or domains registered by speculators for the purpose of resale to pornographers. Even if such content is behind (generally weak) age confirmation hurdles, its appearance under .sport(s) domain names would do harm to the reputation and public trust in sport organizations at large.

As an example, OlympicPorn.com, cancelled as a result of a legal proceeding by the IOC in 2000, was re-registered in 2012. As its name suggests, this domain contains sexually explicit material and attempts to create a connection with the Olympic Movement.

General reputational damage from an intrusion of pornography into a .sport TLD can come through several avenues:

- (a) the operation of plain-sounding domain names ending in .sport behind which pornographic content is proposed to the surprise of the Internet users;
- (b) a change of meaning of frequent words in a sport context, due to a proliferation of .sport domain names with remotely imaginable sexual innuendo;
- (c) crudely offensive pornographic domain names ending in .sport, causing revulsion even in the absence of visible content.

***T4a6. Defensive registrations: an implicit protection racket***

An unaccountable TLD registry has a pecuniary interest in maximising the registration of second-level domains, including unauthorized registrations of community stakeholders' names, variants of those names, and misspellings of

those names. The legitimate owners of those names are compelled to obtain defensive registrations, often by costly channels (such as specialized brand protection agents, law firms) in order to protect their names from misuse especially where the registry uses the first-come-first-served principle to actively create a panic.

See [Annex A12.4]

As evidence of this, the IOC has been forced to register and maintain hundreds of defensive registrations in many existing TLDs. It is likely that many more defensive registrations will be required in the new gTLDs, especially .Sport and .Sports, if they are unregulated.

***T4a7. False sense of official sanction***

The sport spectator can be misled to a false sense of official sanction by virtue of the TLD string. The sport spectator will naturally assume that a domain ending in .sport (or .basketball or .football, etc.) is sanctioned by the appropriate federation(s). The public can thus systematically be misled. For example, Rugby.Sport will lead internet users to believe that the International Rugby Board sanctions such a website. Traffic will be misdirected, leading to initial interest confusion.

In addition, non-sports related second-level domain name registrations can interfere with the charitable efforts of the Sport community, particularly the efforts of Olympism – improving humanity through sports – which directs IOC funds to efforts related to development, gender equity, environmental causes and AIDS relief, amongst other things. For example, AIDSrelief.sport(s) could lend a false sense of official sanction to such a website, unrelated to Olympism, the IOC, its National Olympic Committees, or International Federations.

Under the United States Department of Commerce’s agreement with ICANN, the Affirmation of Commitments, ICANN must demonstrate that the new gTLD program contributes, in part, to consumer trust. Delegating .Sport(s) to an unaccountable registry operator, which lends a false sense of official sanction to the .Sport(s) domain name space, would inevitably erode consumer trust by misleading individuals through unofficial content.

***T4a8. Image loss through misappropriated community-specific keywords***

A .sport(s) TLD registry lacking Sport community accountability is both unable and unwilling to ensure that second-level domains reflecting famous names are assigned to the club, federation, event or athlete best known under that name. Dispute resolution policies based on trademark rights alone are insufficient. Members of the community, the national and international federations, as well as the community at large face a loss of image and prestige if inappropriate parties control key names. Many such unauthorized registrants are experts in buying up domain names and preventing reassignment through subterfuges, and extortion, thus causing further costs to legitimate stakeholders.

Examples of community-specific keywords include sport terms, locations, local sport community names and event designations. While in many cases there is no concept of individual ownership in the sense of intellectual property, each

community has a natural concept of collective ownership of keywords essential to it or to its sub-communities. The very reason why there is a *community-based objection* (as opposed to a *rights infringement objection*) is the fact that keywords targeting a sub-community are a commons and that each member of the sub-community has the right to expect that community institutions ensure the responsible management of those keywords. The uncontrolled/unaccountable operation of the .sport(s) registry would thus constitute a **tragedy of the commons: the destruction or impairment of collective benefits**. Names like “nyc.sport”, “barcelona.sport”, “lausanne.sport”, “100meter.sport”, “running.sport” have community value. If users learn that they all tend to go to pay-per-click or domain-for-sale sites, then their value for the community is destroyed. This is material detriment even if it is not measured in monetary units.

See [Annex A19]

Certain keywords – such as event designators like **rio2014.sport** (implicitly designating the FIFA World Cup) or **2016rio.sport** (implicitly targeting the Olympics) – enjoy various degrees of protection as intellectual property. Smaller events, however, have less resources and are less well-known outside of the community, exposing it to brand-jacking unless the TLD is managed on the basis of community accountability.

See [Annex A12.1]

#### ***T4a9. Systematic exacerbation of naming conflicts***

An unaccountable registry is likely to exacerbate naming conflicts within the Sport community. In refusing to recognize the Sport community, an unaccountable registry further increases pressure by pushing parties outside of the sport community or outside of the meaning of the TLD string to contend for various domains in the .sport(s) registry. The result is a waste of resources in challenges and controversies.

#### ***T4b. Disruption of Sport community efforts and achievements***

Community-based communication policies for anti-doping, anti-drug, anti-racism, ticket scalping, gambling etc. will be disrupted if key domain names related to them are used without adherence to those policies.

The Sport community has achieved a consensus for a number of policies that strongly depend on mass communications.

Many of these policies have seen significant progress over the years with new challenges arising naturally as a result of a changing environment. The Internet itself is a *rapidly changing key component* of the environment of the Sport community. It is therefore essential for the Sport community to be able to organize sport-specific Internet communications channels.

The .sport TLD and sport-specific TLDs convey implicit credibility. That credibility is owed to the natural linguistic landscape and to the pre-existing shared organizational and cultural capital of the Sport community. An unaccountable registry of a sport-specific TLD would not only be free-riding on this capital, but it would damage it and impair further progress.

***T4b1. Loss of credibility of community-based governance model***

The community-based sport-related governance model is a public good, the credibility of which is necessary to support the values of sport and those of civilization in general. The public loses faith in community-based governance organizations if they are seen as powerless against misappropriation of domain names.

***T4b2. Disruption of Anti-Doping Efforts***

Communication is key for anti-doping efforts because a lack of vigilance can create situations where doping practices are perceived as trivial or harmless. In other words, good communication within the community before an athlete is tempted to use doping has a greater positive impact than punishing athletes found guilty of doping.

Both the methods to detect doping and doping substances themselves make significant progress over time. The natural changes resulting from these improvements increase the need for effective communication policies related to doping substances. Some doping substances are harmless outside of a sport context; hence advertising them is not in itself an abetment of doping or a message that makes doping look trivial.

The combination of sport-specific labelling and the perception of official sanction can have considerable effect, both negatively and positively, for doping-related perceptions. Sport-specific labelling would result from the simple addition of the “.sport” TLD string to a keyword sensitive to a doping context. It would also create a perception of official sanction. In the absence of sport-specific community oversight, this can lead to trivialization of doping, especially in the case of newly devised tactics to evade detection.

The sheer number of existing domains – many of them short-lived – containing doping-related keywords goes a long way to illustrating how strong “demand” for problematic doping-related term in .sport(s) will be unless the registry controls the name space.

[See Annex A15]

An unaccountable operator of a .sport TLD will not be willing or able to monitor its name space with respect to doping and betting content. For this reason, a sport-specific TLD in the hands of an unaccountable operator is certain to encumber community efforts against doping.

***T4b3. Disruption of Efforts against Illegal or Undesirable Betting***

Gambling and one of its potential side-effects, the incentive for match-fixing, is highly sensitive to communication. As a .sport(s) TLD or any given sport-specific TLD confers an aura of official sanction, it is necessary that content-related and domain-name-related policies minimize the danger of illegal/undesirable content or innuendo from the start, and allow swift action if problems are found.

That can only be done if the TLD registry is directly accountable to the sport community.

Inversely, prudential policies and enforcement are hampered not only by an unaccountable TLD operator's self interest in maximizing the number of registrations and minimizing administrative controls, but also by a lack of appropriate legal mechanisms. The UDRP and URS are not equipped to deal with issues related to betting.

***T4b4. Disruption of Efforts against Racism and Bullying***

Racism is often the result of a lack of awareness and attention in mass communications. All Sport organizing bodies exercise great care to make sure that racist language and bullying remain absent from official communications.

The topic of racism is particularly sensitive to both the perception of official sanction (as is the case for a .sport TLD) and the power of intentional or unintentional innuendo (as may easily result from content or the mere juxtaposition of otherwise unloaded words).

For this reason, direct oversight before and after domain registration, as well as a path for rapid corrective or disciplinary action are indispensable. If a .sport(s) TLD is operated without appropriate accountability to the Sport community, domain registrations and content remain without the necessary oversight. In a .sport(s) TLD without sport-specific registry policies and oversight, racist content or innuendo would be likely to appear with a false aura of official sanction. Moreover, Sport organizing bodies would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access.

***T4b5. Disruption of Efforts against Hooliganism and Violence***

Hooliganism can be influenced and exacerbated by online content. The 2011 riots in England showed the influence of mobile communications in this context, albeit through messages in this case rather than websites. A lack of oversight in a .sport(s) TLD would create a sport-specific conduit for content inducing dangerous and violent behaviour.

***T4b6. Disruption of Efforts against Fraudulent Ticketing***

As consumers and members of the Sport community, sport spectators expect sport and event organizers to maintain order in the sale of tickets. How intermediaries are selected or whether scalpers are allowed to operate is a matter for the respective organizers to determine.

The existence of uncontrolled names (without acceptable use policies and sport-specific enforcement) ending in .sport(s) would mislead customers. Not only would the sale of fraudulent tickets be harmful to the victims of deceit, it would destroy consumer confidence and trust in the respective organizers and jeopardize the events.

Indeed, in July 22, 2008, the IOC and the United States Olympic Committee filed suit against Xclusive Leisure & Hospitality ("XLH") for using Olympic trademarks on its websites (including beijingticketing.com). This gave the false impression that XLH was a legitimate Olympic ticket source. The U.S. court entered an injunction preventing XLH from fraudulently using Olympic domain names. As the court observed, it is important to avoid mass ticket speculation and increased

costs of viewing the Olympic events (which are intentionally kept low to maximize public ability to participate in the Games).

***T4b7. Disruption of Sport Community Conflict Resolution Policies***

The sport community has instituted conflict resolution mechanisms in many areas. These mechanisms are generally designed to resolve controversies arising within the Sport community. One key example is the Court of Arbitration of Sport (CAS) / (Tribunal Arbitral du Sport (TAS)). The .sport TLD proposed by SportAccord is built upon conflict resolution policies specific to the Sport community.

In a .sport TLD controlled by and accountable to the Sport community, conflicts are less likely than in a .sport TLD devoid of community accountability.

All domain registrations in a community-based .sport TLD will be subject to a sport-specific acceptable use policy covering general sport values and sport-related economic aspects, such as safeguards against ambush marketing. If controversies do arise in a .sport TLD accountable to the Sport community, it is likely that the controversy can be handled by resolution policies within the Sport community.

Conversely, in a non-community-based .sport(s) TLD, there is no sport-specific acceptable use policy for .sport domain names. Moreover, a large number of the .sport(s) domain holders in such a regime would be outside of the sport community, vying to grab portions of the true community's rightful domain name space.

***T4c. Quantitative Estimates of Economic Damage and Level of Certainty***

***H3a. Negative externalities***

If the .sport(s) TLD is placed in the hands of a non-community based registry operator, the operator would have no economic incentive to protect the potential victims – advertisers, sporting event organizers, brand owners, international federations – from harm. Rather, the non-community registry operator would have the opposite economic incentive: to permit the victimization of these Sport community members through abusive domain name registration by unauthorized parties, which increases profit to the registry operator. Conversely, a community-based registry operator's interest lies with the Sport community, in protecting the official message and image of the community.

Not all negative externalities caused by a predatory operator of a .sport(s) TLD can be measured in monetary units. As shown in *Annex A13. Background for quantitative analysis of Detriment to the Sport community*, the negative externalities over 10 years exceed 400 billion US Dollars without counting damage to reputation and community governance processes.

See [Annex A13]

***H3c. Level of Certainty of Detriment***

There is complete certainty of detriment in case the .sport(s) TLD is operated by a registry without appropriate community-based accountability.

It goes without saying that economic damage is an incomplete perspective, as many affected values cannot be measured in terms of money. There is also complete certainty of detriment to the reputation, the values and the governance of the Sport community.

***T4d. Detriment to Internet governance***

The assignment to an unaccountable registry operator of the .sport(s) TLD would inflict considerable damage on Internet governance as a whole. The victims are Internet users in general. Moreover, the Sport community as well as other communities would suffer indirect detriment from ICANN's overload and the general impairment of Internet governance capabilities.

See [Annex A16]

***T4e. Detriment exacerbated by flaws in ICANN gTLD contention process (CPE, Auctions)***

The gTLD process has serious flaws favoring speculative applicants against communities. These flaws also force the winner of an auction to misuse the TLD for extractive purposes.

See [Annex A17]

***T4f. Loss of Public-interest Benefits of a Community-based .sport TLD***

In addition to the damage done by an unaccountable registry, it is appropriate to calculate the damage in terms of the lost benefit that could have been achieved by the responsible management of the TLD.

***T4f1. Loss of opportunity to create a community-based organizational tool***

A sport-themed TLD, if properly managed, can be a powerful organizational tool used in the interest of the underlying community. If an unaccountable party controls it, that benefit can never materialize.

By way of comparison, the .edu TLD is a potent organizational tool for higher education in the US. If the .edu TLD had been monetized instead of being used responsibly, its benefits would have been lost.

Internet users already have access to sports-related websites on .COM and other existing open TLDs. A community-based .sport TLD would offer consumers a ***new choice*** in the domain name space. As the Affirmation of Commitments requires the new gTLD program to, in part, demonstrate that the program has offered new choices for consumers, an officially sanctioned TLD is a better choice for the program as a whole.

***T4f2. Destruction of the opportunity for the community to build the right image for the TLD***

This is largely irreversible. An unaccountable registry, by misusing the TLD for a profit-maximizing scheme will destroy the image of the domain. Even if it later abandons the TLD and hands it over to the community, it will not be possible to clean it up and get the public to "unlearn" the perception of abuse and chaos.

## Remedies Requested

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*(Indicate the remedies requested.)*

SportAccord requests that Expert Panel acknowledge with regard to the application ID 1Y1614Y27785 for the “.sports” TLD by Steel Edge, LLC, a company apparently owned by Donuts, Inc.:

- 1) that the “.sports” TLD string targets the Sport community;
- 2) that there is substantial opposition to application ID 1Y1614Y27785 from a significant portion of the Sport community;
- 3) that consequently application ID 1Y1614Y27785 for the “.sports” TLD is to be rejected.

## Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)

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A copy of this Objection is/was transmitted to the Applicant on [2013-03-13](#) *[insert date]* by [e-mail](#) *[specify means of communication, for example e-mail]* to the following address:

Contact Information Redacted

A copy of this Objection is/was transmitted to ICANN on: [2013-03-13](#) *[insert date]* by [e-mail](#) *[specify means of communication, for example e-mail]* to the following address:

[newgtld@icann.org](mailto:newgtld@icann.org).

## Filing Fee (Article 1 Appendix III to the Rules and Article 8(c) of the Procedure)

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As required, Euros 5 000 were paid to ICC on [2013-03-13](#)

Evidence of the payment is attached for information.

## **Description of the Annexes filed with the Objection (Article 8(b) of the Procedure)**

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*List and Provide description of any annex filed.*

### ***A1. SportAccord Charter (SportAccord Statutes)***

Statutes of the association as of May 2012. SportAccord is an Association under Article 60Y79 of the Swiss Civil Code. The charter defines the bodies of the organization and guarantees its accountability to the international Sport community.

### ***A2. List of SportAccord Members***

SportAccord Full members (107 International Sport Federations) and SportAccord Associate Members

### ***A3. Individual Statements by Sport International Sports Federations***

A3.0 List of Individual Statements by International Sport Federations

A3.1. Statement by FIDE YFEDERATION INTERNATIONALE DES ECHECS  
(signed by Nigel Freeman, Executive Director)

A3.2. Statement by IFMA YINTERNATIONAL FEDERATION OF MUAYTHAI  
AMATEUR  
(signed by Stephen Fox, General secretary)

A3.3. Statement by FIM YFEDERATION INTERNATIONALE DE MOTOCYCLISME  
(signed by Stephane Desprez, Chief Executive Officer)

A3.4. Statement by WA YWORLD ARCHERY FEDERATION  
(signed by Tom Dielen, Secretary General)

A3.5. Statement by INF YINTERNATIONAL NETBALL FEDERATION  
(signed by Urvasi Naido, Chief Executive Officer)

A3.6. Statement by FAI YFEDERATION AERONAUTIQUE INTERNATIONALE  
(signed by JeanYMarc Badan, Secretary General)

A3.7. Statement by IFF YINTERNATIONAL FLOORBALL FEDERATION  
(signed by John Liljelund, Secretary General)

A3.8. Statement by ICSD YINTERNATIONAL COMMITTEE OF SPORTS FOR THE DEAF  
(signed by Marc Cooper, Chief Executive)

A3.9. Statement by IKF YINTERNATIONAL KORFBALL FEDERATION  
(signed by Graham Crafter, Secretary General)

A3.10. Statement by IGF YINTERNATIONAL GOLF FEDERATION  
(signed by Anthony Scanlon, Executive Director)

A3.11. Statement by IIHF YINTERNATIONAL ICE HOCKEY FEDERATION  
(signed by Horst Lichtner, General secretary)

A3.12. Statement by FMJD YFEDERATION MONDIALE DU JEU DE DAMES  
(signed by Frank Teer, General secretary)

A3.13. Statement by ISSF YINTERNATIONAL SHOOTING SPORT FEDERATION  
(signed by Franz Schreiber, Secretary General)

A3.14. Statement by IAF YINTERNATIONAL AIKIDO FEDERATION  
(signed by Kei Izawa, General secretary)

A3.15. Statement by IOF YINTERNATIONAL ORIENTEERING FEDERATION  
(signed by Barbro Ronnberg, Secretary General)

A3.16. Statement by ISA YINTERNATIONAL SURFING ASSOCIATION  
(signed by Robert Mignogna, Director General)

- A3.17. Statement by ITTF YINTERNATIONAL TABLE TENNIS FEDERATION  
(signed by Judit Farago, Chief Executive Officer)
- A3.18. Statement by WSF YWORD SQUASH FEDERATION  
(signed by Andrew Shelley, Chief Executive)
- A3.19. Statement by FEI YFÉDÉRATION EQUESTRE INTERNATIONALE  
(signed by Ingmar De Vos, Secretary General)
- A3.20. Statement by IJF YINTERNATIONAL JUDO FEDERATION  
(signed by JeanLuc Rouge, General secretary)
- A3.21. Statement by ISAF YINTERNATIONAL SAILING FEDERATION  
(signed by Jerome Pels, Chief Executive Officer)
- A3.22. Statement by WCF YWORLD CURLING FEDERATION  
(signed by Colin Grahamslaw, Secretary General)
- A3.23. Statement by FIQ YFEDERATION INTERNTIONAL DES QUILLEURS  
(signed by Kevin Dornberger, President)
- A3.24. Statement by FISU YFÉDÉRATION INTERNATIONALE DU SPORT  
UNIVERSITAIRE  
(signed by Eric Saintrond, Secretary General)
- A3.25. Statement by IFSC YINTERNATIONAL FEDERATION OF SPORT CLIMBING  
(signed by Marco Maria Sclaris, President)
- A3.26. Statement by BWF YBADMINTON WORLD FEDERATION  
(signed by Thomas Lund, Secretary General)
- A3.27. Statement by CMAS YUNDERWATER ACTIVITES  
(signed by Alessandro Zerbi, Secretary General)
- A3.28. Statement by IPC YINTERNATIONAL PARALYMPIC COMMITTEE  
(signed by Xavier Gonzales, Chief Executive Officer)
- A3.29. Statement by UCI YUNION CYCLISTE INTERNATIONALE  
(signed by Christophe Hubschmid, General Director)
- A3.30. Statement by FIE YFÉDÉRATION INTERNATIONALE D'ESCRIME  
(signed by Nathalie Rodriguez, Chief Executive Officer)
- A3.31. Statement by IAAF YINTERNATIONAL ASSOCIATION OF ATHLETICS  
FEDERATIONS  
(signed by Essar Gabriel, General Secretary)
- A3.32. Statement by UIPM YUNION INTERNATIONALE DE PENTATHLON MODERNE  
(signed by Dr H.C. Klaus Schormann, President)
- A3.33. Statement by ITF YINTERNATIONAL TENNIS FEDERATION  
(signed by Juan Margets, Secretary General)
- A3.34. Statement by IRB YINTERNATIONAL RUGBY BOARD  
(signed by Bret Gosper, Chief Executive Officer)
- A3.35. Statement by AIBA YINTERNATIONAL BOXING ASSOCIATION  
(signed by Sebastien Gillot, Communication Director)
- A3.36. Statement by ILS YINTERNATIONAL LIVE SAVING ASSOCIATION  
(signed by Karin Obus, Executive Director)
- A3.37. Statement by IMGA YINTERNATIONAL MASTERS GAMES ASSOCIATION  
(signed by Jens Holm, Chief Executive Officer)
- A3.38. Statement by FINA YFEDERATION INTERNATIONALE DE NATATION  
(signed by Cornel Marculescu, Executive Director)
- A3.39. Statement by IMSA YINTERNATIONAL MIND SPORTS ASSOCIATION  
(signed by José Damiani, President)
- A3.40. Statement by JJIF YJU JITSU INTERNATIONAL FEDERATION  
(signed by Dana Murgescu, General secretary)
- A3.41. Statement by FIG YFÉDÉRATION INTERNATIONALE DE GYMNASTIQUE

- (signed by André Geisbuhler, Secretary General)
- A3.42. Statement by FIVB YFÉRÉRATION INTERNATIONALE DE VOLLEYBALL  
(signed by Dr Ary Graça, Président)
- A3.43. Statement by IFS YINTERNATIONAL SUMO FEDERATION  
(signed by Hidetoshi Tanaka, President)
- A3.44. Statement by CSIT YINTERNATIONAL WORKERS AND AMATEURS IN SPORTS  
CONFEDERATION  
(signed by Harald Bauer, President)
- A3.45. Statement by CIPS YINTERNATIONAL CONFEDERATION OF SPORT FISHING  
(signed by Gianrodolfo Ferrari, Secretary General)
- A3.46. Statement by IHF YINTERNATIONAL HANDBALL FEDERATION  
(signed by Amal Khalifa, Managing Director)
- A3.47. Statement by ISF YINTERNATIONAL SOFTBALL FEDERATION  
(signed by Don Porter, President)
- A3.48. Statement by WMF YWORLD MINIGOLF FEDERATION  
(signed by Hans Bergström, Secretary General)
- A3.49. Statement by WFDF YWORLD FLYING DISC FEDERATION  
(signed by Volker Bernardi, Executive Director)
- A3.50. Statement by IWUF YINTERNATIONAL WUSHU FEDERATION  
(signed by Liu Beijian, Secretary General)
- A3.51. Statement by FIS YFÉDÉRATION INTERNATIONALE DE SKI  
(signed by Sarah Lewis, Secretary General)
- A3.52. Statement by FIFA YFÉDÉRATION INTERNATIONALE DE FOOTBALL  
(signed by Jérôme Valcke, Secretary General and Markus Kattner,  
Deputy Secretary General)
- A3.53. Statement by FIBA YFÉDÉRATION INTERNATIONALE DE BASKETBALL  
(signed by Patrick Baumann, Secretary General)
- A3.54. Statement by FIP YFÉDÉRATION INTERNATIONALE DE POLO  
(signed by Dr Richard Caleel, President)
- A3.55. Statement by FIA YFÉDÉRATION INTERNATIONALE AUTOMOBILE  
(signed by Jean Todt, President)

***A4. Statements by International Olympic Committee (IOC)***

- A4.1. Statement by IOC YINTERNATIONAL OLYMPIC COMMITTEE  
(signed by Christophe de Kepper, IOC Director General)
- A4.2. 2010 Letter by IOC to ICANN expressing concern over new gTLD Program  
(signed by Urs Lacotte, IOC Director General and Howard M. Stupp, IOC  
Legal Affairs Director)  
Retrieved from <http://www.icann.org/en/correspondence/lacotte%toYbeckstrom%16mar10%en.pdf>
- A4.3. Public comment by IOC in support of communityYbased .sport TLD  
(Submitted on ICANN’s public comment forum through Silverberg,  
Goldman & Bikoff, LLP , retrieved on 2013Y03Y13 from  
<https://gtldcomment.icann.org/applicationcomment/commentdetails/1778> )

***A5. Statements by specialized international sports bodies***

- A5.1. Statement by UNOSDP YUNITED NATIONS OFFICE ON SPORT FOR  
DEVELOPMENT AND PEACE

(signed by Wilfried Lemke, Special Adviser to the Secretary General of the United Nations on Sport for Development and Peace)

A5.2. Statement by WADA WORLD ANTI DOPING AGENCY

(signed by Julie Masse, Director Communication)

A5.3. Statement by IAKS INTERNATIONAL ASSOCIATION FOR SPORTS AND LEISURE FACILITIES

(signed by Klaus Meinel, Managing Director)

**A6. Synopsis of Standards for Objection (GNSO PDP and AGB)**

The standards of the AGB diverge in certain aspects from the underlying Recommendations of the GNSO PDP for new gTLDs adopted by the ICANN Board in June 2008.

This synopsis provides the juxtaposition of both.

**A7. SportAccord description of Sport community**

From Response to Question 20ff (Community based designation) of SportAccord's own application for .sport.

**A8. SportAccord history since 1967**

**A9. SportAccord legal registration documents**

Retrieved from <http://www.rc2.vd.ch/registres/hrcintappYpub/externalCompanyReport.action?companyOfrcld13=CHY550.1.060.051Y5&lang=EN>

**A10. Statistical evidence on economic magnitude of Sport community**

A10.1. Sports Industry Overview by Plunkett Research, Ltd. for the US

Retrieved on 2013/02/21 from

<http://www.plunkettresearch.com/sportsYrecreationYmeasureYmarketYresearch/industryYstatistics>

Note: SportAccord has no institutional relationship to this research provider. The data indicates the orders of magnitude of the US sport industry. The Sport community is much wider geographically and in terms of activities. This independent estimate of the size of the US Sport industry alone at 435 billion dollars is indicative of the economic consequences faced by the Sport community in case a .sport(s) TLD lacks appropriate governance.

**A11. Evidence on frequent rights infringements by sport-related domain names**

The sample of cases and listings shown demonstrate the attractiveness of sportY themed domain names for illicit activities. In the absence of appropriate registryY based governance specific to the sport community, rights enforcement is extremely costly.

The IOC, as the world's paramount athletic organization, already must contend with an overwhelming level of cybersquatting in the existing 22 TLDs. The IOC has shared data showing that there are between 5,000Y10,000 unauthorized domain name registrations every year, the vast majority of which represent cybersquatting activity under the .COM TLD.

In order to protect the integrity of the Olympic games, as well as fans and supporters of the Olympic movement, the IOC must expend substantial time,

effort, and capital to impact even the smallest curtailment of the illicit activities associated with such domains. At least 175 Olympic-related domains are removed from major domain auction services on a bi-weekly basis, totalling approximately 4,500 removals per year.

In 2002, the IOC recovered or cancelled nearly 1,800 infringing domain names in a massive *in rem* lawsuit under the Anticybersquatting and Consumer Protection Act. IOC has filed numerous UDRP complaints. However, UDRP proceedings are too costly for systematic use.

**A11.01. Olympic related infringements July-December 2012 (Watch Report)**

Source: IOC/Bikoff. Infringement by domain names containing Olympic keywords.

A11.02. Pekin2008.org UDRP Decision June 2008

A11.03 Athens2004.com UDRP Decision June 2004.pdf

A11.04 BColympic.com UDRP Decision December 2003.pdf

A11.05 Beijing2008.org UDRP Decision June 2005.pdf

A11.06 CTVOlympics.com UDRP Decision May 2009.pdf

A11.07 Olympic.TV UDRP Decision Dec 2002.pdf

A11.08 Olympic.biz UDRP Decision June 2002.pdf

A11.09 OlympicBrand.com UDRP Decision 2003.pdf

A11.10 OlympicCommittee.com UDRP Decision December 2002.pdf

A11.11 OlympicMuseum.Net UDRP Decision May 2011.pdf

A11.12 Turin2006.com UDRP Decision January 2006.pdf

A11.13 Vancouver2010.org UDRP Decision May 2006.pdf

A11.14 GoDaddy Auction Site Removal Requests April, 2012

Cybersquatting Domain names offered for resale and requests for their removal.

A11.15 GoDaddy Auction Site Removal Requests May, 2012

Cybersquatting Domain names offered for resale and requests for their removal.

**A12. Circumstantial evidence regarding TLD portfolio applicants' intents and methods**

A12.1. "Long Tail" presentation on domain monetization by Mr. Paul Stahura

Retrieved on 2013-03-01 from

<http://www.verisign.com/static/037868.pdf>

Paul Stahura is now a principal of Donuts, LLC. Donuts is a portfolio applicant, having applied for the ".sports" and 306 other TLDs. Paul Stahura made the "Long tail" presentation in 2006 in a registrar's conference. It demonstrates the overwhelming scale of strategies by which registrars or registries perform or abet registrations through which users are purposely misled. Millions of domain names resembling keywords of users' interest are traps to cause unintended page visits. These generate income for the operators from advertising and user profiling.

The presentation mentions a technique called "domain tasting".

"Domain tasting" is the practice of setting up domains with a robotized

web site in order to gauge the number of page visits a domain can achieve. It is often performed as an abuse of the registration grace period to avoid paying the registration fee. If the domain “has traffic”, the speculator keeps it, paying the registration fee only when it is clear that more revenue will be generated than the cost of the domain name. Paul Stahura’s “long tail” presentation proposed that registries should offer a long “tasting period” for a very low price on less attractive domain names, maximising large-scale speculation.

The “Long Tail” presentation clearly demonstrates the privileged knowledge of former registrars who now have become TLD applicants. It also shows the logic of extraction that underlies large-scale registration of domain names for the purpose of pay-per-click advertising. The presentation itself argues that a registry can adapt its pricing so as to thrive on large-scale speculation.

A12.2. Letter to ICANN from Jeffrey M. Stoler regarding Portfolio Applicants Donuts and Demand Media.

Retrieved on 2013-03-10 from

<http://www.icann.org/en/news/correspondence/stoler-to-crocker-28jul12-en> .

A12.3. Donuts, LLC reply to GAC Early Warning on .basketball

Retrieved on 2013-03-01 from

[http://www.donuts.co/news/files/donuts\\_reply\\_to\\_greece\\_early\\_warning.pdf](http://www.donuts.co/news/files/donuts_reply_to_greece_early_warning.pdf)

In its response to the ICANN Governmental Advisory Committee (GAC) Early Warning, Donuts LLC announces that it will proceed with the respective application regardless of community opposition.

The 307 TLDs applied for by Donuts notably include “.TICKETS”, “.SPORTS”, “.RUGBY”, “.RACING”, “.FOOTBALL”, “.FOOTBALL”, “.SOCCER”, “.FITNESS”, “.BIKE”, “.BASKETBALL”, “.BASEBALL”, “.CRICKET”, “.SKI”.

A12.4. Earnings Forecast by Registrar related to Defensive Registrations

Melbourne\_IT\_boom\_in\_defensive\_registrations-Computerworld.pdf

Retrieved on 2013-03-01 from

[http://www.computerworld.com.au/article/print/454810/melbourne\\_it\\_expects\\_boom\\_defensive\\_registrations\\_when\\_top\\_level\\_domains\\_arrive/](http://www.computerworld.com.au/article/print/454810/melbourne_it_expects_boom_defensive_registrations_when_top_level_domains_arrive/)

The announcement by MelbourneIT, a large registrar, demonstrates that defensive registrations are widely expected to bring substantial revenues. Highly targeted, high-visibility TLDs like “.sport”/“.sports” are prime objects of speculative activity.

A12.5. RBC Capital Markets Analysis of new gTLD Landscape

Retrieved from

<https://rbcnew.bluematrix.com/docs/pdf/b4a12ee490f044b084edYbf7bba042781.pdf>

The document attests to the considerable revenue expected by portfolio gTLDs applicants. It also states that Demand Media (DMD) has an option to 107 of Donuts' gTLDs (emphases added below):

“DMD could potentially become the registry operator for up to ~80 new gTLDs. DMD has applied for 26 new gTLD strings, for 16 of which DMD is the sole applicant. Further, with its strategic partnership with Donuts (a startup domain registry), **DMD has the right to acquire equal ownership (with Donuts) of up to 107 gTLDs for which Donuts has applied**, for a total of ~80 new gTLDs. While it is difficult to predict how many domains the future “Demand Media registry” would garner, 10Y15mm may not be inconceivable (50 gTLDs; 200Y300K domains on average per gTLD), which could be worth ~\$260Y340mm in PVYterms according to our analysis. DMD will also be providing backYend registry services for up to ~250 gTLD strings Donuts has applied for, which will be additive to DMD’s future revenue and profit.”

A12.6. Donuts Public Interest Commitment (PIC) Specification for its entire gTLD application portfolio

On March 5, 2013, Donuts published a combined PIC specification for its portfolio. The PIC specification also covers the .sports application. It contains no specificity to the Sport community nor any commitment of community accountability.

***A13. Quantitative analysis of Detriment to the Sport community***

Calculation of the minimum expected amount of detriment that can be measured in monetary units, in case the .sport(s) TLD is operated without community accountability and sportYspecific prudential policies.

Excel file allows recapitulation of calculation and hypotheses.

PDF file supplied for ease of viewing.

***A14. Testimony of Mei-Lan Stark, on behalf of International Trademarks Association (INTA), before the Subcommittee on Intellectual Property, Competition and the Internet of Committee of the Judiciary, U.S. House of Representatives***

[http://judiciary.house.gov/hearings/printers/112th/112Y37\\_66155.PDF](http://judiciary.house.gov/hearings/printers/112th/112Y37_66155.PDF) (page 96).

The Testimony is part of the ICANN Generic TopYLevel Domains (gTLD) Oversight Hearing conducted on May 4, 2011. In testimony, Ms Stark said among other things (emphasis added):

(...) Well, **conservatively a large corporation is looking to register maybe 300 defensive names in those 400 spaces. In the sunrise period, that cost is maybe about \$100 a name. That is \$12 million for an individual company.** And that is just the cost of defensive registrations. That is not about the personnel to manage and monitor that portfolio, to monitor

the new gTLD spaces for abuses, and then of course, the cost to actually go and enforce and do something about things like myfox2detroit. (...)

**A15. Statistical evidence on doping-related terms registered as domain names**

A search performed on <http://domaintools.com> for domains registered containing the word “steroids” shows over 8000 matches, including deleted domains. The nature of those domain names is of particular interest: typical doping-related domain names would hardly be of interest to any legitimate party, but they are memorable enough to avoid people having to write them down (which would constitute evidence) and focused enough to suggest availability of doping substances.

**A16. Background information on Detriment to Internet Governance as a whole**

Description of detriment through increased burden on ICANN, ICANN’s current state of overload and the detriment to the Internet community as a whole if governance of the .sport(s) TLD is outside Sport community, upsetting the principle of subsidiarity.

**A17. Background on Detriment through Flaws in gTLD Process related to Community Priority Evaluation (CPE) and Auctions**

Background information on the process bias against communities through a lack of clarity and the inappropriate timing of the Community Priority Evaluation; information on the effects an auction of the “.sports” TLD would have on the Sport Community; information on expected private auctions and their effects on the Sport Community.

**A18. Anti-Phishing Working Group Global Phishing Survey 2012**

Retrieved on 2013-03-10 from [http://docs.apwg.org/reports/APWG\\_GlobalPhishingSurvey\\_1H2012.pdf](http://docs.apwg.org/reports/APWG_GlobalPhishingSurvey_1H2012.pdf)  
Shows high relative number of cases linked to registrars linked to two portfolio applicants. This is applicable by analogy to registries lacking prudential policies.

**A19. Example of a sport-specific UDRP case where the domain targets the local Sport community**

Retrieved on 2013-03-13 from <http://www.wipo.int/amc/en/domains/decisions/html/2009/d20090951.html>

**Signature**

---

Date: **2013-03-13**

Signature: \_\_\_\_\_

A handwritten signature in black ink, consisting of several overlapping, fluid strokes that form a stylized, somewhat abstract shape. The signature is written over a horizontal line.

# EXHIBIT 3

## **Annex A2. List of SportAccord Members**

### **S2d. SportAccord Members**

AIBA %ASSOCIATION INTERNATIONALE DE BOXE (Boxing)  
BWF %ADMINTON WORLD FEDERATION (Badminton)  
CIPS %CONFEDERATION INTERNATIONALE DE LA PECHE SPORTIVE (Sports Fishing)  
CMAS %CONFEDERATION MONDIALE DES ACTIVITES SUBAQUATIQUES (Subaquatics)  
CMSB %CONFEDERATION MONDIALE DES SPORTS DE BOULES (Boules Sport)  
FAI %FEDERATION AERONAUTIQUE INTERNATIONALE (Air Sports)  
FEI %FEDERATION EQUESTRE INTERNATIONALE (Equestrian Sports)  
FIAS %FEDERATION INTERNATIONALE AMATEUR DE SAMBO (Sambo)  
FIBA %FEDERATION INTERNATIONALE DE BASKETBALL (Basketball)  
FIBT %FEDERATION INTERNATIONALE DE BOBSLEIGH ET DE TOBOGGANING (Bobsleigh)  
FIDE %FEDERATION INTERNATIONALE DES ECHECS (Chess)  
FIE %FEDERATION INTERNATIONALE D'ESCRIME (Fencing)  
FIFA %FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION (Football)  
FIG %FEDERATION INTERNATIONALE DE GYMNASTIQUE (Gymnastics)  
FIH %FEDERATION INTERNATIONALE DE HOCKEY (Hockey)  
FIK %INTERNATIONAL KENDO FEDERATION (Kendo)  
FIL %FEDERATION INTERNATIONALE DE LUGE DE COURSE (Luge)  
FILA %FEDERATION INTERNATIONALE DES LUTTES ASSOCIEES (Wrestling)  
FIM %FEDERATION INTERNATIONALE DE MOTOCYCLISME (Motorcycling)  
FINA %FEDERATION INTERNATIONALE DE NATATION (Aquatics)  
FIP %FEDERATION OF INTERNATIONAL POLO (Polo)  
FIPV %FEDERACION INTERNACIONAL DE PELOTA VASCA (Basque Pelota)  
FIQ %FEDERATION INTERNATIONALE DES QUILLEURS (Bowling)  
FIRS %FEDERATION INTERNATIONALE DE ROLLER SPORTS (Roller Sports)  
FIS %FEDERATION INTERNATIONALE DE SKI (Skiing)  
FISA %FEDERATION INTERNATIONALE DES SOCIETES D'AVIRON (Rowing)  
FISav %FEDERATION INTERNATIONALE DE SAVATE (Savate)  
FIVB %FEDERATION INTERNATIONALE DE VOLLEYBALL (Volleyball)  
FMJD %FEDERATION MONDIALE DU JEU DE DAMES (Draughts)  
IAAF %INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (Athletics)  
IAF %INTERNATIONAL AIKIDO FEDERATION (Aikido)  
IBAF %INTERNATIONAL BASEBALL FEDERATION (Baseball)  
IBU %INTERNATIONAL BIATHLON UNION (Biathlon)  
ICC %INTERNATIONAL CRICKET COUNCIL (Cricket)  
ICF %INTERNATIONAL CANOE FEDERATION (Canoe)  
ICSF %INTERNATIONAL CASTING SPORT FEDERATION (Casting)  
IDBF %INTERNATIONAL DRAGON BOAT FEDERATION (Dragon Boat)  
IFA %INTERNATIONAL FISTBALL ASSOCIATION (Fistball)  
IFAF %INTERNATIONAL FEDERATION OF AMERICAN FOOTBALL (American Football)  
IFBB %INTERNATIONAL FEDERATION OF BODYBUILDING & FITNESS (Bodybuilding)  
IFF %INTERNATIONAL FLOORBALL FEDERATION (Floorball)  
IFI %International Federation Icestocksport (Icestocksport)  
IFMA %INTERNATIONAL FEDERATION OF MUAYTHAI AMATEUR (Muaythai)  
IFNA %INTERNATIONAL FEDERATION OF NETBALL ASSOCIATIONS (Netball)

IFS %INTERNATIONAL SUMO FEDERATION (Sumo)  
 IFSC %INTERNATIONAL FEDERATION OF SPORT CLIMBING (Sport Climbing)  
 IFSS %INTERNATIONAL FEDERATION OF SLEDDOG SPORTS (Sleddog)  
 IGF %INTERNATIONAL GO FEDERATION (Go)  
 IGF %INTERNATIONAL GOLF FEDERATION (Golf)  
 IHF %INTERNATIONAL HANDBALL FEDERATION (Handball)  
 IIHF %INTERNATIONAL ICE HOCKEY FEDERATION (Ice Hockey)  
 IJF %INTERNATIONAL JUDO FEDERATION (Judo)  
 IKF %INTERNATIONAL KORFBALL FEDERATION (Korfball)  
 ILS %INTERNATIONAL LIFE SAVING FEDERATION (Life Saving)  
 IOF %INTERNATIONAL ORIENTEERING FEDERATION (Orienteering)  
 IPF %INTERNATIONAL POWERLIFTING FEDERATION (Powerlifting)  
 IRB %INTERNATIONAL RUGBY BOARD (Rugby)  
 IRF %INTERNATIONAL RACQUETBALL FEDERATION (Racquetball)  
 ISA %INTERNATIONAL SURFING ASSOCIATION (Surfing)  
 ISAF %INTERNATIONAL SAILING FEDERATION (Sailing)  
 ISF %INTERNATIONAL SOFTBALL FEDERATION (Softball)  
 ISMF %INTERNATIONAL SKI MOUNTAINEERING FEDERATION (Ski Mountaineering)  
 ISSF %INTERNATIONAL SHOOTING SPORT FEDERATION (Shooting Sport)  
 ISTAF %INTERNATIONAL SEPAKTAKRAW FEDERATION (Sepaktakraw)  
 ISTF %INTERNATIONAL SOFT TENNIS FEDERATION (Soft Tennis)  
 ISU %INTERNATIONAL SKATING UNION (Skating)  
 ITF %INTERNATIONAL TENNIS FEDERATION (Tennis)  
 ITTF %INTERNATIONAL TABLE TENNIS FEDERATION (Table Tennis)  
 ITU %INTERNATIONAL TRIATHLON UNION (Triathlon)  
 IWF %INTERNATIONAL WEIGHTLIFTING FEDERATION (Weightlifting)  
 IWUF %INTERNATIONAL WUSHU FEDERATION (Wushu)  
 IWWF %INTERNATIONAL WATERSKI AND WAKEBOARD FEDERATION (Waterskiing)  
 JJIF %JU%ITSU INTERNATIONAL FEDERATION (Ju%itsu)  
 TWIF %TUG OF WAR INTERNATIONAL FEDERATION (Tug of War)  
 UCI %UNION CYCLISTE INTERNATIONALE (Cycling)  
 UIAA %UNION INTERNATIONALE DES ASSOC. D'ALPINISME (Mountaineering)  
 UIM %UNION INTERNATIONALE MOTONAUTIQUE (Powerboating)  
 UIPM %UNION INTERNATIONALE DE PENTATHLON MODERNE (Modern Pentathlon)  
 WA %WORLD ARCHERY FEDERATION (Archery)  
 WAKO %WORLD ASSOCIATION OF KICKBOXING ORGANIZATIONS (Kickboxing)  
 WBF %WORLD BRIDGE FEDERATION (Bridge)  
 WCBS %WORLD CONFEDERATION OF BILLIARD SPORTS (Billiards Sports)  
 WCF %WORLD CURLING FEDERATION (Curling)  
 WDF %WORLD DARTS FEDERATION (Darts)  
 WDSF %WORLD DANCESPORT FEDERATION (Dance Sport)  
 WDFD %WORLD FLYING DISC FEDERATION (Flying Disc)  
 WKF %WORLD KARATE FEDERATION (Karate)  
 WMF %WORLD MINIGOLFSPORT FEDERATION (Minigolf)  
 WSF %WORLD SQUASH FEDERATION (Squash)  
 WTF %WORLD TAEKWONDO FEDERATION (Taekwondo)

**S2e. SportAccord Associate Members**

CGF %COMMONWEALTH GAMES FEDERATION (Commonwealth Games)

CIJM %INTERNATIONAL COMMITTEE OF THE MEDITERRANEAN GAMES (Mediterranean Games)  
CISM %CONSEIL INTERNATIONAL DU SPORT MILITAIRE (Military Sport)  
CISS %INTERNATIONAL COMMITTEE OF SPORTS FOR THE DEAF (Deaf Sports)  
CSIT %CONFEDERATION SPORTIVE INTERNATIONALE DU TRAVAIL (Workers Sports)  
EBU / UER %EUROPEAN BROADCASTING UNION (European Broadcasting)  
FICS %FEDERATION INTERNATIONALE DE CHIROPRACTIQUE DU SPORT (Sports Chiropractic)  
FISU %FEDERATION INTERNATIONALE DU SPORT UNIVERSITAIRE (University Sports)  
IAKS %INTERNATIONAL ASSOCIATION FOR SPORTS AND LEISURE FACILITIES (Sports Facilities)  
IMGA %INTERNATIONAL MASTERS GAMES ASSOCIATION (Masters Games)  
IPC %INTERNATIONAL PARALYMPIC COMMITTEE (Paralympic)  
ISF %INTERNATIONAL SCHOOL SPORT FEDERATION (School Sports)  
IWGA %INTERNATIONAL WORLD GAMES ASSOCIATION (World Games)  
PI %PANATHLON INTERNATIONAL (Panathlon)  
SOI %SPECIAL OLYMPICS, INC. (Special Olympics)

# EXHIBIT 4

### Objection support letters

Institution acronym	Institution full name	Name of person who signed	Title
1 FIDE	Federation Internationale des Echecs	Nigel Freeman	Executive Director
2 IFMA	International Federation of Muaythai Amateur	Stephen Fox	General secretary
3 FIM	Federation Internationale de motocyclisme	Stephane Desprez	Chief Executive Officer
4 WA	World Archery Federation	Tom Dielen	Secretary General
5 INF	International Netball Federation	Urvasi Naido	Chief Executive Officer
6 FAI	Federation Aeronautique Internationale	Jean-Marc Badan	Secretary General
7 IFF	International Floorball Federation	John Liljelund	Secretary General
8 ICSD	International Committee of Sports for the Deaf	Marc Cooper	Chief Executive
9 IKF	International Korfbal Federation	Graham Crafter	Secretary General
10 IGF	International Golf Federation	Anthony Scanlon	Executive Director
11 IIHF	International Ice Hockey Federation	Horst Lichtner	General secretary
12 FMJD	Federation Mondiale du Jeu de Dames	Frank Teer	General secretary
13 ISSF	International Shooting Sport Federation	Franz Schreiber	Secretary General
14 IAF	International Aikido Federation	Kei Izawa	General secretary
15 IOF	International Orienteering Federation	Barbro Ronnberg	Secretary General
16 ISA	International Surfing Association	Robert Mignogna	Director General
17 ITTF	International Table Tennis Federation	Judit Farago	Chief Executive Officer
18 WSF	World Squash Federation	Andrew Shelley	Chief Executive
19 FEI	Fédération Equestre Internationale	Ingmar De Vos	Secretary General
20 IJF	International Judo Federation	Jean-Luc Rouge	General secretary
21 ISAF	International Sailing Federation	Jerome Pels	Chief Executive Officer
22 WCF	World Curling Federation	Colin Grahamslaw	Secretary General
23 FIQ	Federation Interntional des Quilleurs	Kevin Dornberger	President
24 FISU	Fédération Internationale du Sport Universitaire	Eric Saintrond	Secretary General
25 IFSC	International Federation of Sport Climbing	Marco Maria Scolari	President
26 BWF	Badminton World Federation	Thomas Lund	Secretary General

27	CMAS	Underwater Activites	Alessandro Zerbi	Secretary General
28	IPC	International Paralympic Committee	Xavier Gonzales	Chief Executive Officer
29	UCI	Union Cycliste Internationale	Christophe Hubschmid	General Director
30	FIE	Fédération Internationale d'Esgrime	Nathalie Rodriguez	Chief Executive Officer
31	IAAF	International Association of Athletics Federations	Essar Gabriel	General Secretary
32	UIPM	Union Internationale de Pentathlon Moderne	Dr. H.C. Klaus Schormann	President
33	ITF	International Tennis Federation	Juan Margets	Secretary General
34	IRB	International Rugby Board	Bret Gosper	Chief Executive Officer
35	AIBA	International Boxing Association	Sebastien Gillot	Communication Director
36	ILS	International Live Saving Association	Karin Obus	Executive Director
37	IMGA	International Masters Games Association	Jens Holm	Chief Executive Officer
38	FINA	Federation Internationale de Natation	Cornel Marculescu	Executive Director
39	IMSA	International Mind Sports Association	José Damiani	President
40	JJIF	Ju Jitsu International Federation	Dana Murgescu	General secretary
41	FIG	Fédération International de Gymnastique	André Geisbuhler	Secretary General
42	FIVB	Fédération Internationale de Volleyball	Dr Ary Graça	Président
43	IFS	International Sumo Federation	Hidetoshi Tanaka	President
44	CSIT	International Workers and Amateurs in Sports Confederation	Harald Bauer	President
45	CIPS	International Confederation of Sport Fishing	Gianrodolfo Ferrari	Secretary General
46	IHF	International Handball Federation	Amal Khalifa	Managing Director
47	ISF	International Softball Federation	Don Porter	President
48	WMF	World Minigolf Federation	Hans Bergström	Secretary General
49	WFDF	World Flying Disc Federation	Volker Bernardi	Executive Director
50	IWUF	International Wushu Federation	Liu Beijian	Secretary General
51	FIS	Fédération Internationale de ski	Sarah Lewis	Secretary General
52	FIFA	Fédération Internationale de Football	Jérôme Valcke	Secretary General
53	FIBA	Fédération Internationale de Basketball	Patrick Baumann	Secretary General
54	FIP	Fédération Internationale de Polo	Dr Richard Caleel	President

55 FIA

Fédération Internationale Automobile

Jean Todt

President

IOC

IOC

International Olympic Committee

Christophe de Kepper

Director General

# EXHIBIT 5

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### RESPONSE FORM TO BE COMPLETED BY THE APPLICANT

- Applicant responding to several Objections or Objections based on separate grounds must file separate Responses
- Response Form must be filed in English and submitted by email to Contact Information Redacted
- The substantive part is limited to 5000 words or 20 pages, whichever is less

**Disclaimer:** This form is the template to be used by Applicants who wish to file a Response. Applicants must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

**Annex A** defines capitalized terms and abbreviations in addition to or in lieu of the foregoing.

**Identification of the Parties and their Representatives**

**Applicant**

Name	Steel Edge LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted PLEASE NOTE THAT APPLICANT HAS MOVED AND THE STREET ADDRESS AND SUITE NUMBER DIFFER FROM THOSE SHOWN ON THE APPLICATION
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

**Objector**

Name	SPORTACCORD
Contact person	Pierre Germeau
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Copy the information provided by the Objector.*

**Applicant's Representative(s)**

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtdldisputes.com">http://www.newgtdldisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative (for example external counsel or in-house counsel).*

**Applicant's Contact Address**

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtdldisputes.com">http://www.newgtdldisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Applicant. The Contact Address can be the Applicant's address, the Applicant's Representative's address or any other address used for correspondence in these proceedings.*

**Other Related Entities**

Name	International Olympic Committee
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional other related entity.*

## Disputed gTLD

gTLD Applicant has applied to and Objector objects to [.example]

Name	<.sports> – Application ID 1-1614"27785 (ICC Ref. EXP/486/ICANN/103)
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### Objection

**The Objector filed its Objection on the following Ground (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)**

**Limited Public Interest Objection:** the applied"for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

*Copy the information provided by the Objector.*

**Point-by-Point Response to the claims made by the Objector (Article 3.3.3 of the Guidebook and Article 11 of the Procedure)**

*(Provide an answer for each point raised by the Objector.)*

A.

### INTRODUCTION

ICANN adopted its new gTLD program to enhance choice and competition in domain names and promote free expression online. AGB Preamble, §1.1.2.3, and Mod. 2 Attmt. at A"1. Focused on accomplishing these same goals, Donuts has applied for <.SPORTS > and 306 other generic TLDs. Its economies of scale allow it to offer domains on subjects that otherwise may not have their own forums. See Nevett Dec. ¶¶ 4"6 (**Annex B**).

Such generics also bring competition to registries – which have yet to experience it in a world of only 22 gTLDs – and the opportunity for more consumers to enjoy the benefits of such competition. As one of a growing number of generic niche offerings in an expanding Internet "shopping mall," subject"matter domains give users an alternative to the sprawling "department store" environment of incumbent registries such as <.com>. *Id.* ¶¶ 6, 8.

Applicant would make the <.SPORTS > domain open to all legitimate uses of that common word's multiple meanings. The registry would operate in a neutral fashion, without favoring any one constituency, but with over two dozen anti"abuse mechanisms not required of existing gTLDs. Bloggers, athletes, enthusiasts, and even those not specifically identified with the term, would have nondiscriminatory access to that highly protected TLD. *Id.* ¶¶ 8"13.

The Objection threatens these important benefits. Objector claims a cyber"monopoly over a word that does not describe a clearly delineated community, and would censor its use by this legitimate Applicant. This abuses the community objection process, the "ultimate goal" of which is to "prevent the misappropriation of a community label O and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding." [http://www.icann.org/en/topics/new"gtlds/summary"analysis"proposed"final"guidebook"21feb11"en.pdf](http://www.icann.org/en/topics/new).

The infinite number and variety of meanings and perceptions surrounding "sports" makes it impossible to "delineate" any "community" by reference to that sole, expansive term. Because Objector can and does in no way represent any "clearly delineated community," its Objection must fail for lack of standing.

The Objection also falls well short on the merits. ICANN has made clear that:

There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.

[http://archive.icann.org/en/topics/new"gtlds/summary"analysis"agv3"15feb10"en.pdf](http://archive.icann.org/en/topics/new). More specifically, ICANN demands that community objectors prove *all of four* substantive elements: (i) a clearly delineated community; (ii) substantial opposition from that community; (iii) a strong association between the community and the applied"for string; and (iv) material detriment to the community caused by Applicant's operation of the string. AGB §3.5.4 at 3"24, 25.

Objector does not carry that burden. It Objector does not and could not represent a clearly delineated "sport community" able to co"opt a dictionary term for its own restrictive purposes.<sup>1</sup> Nor does it show that such a community in all its amorphous breadth has substantial opposition to, or a strong association with, Applicant's proposed string.

Most significantly, Objector demonstrates no material detriment to its purported community. Objector's speculates as to all manner of improper activity to sensationalize the Objection, but does not prove such acts will occur. The actual evidence, on the other hand, reveals an unprecedented array of measures to prevent the types of misconduct of which the Objection unjustifiably complains. Those procedures – not this Objection – provide the proper means to address issues that have not yet arisen.

In essence, the Objection contends that harm will result unless Objector runs the domain. That notion stands for the one proposition that ICANN has expressly stated cannot form the basis for a finding of detriment: "An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment." See AGB §3.5.4 at 3"24.

Applicant has the same free speech rights as the general public to conduct its affairs using ordinary words from the English language. To hold otherwise would negate such rights, impede the growth of and competition on the Internet, and set dangerous precedent that takes choice away from the many and places control in the hands of a few.

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<sup>1</sup> Objector has filed the instant Objection, as well as another alleging string confusion, against the Application in an attempt to manipulate the system and unfairly knock Applicant from the objective evaluation process.

B.

**OBJECTOR LACKS STANDING**

By its multi-stakeholder process, ICANN designed the community objection as a vehicle for legitimate, clearly delineated communities of people (e.g., Navajo) to block an applicant that would harm that specific community – that is, “to prevent the misappropriation

of a string that *uniquely or nearly uniquely* identifies a well-established and *closely connected*

group of people or organizations.” See <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf> at 19 (emphases added). This does not describe Objector or what its Objection attempts to do.

The “community” concept in the new gTLD program does not mean “industry segment.” ICANN envisioned a “community” as having more “cohesion than a mere commonality of interest,” such as a locality, an identifiable group of individuals sharing specific characteristics or interests, or entities that provide a common service. See, e.g., AGB §4.2.3 at 4”11, 4”12. It did not intend for a “single entity” to use a community objection as “a means to eliminate an application.” See <http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf> at 15. “Simply not wanting another party to obtain the name is not sufficient” to support a community objection. *Id.*

Beyond the foregoing, Objector must prove it has standing as (i) “an established institution” with (ii) “an ongoing relationship with a clearly delineated community.” AGB §3.2.2.4. Objector claims “established institution” status entirely by unsworn statements in its Objection, referring simply to its 2012 “statutes” and a document it drafted itself, neither of which constitutes independent evidence of its existence. See Objn at 6”7, Annex A1, A2.

Further, to be “clearly delineated,” the “community named by the objector must be strongly associated with the applied-for gTLD string.” AGB §3.2.2.4 at 3”7. In other words, the word “sports” must readily and essentially solely bring Objector’s organization to mind. Merely stating that proposition reveals its folly.

So, too, does application of ICANN’s test for an “ongoing relationship” with a “clearly delineated community,” which expects “formal boundaries” defining the community. AGB §3.2.2.4 at 3”8. Objector labels a “sport community,” yet, fails to identify what comprises it or what “boundaries” surround it. Objn at 6”8.

Nor does such delineation appear remotely possible. The world of sport consists of many parties such as spectators, enthusiasts, consumers, retailers, journalists, commentators, historians and others, and doubtlessly involves activities unaffiliated to Objector such as kabaddi, car racing and mixed martial arts, to name only a few. While these activities do not come within Objector’s purview, they certainly have their own interests in “sports” topics that have nothing to do with Objector’s sphere.

Although one cannot reasonably define a “sport community,” Objector attempts to do so with strokes so broad they demonstrate the antithesis of “clear delineation:”

The Sport community is the community of individuals and organizations who associate themselves with Sport. Sport is activity by individuals or teams of individuals, aiming at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

Objn at 8. This hardly describes the “well-established and closely connected group of people

or organizations” that ICANN envisioned as “uniquely or nearly uniquely” identified by the dictionary term “sports.” See <http://archive.icann.org/en/topics/new/gtlds/agve/analysis/public/comments/04oct09/en.pdf> at 19 (emphases added).

While purporting to represent all the interests of this sprawling and ill-defined “community,” Objector will block registrations under its own <.SPORT> TLD unless Objector and its chosen affiliates deem the registrant (i) legitimate, (ii) beneficial to the cause and the values of Sport, (iii) commensurate in importance with a registered domain name, and (iv) in good faith at all times. Objector Applic. §20(a). Essentially, Objector holds itself out as representing a boundlessly wide group while also maintaining unfettered discretion over who in that group may speak.

Thus, Objector either lacks any significant relationship with a substantial portion of the community it claims to represent, or that “community” is too broad, diverse and wide” ranging in interests to be “clearly delineated.” SportAccord does not object to an application for <.SPORTACCORD>, <.IOC> or <.OLYMPICS>, but rather for <.SPORTS>. The notion of a sport “community,” which would allow a single party to control the use of a dictionary term to the exclusion of all others, defies reason. Such a scheme would contravene the open nature of the Internet.

The Panel should dismiss the Objection on standing alone. It need never consider the substance of the Objection. Nevertheless, we reveal its absence of merit below.

### C.

#### **THE OBJECTION SHOULD BE REJECTED**

For a valid community objection the Objector has the burden to prove four distinct elements: (i) a clearly delineated community; (ii) substantial opposition to the application from a significant portion of the community to which the string is targeted; (iii) a strong association between that community and the subject string; and (iv) a “likelihood” that the Application will cause “material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be O targeted.” AGB at 3”22. “The objector must meet all four tests O for the objection to prevail,” failure on any one compels denial. *Id.* at 3”25. Objector here meets none.

#### ***1. Objector Fails to Invoke a Clearly Delineated Community.***

Applicant has already shown above that Objector does not represent a “clearly delineated” community. However, Objector necessarily must overcome a more stringent test on the merits than it need do for standing. ICANN would have no reason to make “clearly delineated” a substantive element of the objection if it meant nothing more than the criterion for standing. Rules “should be interpreted so as not to render one part inoperative.” *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See also *United States v. Menasche*, 348 U.S. 528, 538”39 (1955). To meet the substantive test, therefore, Objector must show that the string itself describes a clearly delineated community.

By itself, the word “sports” invokes many images. Dictionary.com ascribes 27 different meanings to the word “sport” – 14 as a noun, 2 as an adjective and 9 as a verb – including: (i) an athletic activity requiring skill or physical prowess and often of a competitive nature;” (ii) “diversion; recreation; pleasant pastime;” (iii) “jest; fun; mirth; pleasantries,” as in

"[w]hat he said in sport was taken seriously;" (iv) mockery; ridicule; derision," as in "[t]hey made sport of him;" (v) "laughingstock;" (vi) "suitable for outdoor or informal wear," as in "sport clothes;" (vii) "to amuse oneself with some pleasant pastime or recreation;" (viii) "to play, frolic, or gambol, as a child or an animal;" (ix) "to trifle or treat lightly;" and (x) "to wear, display, carry, etc., especially with ostentation; show off," as in "to sport a new mink coat." See <http://dictionary.reference.com/browse/sport?s=t>, copy at **Annex C**.

In short, "sports" defines many things, making it impossible for Objector to show that the term "uniquely or nearly uniquely" describes a "community." Indeed, Objector itself recognizes its inability to "focus on rigid edges of a community." Objn at 9.

Objector appears to associate the prescribed factors with its own organization, as if it alone made up the entire "community." It does not, of course, as its own attempts to define a "sport community" prove. Failing to satisfy its heavy burden to prove such a clearly delineated community, the Objection must be denied.

## **2. Objector Demonstrates No Substantial Opposition to the Application Within the "Community" It Claims to Represent.**

Objector also falls short on this element, which requires proof of: (a) the number of expressions of opposition to the Application relative to the asserted community's composition; (b) the representative nature of those expressing opposition; (c) the stature or weight of sources of opposition; (d) the distribution or diversity of opposition within the invoked community; (e) Objector's historical defense of the alleged community in other contexts; and (f) costs incurred by Objector in expressing opposition. AGB §3.5.4 at 3"23. Objector proves no "substantial" opposition to the Application to satisfy its burden.

This aspect of the Objection relies almost entirely on its Annexes A2 and A3, the former merely a list of Objector's own member federations. Annex A3 contains substantively identical form letters professing "opposition" from executives of groups affiliated with Objector. With identical, "vanilla" recitations opposing the Applicant and another of Objector's competitors, the letters reflect no independent thought showing genuine opposition by each such member itself. Nor do they add up to a meaningful number of expressions of opposition within the larger sport "community" that Objector claims to represent. Even their support of Objector's application lacks substance.

Objector offers no proof that such cookie-cutter "oppositions" fairly represent the views of a "sport" community, even as defined by Objector. It provides no evidence regarding the stature of those ostensibly voicing opposition, no showing of any historical "defense" it has mounted for the "community" it invokes, no mention of the distribution or diversity of such opposition or of any costs incurred, and not one letter from a single member of the "community" expressing opposition to the <SPORTS> TLD. AGB at 3"23.

Objector acknowledges its failure to include any opposition from any individual community "member," and tries to reframe the issue in the negative. Objector compares the absence of community support for the Application with the support "by key community stakeholders" of its own application for the .SPORT TLD. See Objn at 10. This comparison is as meaningless as it is misleading. The Guidebook does not obligate Applicant to solicit or submit statements of endorsement. Meanwhile, SportAccord waited passively for individuals to object to the Application, while it actively solicited form endorsements from its affiliate organizations' leadership. Absent diversity of support, SportAccord falls short of showing itself as representative of a meaningful distribution of opposition across a "sport community."

Objector has not proved "substantial" opposition. This failure compels rejection of the Objection. AGB §3.5.4 at 3"25.

**3. Objector Demonstrates No "Strong Association" Between the "Community" Invoked and the Applied-For String.**

Objector bears the burden of proving a "strong association" between the applied-for string and the so-called community it invokes. It may do so by showing (a) statements made in the Application, (b) other public statements by Applicant, and (c) public associations between the string and the objecting "community." AGB §3.5.4 at 3"24.

Objector cannot do this, as the evidence demonstrates otherwise. Take, for example, the Application's stated purpose of the TLD:

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users.

No entity, or group of entities, has exclusive rights to own or register second level names in this TLD.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8"9). Contrary to Objector's unsubstantiated claim that the Application "*clearly say[s]* that Sport is the target of the TLD," the purpose of the TLD is open and the string itself is not tied to a specific community. Objn at 10 (emphasis added). That is the whole point of the generically worded TLD. Nevett Dec. ¶7 (**Annex B**).

Indeed, the concept of "targeting," which lies at the heart of this facet of the Objection, runs directly *contrary* to Donuts' philosophy behind the operation of registries generally:

Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8"9). Thus, Applicant expressly does not "target" the string toward *any* particular community, let alone that which Objector claims to represent.

Nor has Objector submitted any evidence to support a "strong association" by the public between the string and the posited community. Instead, Objector attempts to create this link on the basis of a self-serving "definition" it drafted for its own bid for <.SPORT> TLD. A stronger association might exist had Objector filed for .IOC or .SPORTACCORD, i.e., a name closely associated with its organization and affiliates. "Sports," however, is too broad a term for any person or organization to claim what would amount to ownership over it. Hence, the community objection standards have been drafted with the presumption that applicants meeting the criteria should not be excluded unless they trample directly on someone's very specific community label. See [http://archive.icann.org/en/topics/new"gtlds/agve"analysis"public"comments"04oct09"en.pdf](http://archive.icann.org/en/topics/new) at 19.

**4. Objector Has Not Shown That Granting the Application Likely Would Cause Material Detriment to the "Community" Invoked by Objector**

Most importantly, Objector fails to meet its burden to prove that granting the Application would cause material detriment to the purported community. Applicant has planned a well-operated TLD with extensive safeguards that intend to serve the public and their associations with the term "sports." Nothing in the Application implicitly or explicitly shows likelihood of harm to any individuals or groups. Objector's "parade of horrors" that *could* happen, and which at times *do* happen in existing gTLDs, has no evidentiary support showing that they likely *will* happen. To the contrary, the evidence shows that Applicant is doing everything that ICANN requires and much more to prevent such occurrences as much as possible, and more than any gTLD ever has before.

One establishes "material detriment" by proving elements that include: (a) the nature and extent of potential damage to the invoked "community" or its reputation from Applicant's operation of the string; (b) evidence that Applicant does not intend to act consistent with the interests of the invoked community; (c) interference with the core activities of the invoked community by Applicant's operation of the string; (d) extent the invoked community depends on the DNS for core activities; and (e) the level of certainty that detrimental outcomes will occur. AGB §3.5.4 at 3"24. The fear and speculation put forth in the Objection does not supply proof of these elements sufficient to satisfy Objector's burden.

*a. Objector shows no "likely" harm to the "community" or its reputation from Applicant's operation of the subject string.*

Objector does not prove that Applicant's <.SPORTS> gTLD poses a *likelihood* of damage to the purported "community" or its "reputation." Rather, it focuses on protecting its own community application for the competing <.SPORT> TLD. Objector complains of such adverse consequences to the "community" as racism and bullying, pornography, undesirable betting, doping, misperception of official sanction misappropriated famous names, and brand-jacking. Yet, Objector tenders not a shred of evidence that Applicant's proposed string would create any *greater* or *different* harm to the sport "community" than it apparently experiences under the existing regime of <.com> and other generics. As such, Objector does not prove that an open <.SPORTS> gTLD itself would *cause* any such harm, since the issues of which it warns already exist.

More importantly, Applicant has committed to safeguards that surpass ICANN's requirements for new TLDs. The Application incorporates new and robust mechanisms to heighten protection for intellectual property interests and to restrain fraudulent activity. See Application, Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). These protections, described further below, far exceed the already powerful ones ICANN requires for new gTLDs.

Applicant intends to use these measures to curb abuse while preserving consumer choice and TLD competition. Moreover, due to its size and experience in operating domains, Applicant will have greater ability to address potential misconduct. In fact, it will employ a compliance staff whose so function will be just that. Nevett Dec. ¶11 (**Annex B**).

*b. Applicant intends to act in the equal interest of all who may register <.SPORTS> names, including those in Objector's claimed community.*

Objector similarly provides no evidence supporting the second element – namely, that Applicant "does not intend to act in accordance with the interests of the community or of users more widely," including that Applicant "has not proposed or does not intend to institute effective security protection for user interests." AGB §3.5.4 at 3"24. Again, the actual evidence runs contrary.

Applicant has expressed its affirmative intent to act in the best interests of and to protect *all* users, and to “make this TLD a place for Internet users that is far safer than existing TLDs.” Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). It will do so with 14 protections that ICANN demands for new gTLDs (but never required for existing gTLDs), and will go beyond that by implementing eight additional measures, including those to address the exact types of concerns raised by Objector. *Id.* Hence, Objector’s lament that Applicant’s proposal lacks sufficient means to combat misconduct simply has no basis in, and directly contravenes, the facts.

While Objector states its conclusory belief that the Application offers inadequate protections, it fails to show how any of the mechanisms proposed by Applicant fall short. Nor does it elaborate on what tools, in its view, a <SPORTS> domain should employ. Instead of discussing actual detriment it believes the Application poses to the “community,” Objector merely complains of a lack of “any oversight mechanism specific to the Sport community.” Objn at 11.

To the extent Objector implies community oversight is required, Applicant vehemently disagrees.

First, ICANN does not require an applicant to run a gTLD as a community. Virtually any generic word could attract some self-proclaimed community to oppose it, as here. That a TLD *could* function for the benefit of a community does not replace Objector’s burden to prove detriment and the foregoing substantive objection elements. Its contention that the domain should be operated as a community – *i.e.*, that its own application represents the only appropriate way to handle a <SPORTS> gTLD – explicitly does not suffice to show detriment. AGB §3.5.4 at 3”24.

Second, imposing registration restrictions as Objector urges here would hinder free speech, competition and innovation in the namespace. As the Application states:

[A]ttempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). ICANN supports the same objectives. Indeed, they lie at the heart of the entire new gTLD program. See, *e.g.*, AGB Preamble, §1.1.2.3; Module 2, Attmt at A”1.

The Objection would have the Panel gut these principles in deference to the self-interest of Objector and its theoretical community. This would lead the namespace down a dangerous path. Applicant’s content-neutral approach strikes the proper balance that promotes free speech and the growth of cyber media, while protecting users more thoroughly than both the current landscape and ICANN’s new gTLD enhancements do. Objector does not and cannot show that Applicant will act against the legitimate interests of the invoked “community.”

*c. Objector fails to show how Applicant’s operation of the string would interfere with the core activities of the alleged community.*

Because it cannot do so, Objector fails to show how Applicant’s operation of the TLD would interfere with the community’s core activities. It simply forecasts the death of its purported community from Applicant’s control of the TLD – including from pornography, doping and racism. Objn at 12, 15, 16. How this supposedly would occur, Objector does not say; it has no *evidence* to support such inflammatory speculation. Objector discusses

detriment less as a matter of Applicant's operation of the TLD than of Objector's own lack of control. Yet, if sports-related websites were banned from registering names in <.com>, would doping incidents dramatically drop? There is no evidence that Applicant's proposed string would cause the potential interference that Objector concocts. Quite the opposite, Applicant's new safeguards likely will reduce the extent of bad behavior seen in large registries now.

Objector also fears the loss to speculators of domain names corresponding to non-trademark identifiers such as "sport terms," locations, federations, events and athletes. What Objector fears is a reasonable consequence rather than a detriment. A group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection on as against any new gTLD. Doing so would make affiliation with Objector tantamount to trademark protection on the TLD while also limiting legitimate use by all registrants. Applicant believes the policy regulating the TLD must promote rather than stifle growth, free speech, legitimate activity and consumer choice. Nevett Dec. ¶8, 10 (**Annex B**).

Though Objector's policies and regulations have their place in regulating sporting activities, a connection to or oversight by it is irrelevant and unnecessary to administering the TLD. On the contrary, the TLD's administration is best left to an entity like Applicant, which has the experience and capability to launch, expand and operate the TLD in a secure manner while appropriately protecting Internet users and rights-holders from potential fraud and abuse. While safeguarding against fraud and abuse, Applicants' policies acknowledge that over-regulating registrant eligibility unnecessarily restricts users by preventing a substantial segment of legitimate registrants from participating in a space to which they are legitimately connected. Applicants' domain policies, stated in its Application with clarity and in depth, diminishes the risk of abuse while promoting legitimate registrations and safeguarding the reputation of the TLD.

*d. Objector makes no showing that Applicant's TLDs would interfere with the community's core activities.*

This factor requires that any core activity referenced by an Objector must "depend" on the domain name system. The Panel should scrutinize the cited activities and compare their relationship to the overarching business or operational model of Objector. Objector does virtually nothing online beyond promoting its own activities on its websites.

Applicant would operate the TLD in a safe, stable manner, implementing safeguards for this sports-oriented TLD that surpass those of <.COM> and most new gTLD applications. Rather than interfering with the sport "community's" activities, the Applicant's TLD will provide new avenues of access, business and interest; it will not interfere, it will facilitate.

However, it is not for Applicant to disprove that any interference will occur; it is for the Objector to prove that interference will occur. The Objector provides no evidence and merely attempts to gainsay Applicant's plans by saying that the Objector is a more suitable operator. Apart from being untrue, this assertion is irrelevant to carrying its burden on any element of this objection standard.

*e. Objector shows no level of certainty that alleged detrimental outcomes would occur, or any reasonable quantification of such outcomes.*

Vacuous is Objector's bold claim of "complete certainty of detriment in case the .sport(s) TLD is operated by a registry without appropriate community-based accountability." Objn at 17. Again, pure hypothesis, unsupported by any evidence.

Using a self-serving exhibit drafted by itself, Objector estimates that "the negative externalities over 10 years exceed 400 billion US Dollars." *Id.*, Annex A13. This arithmetic reflects no causal relationship between anything Applicant may do and any asserted harm to

the "sport community." Rather, it assumes harm, and then attempts to quantify it in terms of some amorphous contribution sports makes to the global economy. Yet, it makes no showing how the feared detriment will occur where it has not already in existing gTLDs. The world of sport has not collapsed as a result of the Internet, and will not do so with a new gTLD that provides greater protections than cyberspace has ever known.

Objector's "certainty" comes from its own view that the "gTLD process has serious flaws favoring speculative applicants against communities." In other words, laments Objector, the Guidebook dictates that Applicant prevail here, which is not a result Objector agrees with.

Yet, both Applicant and Objector must operate within the framework ICANN has provided. That set of rules, carefully planned and developed over years with input from multiple stakeholders that included groups such as Objector, creates a community"based objection previously unknown to the law or the Internet. While granting unprecedented power to organizations that otherwise would have no legal recourse against any top"level domain, the community objection carries with it strict criteria that define specific circumstances in which that power can be used.

This is not one of those situations. Objector has fallen short of its burden to prove the elements of a community objection, *all* of which the Guidebook expressly requires. That Objector views the process as "flawed" gives this Panel no discretion to disregard it.

Applicant has every right to the gTLD at issue. Objector fails in every respect to meet its burden to divest Applicant of that right. The Objection cannot succeed. Applicant therefore respectfully urges the Panel to overrule it and to direct Objector to pay the costs reasonably incurred by Applicant in opposing the Objection.



# EXHIBIT 6

Maison du Sport International  
Contact Information Redacted

Dear Centre for Expertise of the ICC,

As Complainant in Cases EXP/471/ICANN/88 and EXP/486/ICANN/103 and taking into account that the Centre is close to the appointment of the Expert for this Procedure, we would like stressing the need for said Expert, according to Art. 7 of the ICC Rules for Expertise to be not just qualified for the Procedure as such, but also his or her qualifications in the specific circumstances of the case.

In this very specific (and new) type of Dispute Resolution Procedure, this should include both a good knowledge of the activities of the relevant Community (the Sport Community, in this case) and familiarity with the institutional framework of such Community.

It certainly does not require a person working for, or within, the relevant Community, but without a clear knowledge about what it does and how it is organized the relevant Community, the Expert would necessarily miss the ability to evaluate the most relevant points in the dispute itself.

We are certain that the Centre has already taken these considerations into account.

Best regards,



Vincent Gaillard,  
Director General

Contact Information Redacted

# EXHIBIT 7



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/486/ICANN/103**

**SPORTACCORD (SWITZERLAND) vs/ STEEL EDGE LLC (USA)**

---

SPORTACCORD

Mr. Pierre Germeau

Contact Information Redacted

*By email:* Contact Information Redacted

THE IP & TECHNOLOGY LEGAL GROUP, P.C.

Mr. John M. Genga and Mr. Don C. Moody

Contact Information Redacted

*By email:* Contact Information Redacted  
*and*

25 June 2013

Dear Sirs,

Please be advised, that pursuant to Article 13 of the Procedure and Article 9(5) (d) of the Rules, the Centre has appointed as Expert in this matter:

Mr. Jonathan Peter Taylor

Contact Information Redacted

Tel: Contact Information Redacted

Email: Contact Information Redacted

The Expert is the sole member of the Panel in accordance with Article 13 of the Procedure.

**Chairman of the Standing Committee of the Centre**

The Chairman of the Standing Committee appointed the Panel on 20 June 2013, pursuant to Article 3(3) of Appendix I to the Rules.

Please note that the Panel will only be fully constituted upon receipt of the parties' full payment of the estimated Costs

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

### **Expert's Availability and Independence**

We enclose the Expert's ICC *curriculum vitae*, professional *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

Please be advised that the Expert has declared that he is available and able to serve as member of the Panel in this matter.

Further, please note that the Expert has declared that he is independent, however he wishes to call the parties' attention to certain facts or circumstances disclosed in his Declaration of Acceptance and Availability, Statement of Impartiality and Independence because they might be of such a nature as to call into question their independence in the eyes of the parties.

Accordingly, we invite the parties' comments in this regard, if any, **on or before 28 June 2013**.

Should we not receive any comments from the parties within the provided time limit, the Centre shall understand that they do not object to the appointment of Mr. Taylor as sole member of the Panel in this matter.

### **Expert's Fees and Expenses**

Pursuant to Article 3 of the Appendix III to the Rules, ICC has fixed the Expert's hourly rate at € 450. Further, any reasonable expenses of the Expert's shall be reimbursed.

### **Deposit for Costs**

#### **1. Costs**

According to Article 14(3) of the Rules, ICC currently estimates the total Costs for this matter at **€ 58 600**, subject to later readjustments.

The Costs cover the estimated fees and expenses of the Expert, as well as ICC's administrative costs incurred and still to be incurred.

In the course of the proceeding, the Centre may have to readjust the estimated Costs.

Further, and pursuant to Article 14(5) of the Rules, upon termination of the proceeding the Centre shall settle the total Costs of the proceeding and shall, as the case may be, reimburse the party or parties for any excess payment or bill the parties for any balance required.

#### **2. Advance Payment**

The Costs have to be fully paid by each party pursuant to Article 14(b) of the Procedure.

Accordingly, the Costs should be paid in the following manner:

- Objector: € 53 600 (€ 58 600 – € 5 000 already paid)
- Applicant: € 53 600 (€ 58 600 – € 5 000 already paid)

.../...

In accordance with Article 14(b) of the Procedure, the payment has to be made **within 10 days of the receipt of this letter**. The evidence of such payment has to be submitted to the Centre within the same time limit.

Therefore, we invite the parties to proceed with the payment of the Costs pursuant to the following instructions:

Beneficiary (*Account holder*): International Chamber of Commerce  
Contact Information Redacted

Bank of Beneficiary: UBS SA  
Contact Information Redacted

IBAN: Contact Information Redacted

Swift Code/BIC: Contact Information Redacted

Please include the **case reference, the party's name, the disputed string and the application ID** on your payment to help ensure that it is accurately credited.

Please note also that the parties should bear any banking charges associated with the payment.

We draw your attention to the fact that if the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that the Objector has paid shall be refunded (Article 14(d)(i) of the Procedure).

Further, we draw your attention to the fact that if the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded (Article 14(d)(ii) of the Procedure).

Finally, please note that upon termination of the proceeding, ICC shall refund to the prevailing party, as determined by the Panel, its advance payment of Costs (Article 14(e) of the Procedure). However, please note that the Filing Fee is not refundable.

### **Transfer of the File**

Please be advised that the Costs must be fully paid by each party before this proceeding can continue. Once full payments have been received, the Centre will transfer the file to the Panel and invite it to proceed with this matter.

Accordingly, the Panel and the parties should **not** make contact until the Centre has transferred the file to the Panel.

Should you have any further questions, please do not hesitate to contact us.

.../...

Yours faithfully,



Špela Košak  
Deputy Manager  
ICC International Centre for Expertise

Enclosures (*for parties only*):

- Experts' ICC *curriculum vitae*
- Experts' professional *curriculum vitae*
- Experts' Declaration of Acceptance and Availability, Statement of Impartiality and Independence

c.c. (*with enclosures*):

Mr. Daniel Schindler  
Mr. Jon Nevett

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

c.c. (*without enclosures*):

Mr. Jonathan Peter Taylor

*By email:* Contact Information Redacted

# EXHIBIT 8



International Chamber of Commerce  
*The world business organization*

International Centre for Expertise Centre international d'expertise

Case N°: EXP/486/ICANN/103

**ICC EXPERT  
DECLARATION OF ACCEPTANCE AND AVAILABILITY,  
STATEMENT OF IMPARTIALITY AND INDEPENDENCE**

Family Name(s): TAYLOR Given Name(s): JONATHAN

Please tick all relevant boxes.

**1. ACCEPTANCE**

- I agree to serve as expert under and in accordance with ICANN's gTLD Applicant Guidebook, including the New gTLD Dispute Resolution Procedure ("**Procedure**"), the Rules for Expertise of the ICC ("**Rules**") including Appendix III to the ICC Rules and supplemented by the ICC Practice Note on the Administration of Cases. I confirm that I am familiar with these rules and documents. I accept that my fees and expenses will be fixed exclusively by the ICC International Centre for Expertise ("**Centre**") (Article 3 Appendix III to the ICC Rules).

**NON-ACCEPTANCE**

- I decline to serve as expert in this case.  
*(If you tick here, simply date and sign the form without completing any other sections.)*

**2. AVAILABILITY**

- I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this proceeding diligently, efficiently and in accordance with the time limits provided in the Procedure, subject to any extensions granted by the Centre pursuant to Article 21(a) of the Procedure.

.../...

ICC International Centre for ADR Centre international d'ADR de la CCI  
Contact Information Redacted

3. INDEPENDENCE AND IMPARTIALITY

(Tick one box and provide details below and/or, if necessary, on a separate sheet.)

In deciding which box to tick, you should take into account, having regard to Article 11(1) of the Rules and Article 13(c) of the Procedure, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

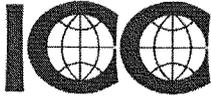
My firm has given advice in the past to the IOC, once on a data protection issue, and I gave some advice on anti-doping before Vancouver Games 2010 and London Games 2012. We have not done anything for them since May 2011. We have acted against them on various matters since then.

Date: 17.06.13

Signature: 

The information requested in this form will be considered by the ICC International Centre for Expertise solely for the purpose of your appointment. The information will remain confidential and will be stored in a case management database system. It may be disclosed solely to the parties and their counsel in the case referenced above for the purposes of that proceeding. According to Article 32 and, in particular, Article 40 of the French law "Informatique et Libertés" of 6 January 1978, you may access this information and ask for rectification by writing to the Centre.

# EXHIBIT 9



International Chamber of Commerce

The world business organization

International Centre for Expertise Centre international d'expertise

### CURRICULUM VITAE (CO)

For the confidential use of the International Chamber of Commerce and communication to the parties. To be completed in English.

Mr.

Ms.

Family Name(s):

TAYLOR

Given Name(s):

JONATHAN PETER

Date of birth:

Contact Information Redacted

Nationality(ies):

Contact Information Redacted

Personal Address:

Contact Information Redacted

Telephone: Contact Information Redacted

Mobile: Contact Information Redacted

E-Mail: Contact Information Redacted

Fax:

Business Address (Including company or firm name where applicable):

BIRD & BIRD LLP

Contact Information Redacted

Telephone: Contact Information Redacted

Fax: Contact Information Redacted

Mobile: Contact Information Redacted

E-Mail:

Contact Information Redacted

Website:

www.twobirds.com

Please indicate which address you wish to be used for any correspondence:

Personal

Business

Please indicate which email you wish to be used for all notifications and communications:

Personal

Business

.../...

ICC International Centre for ADR • Centre international d'ADR de la CCI

Contact Information Redacted

*For the confidential use of ICC and communication to the parties. To be completed in English.*

Academic degrees / Qualifications:

BA (1<sup>st</sup> Class Hons.) in Jurisprudence, University of Oxford, 1989

LLM, University of Virginia, 1990

Qualified to practise at the New York Bar, 1991, practised there until 1997.

Qualified to practise as a solicitor in England and Wales, 1996, and have practised there ever since 1997.

Training and qualifications in the field of dispute resolution (e.g. training as an arbitrator, accreditation as a mediator etc.)

Chairman of the Anti-Doping Tribunal of the International Baseball Federation.

Member of Sport Resolution UK's Panel of Arbitrators.

Current professional activity(ies) and position(s):

Partner and Joint Head of the International Sports Group, Bird & Bird LLP, London

Member, Ethics Committee, British Horseracing Authority

Member, WADA Working Group on legal matters

Other professional experience (including activities and positions) relevant for the present procedure:

Director of Studies in Sports Law, King's College, London, 2000-2007.

Joint editor, Lewis & Taylor, 'Sport: Law & Practice' (Bloomsbury 3<sup>rd</sup> Edn, due 2013)

Additional information (Use separate sheet if necessary):

Please see CV attached.

.../...

For the confidential use of ICC and communication to the parties. To be completed in English.

Languages:

I hereby confirm that I am fully able to conduct expertise proceedings in English without the assistance of an interpreter or translator and that I am capable of drafting an expert determination in English.

Additionally, please mark all languages in which you consider yourself able to conduct expertise proceedings and read and understand documents without the assistance of an interpreter or translator:

- |                                  |                                     |                                      |                                 |
|----------------------------------|-------------------------------------|--------------------------------------|---------------------------------|
| <input type="checkbox"/> French  | <input type="checkbox"/> German     | <input type="checkbox"/> Italian     | <input type="checkbox"/> Arabic |
| <input type="checkbox"/> Spanish | <input type="checkbox"/> Portuguese | <input type="checkbox"/> Russian     | <input type="checkbox"/> Polish |
| <input type="checkbox"/> Chinese | <input type="checkbox"/> Japanese   | <input type="checkbox"/> Other _____ |                                 |

Please indicate other languages of which you have good knowledge:

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**Jonathan Taylor**

Partner, Sports Group

Contact Information Redacted

DD: Contact Information Redacted

Contact Information Redacted

**Practice Areas:**

- Regulation of sport.
- Commercialisation of sport.
- Resolution of sports-related disputes.

**Education:**

- BA (Hons) 1<sup>st</sup> Class in Jurisprudence, University College, Oxford, 1989.
- LL.M, University of Virginia, 1990.

**Professional Qualifications:**

- Admitted to New York bar, 1990.
- Admitted as a solicitor in England & Wales, 1996.

**Positions:**

- Chairman, IBAF Anti-Doping Panel.
- Member, BHA Ethics Committee.
- Member, WADA Working Group on Legal Matters.
- Member, Sport Resolutions (UK) Panel of Arbitrators.

Jonathan Taylor is a partner in Bird & Bird LLP’s Sports Group, which is recognised as a market-leading UK sports law practice.

After working as a commercial litigator at the New York bar for seven years, Jon returned to England in 1997, since when he has acted solely for clients in the sports sector, advising international and national governing bodies, public and quasi-public agencies, event organisers, broadcasters, sponsors and commercial agents, on the full range of commercial, contentious, regulatory and disciplinary issues that arise in the sports sector. His experience includes:

- Drafting player contracts (he drafted the British Lions contracts for the 2001, 2005 and 2009 tours); broadcasting contracts (for the Six Nations Championship, the Heineken Cup, and the Football Associations of the Republic of Ireland, Wales and Northern Ireland, among others); sponsorship contracts (including the Lions-HSBC main sponsor contract for 2009 and 2013, and the ERC-Heineken title sponsorship for each cycle since 2001); funding contracts; and match/event staging contracts.
- Drafting sporting rules and regulations, including anti-doping rules (‘whereabouts rules’ for the World Anti-Doping Agency and the International Olympic Committee, the UK Anti-Doping Rules for UK Anti-Doping, and the Tennis Anti-Doping Programme for the International Tennis Federation), anti-corruption rules (for the International Cricket Council and the British Darts Organisation), salary cap regulations (for the Rugby Football League) and match-sanctioning rules and regulations (for the

# BIRD & BIRD

International Cricket Council and others).

- Prosecuting sports clubs and athletes, before internal tribunals and (on appeal) before the Court of Arbitration for Sport, for breach of those rules and regulations, including Pakistani cricketers Salman Butt, Mohammad Amir and Mohammad Asif for breach of the ICC's Anti-Corruption Code; and professional tennis players Mariano Puerta, Martina Hingis and Richard Gasquet for breach of the Tennis Anti-Doping Programme.
- Defending the rules and decisions of sports governing bodies from legal challenge, including defending the International Rugby Board's match-sanctioning regulations in the English High Court and before the European Commission; defending the match-sanctioning rules and decisions of the International Cricket Council and the England Cricket Board in the English High Court; and defending decisions of the Football League (in relation to Wimbledon FC and Leeds United FC) and the Football Conference (in relation to the 'football creditor' rule) in FA Rule K arbitrations.
- Advising sports bodies on Government initiatives impacting on sport, including responding on behalf of various football and rugby bodies to proposals to list their events for mandatory FTA broadcast under the Broadcasting Act; drafting the DCMS-sponsored National Anti-Doping Policy; and assisting in the establishment of UK Anti-Doping and the National Anti-Doping Panel as independent anti-doping organisations.
- Taking action in the courts against third parties ambushing/infringing on sports bodies' events and rights, including obtaining High Court injunctions restraining (i) touting of tickets for the 2004 UEFA European Championships; and (ii) unauthorised streaming of live UCL television programming on the Internet.

Based on the quality of his work and advice, Jon has been described in the legal directories as '*simply pre-eminent*' (Legal 500) and as a '*star individual*' in the field (Chambers). In 2007, The Times listed him as one of the 11 'Best Sports Lawyers in Britain', describing him as '*a first-class act ... a pre-eminent regulatory and litigation*

# BIRD & BIRD

*lawyer ... "Unpretentious, a great bloke and a fantastic lawyer." In both 2009 and 2010, Sports Business named him one of 'The World's Twenty Most Influential Lawyers' in the sports sector. And Chambers 2011 said he is 'a titanic figure within UK sports law. He advises a broad range of sporting clients on commercial, contentious, regulatory and disciplinary issues. He is also a seasoned advocate, and has represented his clients in proceedings before a wide range of sports tribunals, including before the Court of Arbitration for Sport (CAS). Sources acknowledge that "on the disciplinary side in particular, there is no one better in sport." The praise is near-universal, with commentators describing a "phenomenally good lawyer: he is ferociously bright, exhibits great judgement and commands total loyalty from his clients."*

Jon sits as an arbitrator in sports disputes (as chairman of the International Baseball Federation's Anti-Doping Panel, and also under FA Rule K), and is also a member of the British Horseracing Authority's Ethics Committee and of the World Anti-Doping Agency's Working Group on Legal Matters. He was Director of Studies in Sports Law at King's College, London, from 2000 to 2007; and is co-editor (with Adam Lewis QC of Blackstone Chambers) of the leading UK sports law text, *Sport: Law and Practice* (Bloomsbury 3<sup>rd</sup> Edn due 2013).

# EXHIBIT 10

## Khurram A. Nizami

---

**From:** Peter Young -Contact Information Redacted  
**Sent:** Thursday, June 27, 2013 9:17 AM  
**To:** 'EXPERTISE'  
**Subject:** RE: ICC EXP/471/ICANN/88  
**Attachments:** Appointment of Jonathan Taylor sport panellist.docx  
**Importance:** High

Dear Sirs

We refer to your letter of Tuesday 25<sup>th</sup> June 2013.

Please find attached a document detailing an objection to the appointment of Mr Jonathan Taylor as panellist.

Yours faithfully

Peter Young



**Peter Young**  
*Director/Chief Legal Officer*  
*Famous Four Media Limited*  
Contact Information Redacted

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**From:** READE Emma Contact Information Redacted **On Behalf Of** EXPERTISE  
**Sent:** 25 June 2013 18:38  
**To:** Contact Information Redacted Peter Young  
**Cc:** Contact Information Redacted EXPERTISE  
**Subject:** ICC EXP/471/ICANN/88

Dear Sirs,

Please find attached our letter of today.

Faithfully yours,

Emma Reade

ICC International Centre for Expertise  
Contact Information Redacted

Tel.: Contact Information Redacted

Fax: Contact Information Redacted



Please consider the environment before printing this e-mail.

-----  
*This message is confidential. If you have received this message in error please delete it and notify the sender immediately.  
Please contact the Centre by telephone at **Contact Information Redacted**  
You should not retain the message or disclose its contents to anyone.*

-----  
*Ce message est confidentiel. Si vous avez reçu ce message par erreur, veuillez le détruire et en informer l'expéditeur.  
Veuillez contacter le Centre par téléphone au **Contact Information Redacted**  
Vous ne devez ni conserver le message, ni en révéler le contenu.*

Please note that we are submitting an objection at this time but we reserve the right to supplement the objection with additional information we discover in the allotted time to deadline which we interpret from the ICC rules as 1 July, 2013.<sup>1</sup>

We strongly object to the appointment of Mr. Jonathan Taylor as the sole panelist on the community objection against our application for the .SPORT string. First, the appointment of **any** sports lawyer seems inappropriate, for two reasons:

1. The issues at stake are not related to sports law, but are in the nature of questions of general interpretation: a sports lawyer's natural inclination will be to feel that he or she is part of a so-called "community". This is borne out by the fact that Mr Taylor has previously referred to sports "communities" in previous professional articles written by him<sup>2</sup>. This concern is notwithstanding our overall contention that for the purposes of the ICANN new gTLD Program, the complainant's assertion that a "sports community" exists falls short of meeting the ICANN requirements for such a community.
2. Any sports lawyer would, whether consciously or not, prefer a sports organization or federation (such as the objector, SportAccord) over and above a commercial registry operator (such as dot Sport Limited).

Second, Mr. Taylor's career appears to have been intertwined with, and depend heavily upon the very entities that have objected not only to our .SPORT string application, but also objected to our application for another string that is the subject of a very similar objection (.RUGBY):

### **1. Mr. Taylor is the co-head of Bird & Bird's International Sport Group.**

- "Jonathan is the co-head of Bird & Bird's Sport Group."<sup>3</sup>
- Bird & Bird is regularly retained by and represents the positions of established governing bodies which compose the membership of the objector, Sport Accord.
- Bird & Bird has become the go-to firm for the governing bodies of sport, and its client roster alone reveals the team's standing in the market, including the Football Association (FA), the International Cricket Council (ICC), the International Tennis Federation (ITF), the Premier League, the Rugby Football Union (RFU) and British Cycling, amongst others.<sup>4</sup>

### **2. Involvement with International Rugby Board**

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<sup>1</sup> See email correspondence sent to ICC 26 June 2013 from Peter Young

<sup>2</sup> [http://www.wipo.int/wipo\\_magazine/en/2012/01/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2012/01/article_0002.html) where the word "community" is mentioned 5 times

<sup>3</sup> Jonathan Taylor Attorney Page, Bird & Bird Website, [http://twobirds.com/English/Lawyers/Pages/Jonathan\\_Taylor1.aspx](http://twobirds.com/English/Lawyers/Pages/Jonathan_Taylor1.aspx), Accessed June 25, 2013

<sup>4</sup> <http://www.chambersandpartners.com/USA/Editorial/253807>

- According to his CV, Jonathan Taylor defended The International Rugby Board's match-sanctioning regulations in English High Court and before the European Commission.<sup>5</sup>
- **The International Rugby Board is a member of SportAccord<sup>6</sup> and submitted a letter to ICANN in support of SportAccord's application for the .sport TLD.<sup>7</sup> The IRB separately objected, on community grounds, to another string for which we applied, .RUGBY.**

### 3. Involvement with International Olympic Committee

- According to his CV, Jonathan Taylor drafted 'whereabouts rules' for the International Olympic Committee.
- **The International Olympic Committee is listed as having expressed their official support for SportAccord's application for the .sport TLD<sup>8</sup> and appears on SportAccord's .sport Policy Advisory Board.<sup>9</sup>**

### 4. Involvement with the International Cricket Council

- According to his CV, Jonathan Taylor drafted anti-corruption rules for the International Cricket Council and defended the council's match-sanctioning rules and decisions in English High Court.<sup>10</sup>
- **The International Cricket Council is a member of SportAccord.**
- "SportAccord is the umbrella organisation for all (Olympic and non-Olympic) international sports federations as well as organisers of multi-sports games and sport-related international associations." and appears on the "List of International Sports Federations"<sup>11</sup>

<sup>5</sup> Jonathan Taylor, Curriculum Vitae, Accessed

<sup>6</sup> "Members," SportAccord webpage, <http://www.sportaccord.com/en/members/> Accessed June 25, 2013

<sup>7</sup> In a March 26, 2012 letter from Acting CEO of the International Rugby Board, Robert Brophy, to SportAccord Director General, Vincent Gaillard, Brophy wrote, "With regard to the *sport* internet domain name, the IRB is happy to offer its formal support to this initiative. This support is offered on the understanding that depending on the direction the initiative takes, the IRB will be entitled to make a decision at a later date as to its level of involvement."

<sup>8</sup> "Attachment 20f (oo-ListSportAccord-support pdf)" ICANN Application Details webpage, <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1593> Accessed June 25, 2013

<sup>9</sup> "Policy Advisory Board," SportAccord webpage, <http://www.sportaccord.com/en/what-we-do/dot-sport/?idContent=16369> Accessed June 25, 2013

<sup>10</sup> According to Jonathan Taylor's CV, his experience includes: "Drafting sporting rules and regulations, including ... anti-corruption rules (for the International Cricket Council) ..... and match sanctioning rules and regulations (for the International Cricket Council and others)"

<sup>11</sup> Members Page, SportAccord Website, <http://www.sportaccord.com/en/members/> Accessed June 25, 2012

## 5. Involvement with the World Anti-Doping Agency

- Bird & Bird's International Sport Group represented The World Anti-Doping Agency in a dispute with The British Olympic Association over the compatibility of its doping bye-law with The World Anti-Doping Code.<sup>12</sup>
- **SportAccord lists the World Anti-Doping Agency as a partner institution on its website**, and Mr. Taylor was listed on the SportAccord 2007 Delegate List as a delegate from The World Anti-Doping Agency Legal Committee<sup>13</sup>.

## 6. Involvement with the International Tennis Federation

- In 2012, Mr. Taylor represented The International Tennis Federation before The Court Of Arbitration For Sport in the appeal of doping sanctions against Bulgarian professional tennis player Dimitar Kutrovsky, as counsel for the Respondent.<sup>14</sup>
- Mr. Taylor also represented The International Tennis Federation in its appeal of a sentence imposed on Richard Gasquet after he tested positive for cocaine metabolites.<sup>15</sup>
- **The International Tennis Federation is a member of SportAccord.**<sup>16</sup>

## 7. Involvement with FIFA

- In 2006, *The Lawyer* Named Taylor a member of FIFA's "Legal Dream Team" for his work as a partner at Hammonds, the firm representing FIFA's IP Rights Protection, UK and German ticketing and sponsorship agreements.<sup>17</sup>
- **FIFA is a member of SportAccord.**<sup>18</sup>

## 8. Mr Taylor was a SportAccord Convention Panelist

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<sup>12</sup> "Acting for the World Anti-Doping Agency in its high profile dispute with the British Olympic Association over the compatibility of its doping bye-law with the World Anti-Doping Code" Bird & Bird International Sports Group Website, <http://twobirds.com/English/Expertise/Pages/Sport.aspx> Accessed June 25, 2013

<sup>13</sup> <http://www.sportcentric.com/vsite/vfile/page/fileurl/0,11040,5035-184873-202095-120962-0-file,00.pdf>, Accessed June 25, 2013

<sup>14</sup> Arbitration CAS 2012/A/2804, Dimitar Kutrovsky v International Tennis Federation (ITF), Oct 3, 2012, <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/2804.pdf>, Accessed June 25, 2013

<sup>15</sup> Arbitral Award, Court of Arbitration for Sport, CAS 2009/A/1926, International Tennis Federation v Richard Gasquet, <http://www.itftennis.com/media/132761/132761.pdf>, Accessed June 25, 2013

<sup>16</sup> Members Page, SportAccord Website, <http://www.sportaccord.com/en/members/> Accessed June 25, 2012

<sup>17</sup> Ben Moshinsky, "Forget Argentina and Brazil – this is the real World Cup-winning team," *The Lawyer*, May 29, 2006

<sup>18</sup> Members Page, SportAccord Website, <http://www.sportaccord.com/en/members/> Accessed June 25, 2012

- In 2011, Mr. Taylor was a panelist at The 2011 LawAccord International Convention.<sup>19</sup>
- The LawAccord Conference was actually a complement to the main Sport Accord conference programme.<sup>20</sup>
- “Organisers of this year’s SportAccord Convention in London have announced that a conference of senior sports law practitioners from around the world will take place as a complement to the main conference programme.”

## 9. Involvement with the International Baseball Federation

- Mr. Taylor is chairman of The International Baseball Federation’s Anti-Doping Panel-Tribunal.<sup>21</sup>
- **The International Baseball Federation is a member of SportAccord.**<sup>22</sup>

## 10. Involvement with ICANN

- Mr. Taylor has served as counsel to a party who successfully used ICANN’s UDRP process to recover a domain name for a client. Because of this he is likely skeptical of any entrepreneurial efforts to establish new gTLDs and their potential impact on his client base.
- Mr Taylor’s team prosecuted major cases such as the landmark *Bacardi-Martini v. Newcastle United* dispute in 1998 regarding the French statute preventing alcohol brands from advertising at sporting events, and an Internet Corporation for Assigned Names and Numbers (“**the ICANN**”) dispute between a football club and a cyber squatter over a domain name.<sup>23</sup>

<sup>19</sup> “Yesterday’s LawAccord International Convention at the Park Plaza County Hall revealed the existence of tensions between sports governing bodies and the law-enforcement agencies in the battle against match-fixing

“During a debate on the case for creating an international body comparable with the World Anti-Doping Agency (WADA) to tackle match-fixing, panellist **Jonathan Taylor** of UK-based international law firm Bird & Bird declared: ‘This is a corrupt, criminal, clandestine behaviour by people who often come from outside the sport, and so are not subject to its laws. In such cases sports administrators can’t be law-enforcers – they have to go to the professional fulltime agencies’

“Lawyers debate match-fixing remedies,” *The Daily* (SportAccord International Convention Newsletter), June 4, 2011

<sup>20</sup> “SportAccord Convention unveils LawAccord conference plans,” *SportBusiness International*, Feb 24, 2011, <http://www.sportbusiness.com/sportbusiness-international/sportaccord-convention-unveils-lawaccord-conference-plans>, Accessed June 25, 2013

<sup>21</sup> IBAF 2011 Yearbook, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&sqi=2&ved=0CDQQFjAB&url=http%3A%2F%2Fwww.ibaf.org%2Fdoc%2F45d0a523-83ad-40c3-a273-c8d691b486bf%2F2011\\_IBAF\\_yearbook\\_eng.pdf&ei=TA3KUf2bH8G90gG63YH4DQ&usq=AFOjCNG1Rkklkdoko31XQam8cuQykp15AA&sig2=FNCB2MEjQc75G7LX7l-jhg&bvrm=bv48293060bs1d dmQ](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&sqi=2&ved=0CDQQFjAB&url=http%3A%2F%2Fwww.ibaf.org%2Fdoc%2F45d0a523-83ad-40c3-a273-c8d691b486bf%2F2011_IBAF_yearbook_eng.pdf&ei=TA3KUf2bH8G90gG63YH4DQ&usq=AFOjCNG1Rkklkdoko31XQam8cuQykp15AA&sig2=FNCB2MEjQc75G7LX7l-jhg&bvrm=bv48293060bs1d dmQ), Accessed June 25, 2013

<sup>22</sup> Members Page, SportAccord Website, <http://www.sportaccord.com/en/members/>, Accessed June 25, 2012

<sup>23</sup> [http://www.mylaw.net/Article/Jonathan\\_Taylor\\_The\\_man\\_behind\\_controversial\\_whereabout\\_rule/#Ucrg-JzhfLI](http://www.mylaw.net/Article/Jonathan_Taylor_The_man_behind_controversial_whereabout_rule/#Ucrg-JzhfLI) (accessed June 26)

## 11. Mr. Taylor has other strong relationships with persons involved in sport.

- Mr. Taylor serves as a member of the Editorial Board of the World Sports Law Report which carries an annual subscription rate upwards of £620. This creates an incentive to take position and outlooks that are favorable to the subscribers of this publication.
- *World Sports Law Report* has an Editorial Board that includes top practitioners that advise sport, the companies involved with it and the athletes that participate in it.<sup>24</sup>

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<sup>24</sup> [http://www.e-comlaw.com/world-sports-law-report/about\\_template.asp](http://www.e-comlaw.com/world-sports-law-report/about_template.asp)

# EXHIBIT 11



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/471/ICANN/88**

**SPORTACCORD (SWITZERLAND) vs/ DOT SPORT LIMITED (GIBRALTAR)**

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SPORTACCORD  
Mr. Pierre Germeau  
Contact Information Redacted

*By email:* Contact Information Redacted

FAMOUR FOUR MEDIA LIMITED  
Mr. Peter Young  
Contact Information Redacted

*By e-mail:* Contact Information Redacted

16 July 2013

Dear Sirs,

The Centre acknowledges receipt of Mr. Peter Young's e-mail with attachment dated 27 June 2013, sent on behalf of the Applicant, a copy of which is enclosed for the Objector's and the Expert's information.

**Correspondence**

We remind the parties that copies of all correspondence in this matter must henceforth always be sent directly to the other party and the Expert.

**Deposit for Costs**

The Centre acknowledges receipt of € 53 600 paid by the Objector, constituting its advance payment of the estimated Costs, and € 53 600 paid by the Applicant, constituting its advance payment of the estimated Costs.

Accordingly, the estimated Costs have now been paid in full by each party.

**Objection to Appointment**

We take note of the Applicant's objection to the appointment of Mr. Taylor.

Further, we note the Applicant's indication that it reserves the right to "*supplement the objection with additional information*", but that no further comments from the Applicant were received by the Centre.

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

Furthermore, and with reference to the Centre's letter dated 25 June 2013, we note that the Objector has not submitted any comments on Mr. Taylor's appointment. Therefore, we understand that the Objector does not object to the appointment of Mr. Taylor as Expert in this matter.

Accordingly, the Centre will now decide whether to confirm the appointment of Mr. Taylor.

Once the Centre has taken its decision it will either confirm the full constitution of the Expert Panel and transfer the file, or, as the case may be, proceed with the appointment of another Expert in this matter.

Should you have any questions, please do not hesitate to contact us.

Yours faithfully,



Špela Košak  
Deputy Manager  
ICC International Centre for Expertise

Enclosure: *(for the Objector and the Expert only)*:

- Applicant's email with attachment dated 27 June 2013

C.c:

- Mr. Jonathan Peter Taylor *By e-mail:* Contact Information Redacted

# EXHIBIT 12



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/486/ICANN/103**

**SPORTACCORD (SWITZERLAND) vs/ STEEL EDGE LLC (USA)**

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SPORTACCORD

Mr. Pierre Germeau

Contact Information Redacted

*By email:* Contact Information Redacted

THE IP & TECHNOLOGY LEGAL GROUP, P.C.

Mr. John M. Genga and Mr. Don C. Moody

Contact Information Redacted

*By email:* Contact Information Redacted  
*and*

16 July 2013

Dear Sirs,

The Centre acknowledges receipt of Mr. John Genga's email dated 29 June 2013, sent on behalf of the Applicant, a copy of which was directly sent to the Objector.

**Deposit for Costs**

The Centre acknowledges receipt of € 53 600 paid by the Objector, constituting its advance payment of the estimated Costs, and € 53 600 paid by the Applicant, constituting its advance payment of the estimated Costs.

Accordingly, the estimated Costs have now been paid in full by each party.

**Appointment of Mr. Taylor**

The Centre has taken note of the Applicant's indication that it does not object to the appointment of Mr. Taylor.

Further, we note that the Centre has not received any comments from Objector within the time limit granted. Accordingly, we understand that the Objector also does not object to the appointment of Mr. Taylor as Expert in this matter and the Centre herewith confirms the final constitution of the Expert Panel.

...../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

**Next Steps**

In light of the above, the Centre shall transfer the file to the Expert Panel shortly and invite it to proceed with this matter.

Yours faithfully,



Špela Košak  
Deputy Manager  
ICC International Centre for Expertise

c.c.:

- Mr. Daniel Schindler
- Mr. Jon Nevett
- Mr. Jonathan Peter Taylor

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

# EXHIBIT 13



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/471/ICANN/88**

**SPORTACCORD (SWITZERLAND) vs/ DOT SPORT LIMITED (GIBRALTAR)**

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SPORTACCORD

Mr. Pierre Germeau  
Contact Information

Redacted

*By email:* Contact Information Redacted

FAMOUR FOUR MEDIA LIMITED

Mr. Peter Young

Contact Information Redacted

*By e-mail:* Contact Information Redacted

25 July 2013

Dear Sirs,

The Centre writes to you with reference to its letter dated 16 July 2013 to inform the parties that it has decided not to confirm the appointment of Mr. Taylor as Expert in this matter.

Accordingly, the Centre will now proceed with the appointment of another Expert and inform the parties of such appointment immediately thereafter.

Subsequently, the Centre will transfer the file to the fully constituted Expert Panel.

Should you have any questions, please do not hesitate to contact us.

Yours faithfully,

Hannah Tümpel

Manager

ICC International Centre for Expertise

c.c.: - Mr. Jonathan Peter Taylor

*By e-mail:* Contact Information Redacted

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**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

# EXHIBIT 14

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/486/ICANN/103

SPORTACCORD  
(SWITZERLAND)  
vs/  
STEEL EDGE LLC  
(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

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**EXPERT DETERMINATION OF A COMMUNITY OBJECTION TO AN APPLICATION FOR A NEW  
GENERIC TOP-LEVEL DOMAIN NAME (<.SPORTS>)**

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The undersigned Expert, appointed by the International Centre for Expertise of the ICC to sit alone as the Expert Panel in the above-referenced matter, hereby issues the following Expert Determination resolving the above-referenced objection:

**A PARTIES**

1. This dispute arises under the programme established by the Internet Corporation for Assigned Names and Numbers ('**ICANN**') for the acquisition and operation of new generic top-level domain names ('**gTLD**'). Background information about that programme can be found in the ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (the '**GNSO Final Report**').
2. Steel Edge LLC of Contact Information Redacted America (the '**Applicant**'), represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C., Contact Information Redacted, is a subsidiary of Donuts Inc., which has applied, directly or through its affiliated enterprises (including the Applicant), for more than 300 new gTLDs. The Applicant submitted a New gTLD Application to ICANN for the string <.SPORTS> on 13 June 2012 (Application No. 1-1614-27785: the '**Application**').
3. SportAccord, of Contact Information Redacted (the '**Objector**'), is a Swiss association representing Olympic and non-Olympic international sports federations and organisers of international sports events. On 13 March 2013 the Objector filed a 'Community Objection' to the Application, i.e., it objected to the Application on the basis that [there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted](#). It is that Community Objection (the '**Objection**') that is being resolved in these proceedings.
4. The Objector has also applied in the same g-TLD application round for the gTLD <.SPORT>, and had a 'String Confusion Objection' against the Application sustained by a different expert on 20 August 2013, on the basis that the string <.SPORTS> is confusingly similar to the string <.SPORT>. As a result, the Expert's understanding is that if this Objection is not upheld, then (absent agreement between them) the Applicant's application for <.SPORTS> and the Objector's application for <.SPORT> will be resolved by the separate 'string contention procedure' established as part of the new gTLD programme.

## B. APPLICABLE RULES AND PROCEDURAL HISTORY

5. The rules applicable to this matter are (1) the ICANN's gTLD Applicant Guidebook (v. 2012-06-04) (the '**Guidebook**'); (2) in particular, the New gTLD Dispute Resolution Procedure attached to Module 3 of the Guidebook (the '**Procedure**'); and (3) the Rules for Expertise of the ICC (the '**Rules**'), as supplemented by (4) the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure.
6. Under Article 3(d) of the Procedure, Community Objections are administered by the International Centre for Expertise of the ICC (the '**Centre**'). On 5 April 2013, the Centre completed its administrative review of the Objection. The Centre determined that the Objection complied with all relevant requirements, and therefore notified the Applicant of the Objection. The Applicant filed a response to the Objection on 22 May 2013 (the '**Response**').
7. Pursuant to Article 13 of the Procedure and Article 3(3) of Appendix I to the Rules, on 25 June 2013 the Centre notified the parties that the Chairman of the ICC Standing Committee had appointed on 20 June 2013 the undersigned, Jonathan Taylor (of Bird & Bird LLP, 15 Fetter Lane, London, UK) to sit alone as the Expert determining this matter, and provided them with the Expert's statement of independence and impartiality. Neither party objected to the undersigned's appointment as Expert. Further to the parties' advance payment of costs in full, the Centre confirmed that appointment on 16 July 2013 and on 26 July 2013 transferred the file to the Expert. All subsequent communications between the Parties, the Expert and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. The language of all submissions and proceedings was English pursuant to Article 5(a) of the Procedure.
8. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of '[the constitution of the Panel](#)'. The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 26 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 9 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). Pursuant to Article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.
9. Article 20 of the Procedure states that for each category of objection to applications for new gTLDs, '[\(a\) ... the Panel shall apply the standards that have been defined by ICANN. \(b\) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable](#)'. The standards defined by ICANN as applicable to Community Objections to new g-TLD applications are set out in Module 3 of the Guidebook, and the most relevant parts are quoted below.

10. The Expert has considered carefully all of the submissions made and the materials put forward by the parties, in the Application, the Objection, and the Response, and the annexes to each of them, to determine whether the Objection meets the standards defined by ICANN. His findings are set out below, first in relation to standing and then in relation to the substantive requirements.

**C. FINDINGS IN RELATION TO STANDING (SECTION 3.2.2 OF THE GUIDEBOOK)**

11. A party raising a Community Objection to an application for a new gTLD must have sufficient standing to make such an objection. (Guidebook, section 3.2.2). To demonstrate that standing, it must show that it is an 'established institution associated with a clearly delineated community' that is 'strongly associated with the applied-for gTLD string'. (Guidebook, section 3.2.2 and section 3.2.2.4).
12. The Expert must therefore determine whether the Objector is (i) an established institution (ii) associated with (iii) a clearly delineated community (iv) that is strongly associated with the string <SPORTS>. The Guidebook identifies factors that may be considered in determining these issues, and they are quoted below; but the Guidebook also explains (at section 3.2.2.4) that the Expert 'will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements'.
13. First, then, is the Objector 'an established institution'?
  - 13.1 According to the Guidebook (at p.3-8), '[f]actors that may be considered in making this determination include, but are not limited to, level of global recognition of the institution; length of time the institution has been in existence; and public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process'.
  - 13.2 The Objector is a not-for-profit association that has been in existence since 1967, originally under the name 'General Association of International Sports Federations' and (since 2009) under the name 'SportAccord'. (Objection Annex 8). Constituted in accordance with and registered as an association under Articles 60-79 of the Swiss Civil Code, it functions as an umbrella organisation and representative body for its members, which are international sports federations and the organisers of international sports events, recognised as such by the International Olympic Committee, the body that heads the international sports movement. (Objection Annex 7, p.2). It started with 26 members and today it has 107 members, of which 91 are international sports federations and the

other 16 are organisers of international sports events (such as the Commonwealth Games Federation). (See Objection Annex 2).

- 13.3 The Applicant does not challenge the accuracy of any of these facts. Instead, it simply asserts that 'independent evidence' of the existence of the Objector is required, and that copies of its Statutes and a membership list that the Objector drafted itself do not satisfy this requirement. (Response p.6).
- 13.4 The Applicant does not cite any authority for this proposed requirement, and in fact as far as the Expert is aware there is not such requirement. To the contrary, according to the Guidebook, an institution's existence 'may' be demonstrated by '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'. (Guidebook, section 3.2.2.4). The 'may' indicates that this is optional, not mandatory, i.e., other evidence may suffice. The Objector has provided not only a copy of its Statutes (a formal legal document constituting it as an association under Swiss law) but also details of its registration as an association under Swiss law (see Objection Annex 9). More importantly, however, looking beyond the form to the substance, the Applicant has not actually disputed the Objector's account of its creation, its history, and its current membership. As a result, it is more than clear, in the Expert's view, that the Objector's existence as an established institution has been sufficiently evidenced.
14. Next, is the community on behalf of which the Objector claims to bring the objection 'a clearly delineated community'?:
- 14.1 According to the GNSO Final Report, the term 'community' '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'. (GNSO Final Report, Implementation Guideline P). According to the Guidebook, factors that may be considered in determining whether the 'community' identified by the objector is a clearly delineated community 'include, but are not limited to, ... the level of formal boundaries around the community'.
- 14.2 The Objector says that it represents 'the Sport community' (Objection p.6), i.e., 'the community of individuals and organizations who associate themselves with Sport. Sport is activity by individuals or teams of individuals, aimed at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience'. (Objection p.8). It asserts that this community is 'highly organized on local, national and international level. It is clearly delineated by way of its organizational structures and its values'. (Objection p.6). It explains: 'At the base level, the Sport community is structured into local clubs and event organizers. At higher levels, Sport community governance is by

regional, national, and international Sport federations. The Federations collaborate at the local, national and international levels in Sport events or with event organizers, governments, the various bodies of the Olympic Movement, and within associations of federations. SportAccord itself, the Objector, is an association comprising 107 International Sport Federations. Individual practitioners of sport, sport spectators, sport fans and sport sponsors are part of the Sport community and share its values and objectives. Above all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection pp.8-9).

- 14.3 The Applicant asserts that the Objector has 'failed to identify what comprises [the community of individuals and organizations who associate themselves with Sport] or what "boundaries" surround it', and instead is holding itself out as representing a 'boundlessly wide group'. (Response p.6). That group is 'too broad, diverse and wide-ranging in interests to be "clearly delineated".' (Response p.7). The Applicant also notes that there are various parties involved in 'the world of sport' that are not affiliated to the community identified by the Objector (such as spectators, enthusiasts, and commentators, and all those connected with sports whose international federations are not in membership of the Objector), i.e., even if the 'Sport community' identified by the Objector is a valid community, it does not cover everyone in 'the world of sport'. (Response p.6).
- 14.4 The Expert agrees that 'the community of individuals and organizations who associate themselves with Sport', on its face, is a very broad group with no clearly delineated boundaries. If the Objector had stopped there, then the Expert considers that the Applicant would be right that the Objector had failed to satisfy this requirement. However, the Objector does go on to make clear (in the passages quoted at paragraph 14.2, above) that it is referring to the individuals and organisations who associate themselves with organised sport, i.e., sport that is sanctioned and conducted in accordance with a common set of rules that are applied and enforced throughout the sport through a pyramid system of governance and control that has the IOC and the international federations at its apex, member regional federations below them, member national federations below them, and regional, league, club and individual members below them.
- 14.5 In the Expert's view, this is a 'clearly delineated' community (or, as the Applicant has put it [Application p.7], a 'well-established and closely connected group of people or organizations'). Either you participate in official, sanctioned forms of the sport, thereby submitting yourself to be bound by and to comply with the uniformly applicable rules and regulations of that sport (either by becoming a member yourself, or by playing for a member team or in a sanctioned competition), or you participate in informal,

unsanctioned and unofficial forms of sport. Either you follow these official, organised forms of sport (because you are attracted by their adherence to a uniform set of rules) or you follow other (unsanctioned and unofficial) forms of sport. This is the clear distinguishing feature of members of the community identified by the Objector. As the Objector puts it, '[a]bove all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection p.9). To make the distinction clear, this 'Sport community' that the Objector refers to (i.e., individuals and organisations who have committed themselves to a common enterprise of officially-sanctioned sport, governed and regulated by international federations and their members who are recognised by the International Olympic Committee as the sole and authoritative governing bodies of their respective sports) may be more accurately referred to as the 'Organised Sports Movement'. That is how the Expert will refer to it below; and references by the Objector to the 'Sport community' are to be taken to be references to this 'Organised Sports Movement'.

14.6 The Applicant also asserts that the word 'sport' has an 'infinite number and variety of meanings and perceptions', which means it is impossible to delineate any community meaningfully as a 'sport' community. (Response p.5). It insists that '[s]ports is too broad a term for any person or organization to claim what would amount to ownership over it'. (Response p.6). The Expert agrees that 'the world of sport' encompasses not only the Organised Sport Movement but also individuals and organisation that prefer informal, unsanctioned and unofficial forms of sport. But that does not mean that those who prefer formal, sanctioned official forms of sport do not form a clearly delineated community. Properly understood, this is not an argument that the 'Organised Sports Movement' identified by the Objector is not clearly delineated. Rather it is a separate and distinct argument that the Organised Sports Movement is not synonymous with the gTLD in issue (<.SPORTS>). That argument is addressed at paragraph 15 below.

15. Next, is the Objector 'associated with' the Organised Sports Movement?

15.1 According to the Guidebook, factors that may be considered in determining whether the objector is associated with the community in question 'include, but are not limited to, the presence of mechanisms for participation in activities, membership, and leadership; institutional purpose related to the benefit of the associated community; performance of regular activities that benefit the associated community; ...'. (Guidebook p.3-8).

15.2 The Objector explains that its Statutes create clear mechanisms for international sports bodies to become members of its General Assembly and for individuals from those bodies to be appointed to its governing Council. (Objection p.7). It notes that 91 international federations have become members, as well as 16 organisers of international sports events. It explains that its mission and its activities include helping

its members to govern and regulate their sports more effectively by addressing issues of common interest and concern to them, including establishing permanent liaisons between the international federations, defending their common goals and objectives, preserving their autonomy, and administering programmes for good sports governance, social responsibility, doping-free sport, and the fight against match-fixing and illegal betting. (Article 2 of the SportAccord Statutes, Objection Annex 1).

15.3 The Applicant does not dispute any of the above. Therefore its assertion that the Objector 'lacks any significant relationship with a substantial portion of the community it claims to represent' (Application p.7) must be based on the premise that the Objector is claiming to represent not just the Organised Sports Movement but rather 'the [whole] world of sport'. Once it is clarified that the community that the Objector claims to represent is the Organised Sports Movement, this argument falls away: it is clear that the Objector, with its 91 international federation members, has a significant relationship with the Organised Sports Movement. Indeed, one of its functions is to represent them in matters of common interest, such as this Community Objection.

16. Finally, is the Organised Sports Movement strongly associated with the string <.SPORTS>?

16.1 This seems to the Expert to be self-evident. While there are people who prefer to participate in or follow unofficial, informal and unsanctioned forms of sport, the vast majority prefer to participate in or follow sports that are official and sanctioned by IOC-recognised international federations and their members, and so are played in accordance with their system of uniform rules and regulations. The Objector notes that it has 91 international sports federations in membership, between them those international federations have an estimated 15,000 member national federations, who have an estimated 5 million club members, and (between them) tens or hundreds of millions of individual athletes participating in their respective sports. Many million more members of this community do not participate themselves but follow their sports as fans or as commercial partners (such as sponsors) who seek to associate themselves with those sports. Therefore, although the Organised Sports Movement may not encompass the whole of 'the world of sport', it encompasses the vast majority of it. The Expert accepts the Objector's assertion (Objection p.10) that when that 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 described above.

16.2 The Applicant asserts that this requirement (proof that the community is 'strongly associated with the applied-for gTLD') means 'in other words' that 'the word "sports" must readily and essentially solely bring Objector's organization to mind. Merely stating that proposition reveals its folly'. (Response p.6). First, however, the 'Objector's organization' may not be the same as the 'community' that the Objector claims to

represent. But even if one reads 'Objector's community' in place of 'Objector's organization', the Expert does not agree that that is an appropriate reformulation of the requirement: 'strongly associated with' is not the same as 'readily and essentially solely brings to mind'. The word 'sports' may not 'solely bring to mind' the Organised Sports Movement, but it is 'strongly associated with' that movement.

- 16.3 Alternatively, the Applicant says the Objector must show that the applied-for gTLD is 'uniquely or nearly uniquely' identified with the community the Objector is representing. The Applicant says that the Objector does not meet this requirement, because there are people who are not in the community that the Objector purports to represent who could nevertheless be identified with 'sports'. (Response pp.6-7).
- 16.4 The Expert agrees that the Objector does not meet this alleged requirement: there are people in 'the world of sport' who are not adherents to the Organised Sports Movement. But is it actually a requirement? In support of this alleged requirement, the Applicant asserts that 'ICANN designed the community objection ... "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people"' (Response at p.6), and (again) that 'ICANN envisioned' that the community on whose behalf an objection was brought would be "'uniquely or nearly uniquely" identified' by the applied-for gTLD. (Ibid. p.7). The Expert interprets these remarks as a suggestion that ICANN has said that an objector on behalf of a community must show that the applied-for gTLD must be 'uniquely or nearly uniquely' identified with the community represented by the objector. However, the quote does not come from the Guidebook; and upon inspection of the document from which the Applicant has taken the quote (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda'), it transpires that the words quoted are not the words of ICANN, but rather the words of a private company called eNOM, asserting (as part of its comments on the July 2009 draft of the Guidebook) what it contends the objective of the Community Objection is (or should be). In its 'Commentary and Proposed Position' on the comments on that section of the Guidebook, ICANN does not endorse the eNOM comment, instead simply saying that 'the established criteria' (i.e., those set out in the draft Guidebook) should be used. And (as already noted) eNOM's proposed gloss on the Community Objection criteria did not make its way into the final version of the Guidebook issued in June 2012.
- 16.5 As a result, the Expert considers this submission by the Applicant, which is clearly intended to induce the Expert to reject the Objection, to be extremely misleading. This is (at the very least) unfortunate. In any event, contriving an argument to support a particular position (here, that the Objection should be rejected) creates a strong

inference that there is no valid argument for that position. More generally, it does nothing for the Applicant's credibility.

16.6 As a result, the Expert rejects the suggestion that the Objector must show that <.SPORTS> uniquely or nearly uniquely identifies the Organised Sports Movement. The fact that not every single person who participates in or 'consumes' sport in one way or another is a member of the Organised Sports Movement does not mean that the Objector does not meet the standing requirements, properly construed.

17. Based on the foregoing, the Expert determines that the Objector meets all of the standing requirements set out in the Guidebook, and therefore has standing to object to the Application.

**D. FINDINGS IN RELATION TO THE SUBSTANTIVE REQUIREMENTS FOR A COMMUNITY OBJECTION (SECTION 3.5.4 OF THE GUIDEBOOK)**

18. There is a presumption in favour of granting new gTLDs, and therefore a corresponding burden on those who object to an application for a new gTLD to show why the application should not be granted. (See Guidebook, section 3.5). To sustain a Community Objection, the objector must show that 'there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted'. (Ibid., section 3.2.1). According to section 3.5.4 of the Guidebook, in order to do that, the Objector must satisfy each of the following four substantive requirements. If it does so, it has made the requisite showing; if it does not, then it has not.

**D.1 The Objector must prove that the community it invokes is 'a clearly delineated community'**

19. The Guidebook states: 'The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community and what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community ...; and the number of people or entities that make up the community. If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail'.

20. The Objection proceeds on the basis that this requirement – proof that the community invoked by the Objector is a 'clearly delineated community' – is the same as the second of the standing requirements (that the Objector shows that that the community that it claims to be associated with is 'a clearly delineated community').

21. The Applicant in contrast asserts that the test here must be 'more stringent' than the test applied in the context of standing, because 'ICANN would have no reason to make "clearly delineated" a substantive element of objection if it meant nothing more than the criterion for standing. Rules "should be interpreted so as not to render one part inoperative".' (Response p.7). It therefore proposes the following test: 'Objector must show that the string itself describes a clearly delineated community', and then notes that 'sports' means many different things, and therefore does not meet that test. (Ibid. pp.7-8).
22. The Applicant's argument is superficially attractive. The Expert does not accept it, however, for the following reasons:
  - 22.1 Where a set of rules uses a specific phrase ('clearly delineated community') twice, it would be strange to interpret that phrase one way the first time it appears and another way the second time it appears. It is so counter-intuitive that absolutely compelling grounds would be required to adopt that approach.
  - 22.2 Without wishing to split hairs, technically speaking, interpreting the phrase in the same way each time it appears does not render the second requirement 'inoperative' (as the Applicant suggests) – the Objector has to show that he meets it. Rather, it renders the second requirement redundant (because it does not add anything to what has gone before). Redundancy is never ideal, but the Expert does not consider it to be a compelling reason to construe the same phrase differently in two parts of the same rule.
  - 22.3 The fact that the Applicant suggests that 'clearly delineated community' as it appears in the first substantive requirement should be construed to mean that 'Objector must show that the string itself describes a clearly delineated community' is both ironic (because the Applicant has also suggested that that is how the second standing requirement should be construed, i.e., it proposes the same redundancy that it says the Expert should avoid) and unhelpful to the Applicant (because it is a repeat of the requirement that the Applicant suggested – wrongly – was an ICANN requirement). (See paragraph 16.4 above).
  - 22.4 While there is no system of binding precedent in an expert determination, the Expert does place reliance on the fact that another expert, construing exactly the same rules, has found that the first substantive requirement adds nothing beyond what is required by the second standing requirement: see Expert Determination dated 3 September 2013 (<FLY>), Case No. EXP/493/ICANN/110, para 13.

23. As a result, since the Expert has already found (in the context of the second standing requirement) that the community that the Objector invokes in the Objection (i.e., the Organised Sports Movement) is a clearly delineated community, it follows that the Objector has also satisfied this first substantive requirement.

**D.2 The Objector must prove that the opposition to the Application by the community invoked by the Objector is substantial**

24. The Guidebook states (at section 3.5.4, p.3-23): 'The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: number of expressions of opposition relative to the composition of the community; the representative nature of entities expressing opposition; level of recognised stature or weight among sources of opposition; diversity amongst sources of expressions of opposition, including regional, subsectors of community, leadership of community, membership of community; historical defence of the community in other contexts; and costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail'. The Applicant suggests that the Objector must establish each of these factors (Response p.8), but in fact the words quoted make it clear that these factors are not an exhaustive list of potentially relevant factors, and that therefore the Objector may meet its burden by establishing all of them, or some of them, or even none of them, provided that it establishes enough relevant factors (which may or may not be factors listed in the Guidebook) to outweigh any countervailing factors established by the Applicant.
25. The Objector states that it has received 'not just significant, but overwhelming' support for the Objection from the community it represents (i.e., the Organised Sports Movement). (Objection p.10). It notes that its Executive Committee, on whose authority the Objection has been filed, speaks for its entire membership, i.e., the 107 international sports federations/event organisers listed at Annex 2 to the Objection. It also submits with the Objection individual statements of support for the Objection from 55 of those members, as well as further statements of support from the International Olympic Committee (the body at the apex of the Olympic Movement) and the World Anti-Doping Agency (a foundation made up of representatives of both the Olympic Movement and public authorities). (Objection Annexes 3 and 4).
26. The Applicant's contention that this does not represent a 'meaningful number of expressions of opposition' from the community in question appears to be premised on that community being anyone with any interest in any form of sport. Once it is clarified that the 'Sport community' to which the Objector refers is actually the Organised Sports Movement, that contention falls away: the IOC and 55 international federations, as well as WADA, are a meaningful portion of the Organised Sports Movement by anyone's reckoning.

27. The Applicant's challenge to the 'stature of those ostensibly voicing opposition' is also rejected: the IOC, WADA and the international federations in membership of the Objector are the ultimate governing bodies of organised sport; there is no higher authority than them.
28. Accordingly, the Expert finds that the Objector has also satisfied this second substantive requirement.

**D.3 The Objector must prove that there is a strong association between the community it represents and the applied-for gTLD string**

29. The Guidebook states (at section 3.5.4): 'Targeting. The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: statements contained in application; other public statements by the applicant; and associations by the public. If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail'.
30. Once again, this appears to be a repeat of one of the standing requirements, namely the third requirement that the community with which the objector is associated is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection'. (See paragraph 16 above). Given the identical wording, the Expert considers that, absent compelling reason, they must mean the same thing in both contexts, and therefore satisfaction of the standing requirement inevitably means satisfaction of the third substantive requirement as well. Once again, the Expert draws support for that conclusion from the fact that the expert in Expert Determination dated 3 September 2013 (<.FLY>), Case No. EXP/493/ICANN/110, para 13, took the same approach.
31. Is there anything in the submissions that the parties make on this point that compels a different conclusion in this context? The only new elements are the concepts of 'explicit targeting' and 'implicit targeting', which the parties deploy to show (or to refute) the required association between the Organised Sports Movement and <.SPORTS>. This is presumably because the relevant sub-paragraph in section 3.5.4 (quoted at paragraph 29 above) is headed 'Targeting', but then no mention is made of those concepts as factors of possible relevance to this third substantive requirement. Instead, the concepts are only specifically mentioned in the context of the fourth substantive requirement. (See paragraph 38 below). This is slightly strange, but the Expert is content to review the submissions on 'explicit targeting' and 'implicit targeting' at this stage to see if anything in them compels him to depart from the conclusion previously reached (in the context of the standing requirements) that the Organised Sports Movement is strongly associated with the <.SPORTS> gTLD.
32. According to the GNSO Final Report, 'explicit targeting means there is a description of the intended use of the TLD in the application'. This must mean 'a description of the intended use of the TLD in the application that reveals that it is targeted at' the community in question. The

Objector argues that it must be found that the Application explicitly targets the Sport community the Objector represents, because if 'there is an ICANN community, it would be contradictory to pretend that there is no such thing as a Sport community'. (Objection p.10). With respect, the Expert finds this argument very difficult to follow. In response, the Applicant states that the express purpose of applying for this gTLD is 'maximising Internet participation', to which end it will 'encourage inclusiveness in the registration policies'. It says: 'This TLD is a generic term and its second level names will be attractive to a variety of Internet users. No entity, or group of entities, has exclusive rights to own or register second level names in this TLD.' In other words, the intended use of the TLD is 'open and the string itself is not tied to a specific community'. Therefore it is not targeted at any specific community. (Application p.9). However, the Expert does not believe that it follows that because the <.SPORTS> TLD will be made available to anyone, whether they are a member of the Organised Sports Movement or not, therefore use of that TLD cannot be targeted at that community. This factor seems neutral at best.

33. According to the GNSO Final Report, 'implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use'. On its face, this looks like a subjective test (i.e., does the Objector actually make such assumption/hold such belief?) rather than an objective test (is the assumption/belief reasonable?), which is slightly unusual (usually an objective approach is taken), although not unheard of. However, the Expert would normally want any subjective assumption or belief to be shown to be objectively reasonable.
34. The Objector certainly states a subjective assumption and belief that the intent and/or the effect of the use of the <.SPORTS> gTLD will be a targeting of the Organised Sports Movement. It asserts that 'modern usage' of the word 'sport' is almost exclusively associated with organised sport (i.e., what the Expert has termed the Organised Sports Movement) and thus the gTLD <.SPORTS> is clearly targeted at organised sport. (Objection p.10). It also asserts a belief that the gTLD will give associated websites 'a false sense of official sanction' that could confuse users into thinking their content is issued by or endorsed by the Organised Sports Movement. (Ibid).
35. The Applicant's response is (i) to deny that the word 'sports' mainly calls to mind organised sports (rather, it 'represents a generic form of activity and expression'); (ii) to insist that therefore <.SPORTS> is not targeted exclusively at organised sports; and (iii) to assert that the Objector has not provided any evidence to support its belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement. (Application p.9).
36. The Expert has already rejected the first two of these contentions in the context of the standing requirements, including pointing out that there is no requirement that the .SPORTS gTLD must only call to mind the organised sports movement. (See paragraph 16 above). The Expert also

considers the Objector's belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement to be a reasonable belief. (See paragraph 43.3, below).

37. As a result, the Expert sees no compelling reason to depart from his conclusion (in the context of the standing requirements: see paragraph 16 above) that there is 'a strong association' between the <.SPORTS> gTLD and the Organised Sports Movement.

**D.4 The Objector must prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted**

38. Finally, the Guidebook states (at page 3-24): 'The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted'.
39. The Expert does not consider that the reference to 'the community to which the string may be explicitly or implicitly targeted' adds anything material to the already-discussed requirement of proof that the community that the objector is associated with is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection' for purposes of standing (see paragraph 16 above) and of proof of 'a strong association between the applied-for gTLD string and the community represented by the objector' in the context of the third substantive requirement (see paragraphs 29-37 above). Since the Expert has already found that those requirements are satisfied, including finding it reasonable to believe that websites using the string <.SPORTS> will be at least implicitly targeting the Organised Sports Movement (see paragraph 29 above), it follows that this part of the fourth substantive requirement is also met.
40. That leaves the question of whether the Applicant's proposed operation of the string 'creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of' the Organised Sports Movement. The Guidebook provides the following guidance on this issue (at page 3-24): 'An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment. Factors that could be used by a panel in making this determination include but are not limited to: nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; dependence of the community on the DNS [domain name system] for its core activities; nature and extent of concrete or economic damage to the community represented by

the objector that would result from the applicant's operation of the applied-for gTLD; and level of certainty that alleged detrimental outcomes would occur'. Again, the Objector does not have to establish that each of these factors is present in order to sustain its burden. It can invoke some of these factors (and/or other factors that it can show are relevant), and those factors are then balanced against any countervailing factors established by the Applicant. However, since the Objector has the burden on this point as well, the factors it invokes must outweigh any factors invoked by the Applicant, or else the Objection must be rejected.

41. The Objector's submissions on this point (Objection pp. 11-18 and related annexes) can be summarised as follows:

41.1 First, the Objector contends that the Organised Sports Movement would suffer both economic and reputational damage from the Applicant's operation of the <.SPORTS> gTLD, because the Applicant's intended operation of the gTLD would 'disrupt Sport community policies, promote ambush marketing, increase cybersquatting and abet abuse in a way that specifically targets the Sport community'. This argument runs as follows:

41.1.1 The Organised Sports Movement already suffers serious detriment from users' abuse of the 22 existing TLDs to target and exploit the reputation and goodwill of the Sport community, including ambush marketing and brand jacking, cybersquatting and typo-squatting. (For example, the IOC alone already has to deal each year with between 5,000 and 10,000 domain name registrations that infringe its rights [Objection Annex 11], and approximately 4,500 Olympic-related domains are removed from major domain auction services each year; while the IOC has been forced to register and maintain 'hundreds of defensive registrations in many existing TLDs'). Another well-established type of abuse is the misuse of sports themes for pornography (e.g., Olympicporn.com).

41.1.2 The <.SPORTS> gTLD will be an even more effective means for abusers to target and exploit the reputation and goodwill of the Organised Sports Movement, because that TLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction'. The Objector asserts that this 'would inevitably erode consumer trust by misleading individuals through unofficial content'. For example, if users were to use the 'false sense of official sanction' arising from the <.SPORTS> gTLD to give credibility to websites selling tickets to sports events that they do not have and/or do not have the right to re-sell, so that the purchaser is defrauded out of his or her money, which would 'destroy consumer confidence and trust in the respective organizers and jeopardise events'.

41.2 The Objector also contends that the Applicant's proposed operation of the <.SPORTS> gTLD would interfere with the Organised Sports Movement's use of the Internet to promote the integrity of organised sport and to promote public confidence in the ability of the Organised Sports Movement to preserve that integrity. This argument runs as follows:

41.2.1 The Organised Sports Movement relies on mass communication via the Internet on issues such as anti-doping, anti-drug, anti-racism, ticket scalping and gambling to protect public confidence in the integrity of sport and in the ability of sports governing bodies to protect that integrity.

41.2.2 The Objector notes that the Applicant's policy of unrestricted access would inevitably mean that 'a large number of the .sport(s) domain holders in such a regime would be outside of the sport community', using the gTLD not only to exploit improperly the goodwill and other assets of the Organised Sports Movement, but also in ways that will distort and contradict the messages that the Organised Sports Movement is seeking to send about the integrity and values of (organised) sport.

41.2.3 Visitors to <.SPORTS> websites may perceive, because of that TLD, that the content of those sites is linked to, and even sanctioned by, the Organised Sports Movement. Unscrupulous users may take advantage of this to suggest, for example, that doping products (e.g., supplements) or gambling products that they are selling are connected officially to/endorsed by the Organised Sports Movement. This may cause athletes to believe that substances such as steroids are officially sanctioned when their use is in fact prohibited; and/or may lead followers of a sport to believe that its governing bodies are not in fact firmly opposed to activities that have the potential to corrupt that sport (such as certain inappropriate or illegal gambling activities), and so to lose confidence in the strength and commitment to integrity of the Organised Sports Movement.

41.2.4 The Objector asserts that the sheer number of existing domain names containing doping-related keywords (Objection Annex 15) illustrates the risk to the credibility of sport that a sports-specific gTLD would present.

41.2.5 The Objector also highlights the risk of racist content or innuendo appearing with a 'false aura of official sanction', and the difficulty in ensuring removal of such content due to a lack of legal mechanisms and practical access. It is also concerned about 'content inducing dangerous and violent behaviour'.

- 41.3 The Objector asserts that sports bodies 'would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access', i.e., because the existing ICANN anti-abuse policies are of limited effectiveness, being expensive, burdensome, and impracticable in many respects. For example, 'IOC has filed numerous UDRP complaints. However, UDRP proceedings are too costly for systematic use'. It is therefore concerned about creating many further opportunities for abuse (indeed, more targeted abuse) through the <.SPORTS> gTLD. It says the only way to prevent abuse of the kind it has identified would be to submit the gTLD operator to 'a sport-specific acceptable use policy covering general sports values and sport-related economic interests, such as safeguards against ambush marketing', and to make it accountable to the Sport community for compliance with that policy, by means of 'direct oversight before and after domain registration, as well as a path for rapid corrective or disciplinary action ... '. Otherwise, for example, 'an unaccountable operator of a .sport TLD will not be willing or able to monitor its name space with respect to doping-abetting content' and is therefore 'certain to encumber community efforts against doping'.
- 41.4 The Objector notes that the Applicant 'lack[s] accountability to the Sport community' and that 'the TLD policies described in [the Application] are devoid of any oversight mechanism specific to the Sport community'. It asserts that, rather than having an interest in 'protecting the official message and image of the [Organised Sport Movement]', the Applicant 'has a pecuniary interest in maximising the registration of second-level domain names, including unauthorized registrations of community stakeholders' names, variants of those names, and misspellings of those names'. It notes in this regard that Donuts (the Applicant's parent company) is closely associated with Demand Media Group (Response Exhibit 1, Q.23), which has had 22 rulings against it since September 2008 for bad faith domain name registrations, typo-squatting, and cyber-squatting. (Objection Annex 12, email dated 28.07.12, para 7). It notes that Demand Media Group has an option to 107 of the gTLDs for which Donuts and its affiliates have applied. (Objection p.26).
- 41.5 The Objector asserts that, as a result of the above, the Olympic Sports Movement will suffer substantial monetary damage, but also reputational damage, and damage to the values and image of sport (Objection p.17, and Annex 13); ICANN and internet governance capabilities will be overloaded; and society will lose the benefits that could have been achieved through responsible management, as well as an opportunity to create a 'powerful organizational tool' (just as the .edu TLD was harnessed in the US for educational benefits rather than monetised). The Objector asserts that these effects will be 'largely irreversible', in that they will 'destroy the image of the domain', and 'it will not be possible to clean it up and get the public to "unlearn" the perception of abuse and chaos'.

42. In response, the Appellant makes the following submissions:
- 42.1 The Applicant acknowledges the risks of cyber-squatting and similar forms of abuse, but asserts that it is 'committed to safeguards that surpass ICANN's requirements for the new TLDs' that will 'reduce the extent of bad behaviour seen in large registries now'. (Response Annex 10). It asserts that the Objector 'tenders not a shred of evidence that Applicant's proposed string would create any greater or different harm to the sport "community" than it apparently experiences under the existing regime'. (Response p.10). In other words, if harm arises, it will not have been caused by the <.SPORTS> gTLD. (Ibid.).
- 42.2 The Applicant openly acknowledges and indeed seeks to make a virtue out of the fact that it 'will not limit eligibility or otherwise exclude legitimate registrants in second level names'. (Response Annex 3 p.12). For example, it says that it would give access to the <.SPORTS> gTLD to 'bloggers, athletes, enthusiasts, and even those not specifically identified with the term'. (Response p.4). However, the Applicant disagrees with the Objector that this will cause material detriment to the Organised Sports Movement. In particular, it says that it will put in place registration policies that include the 14 mechanisms required by ICANN for the new gTLDs, but also 'eight innovative and forceful mechanisms and resources that far exceed [those] already powerful protections', to 'address the exact type of concerns raised by Objector'. (Response tab 3, Exh 1). It asserts that these mechanisms 'protect and eradicate abuse, rather than attempting to do so by limiting registrant eligibility'. (Response tab 3 Exhibit 1, p.11).
- 42.3 The Applicant acknowledges these policies will not prevent the Olympic Sports Movement losing domain names corresponding to non-trademark protected individuals, events and organisations to speculators, but contends that this is a 'reasonable consequence rather than a detriment' within the meaning of the Guidebook. (Response p.12). It argues that it would be improper to give recognition in this context to anything that is not already protected by intellectual property law, and that imposing registration restrictions as suggested by the Objector would 'hinder free speech, competition and innovation in the namespace', which would be contrary to the objectives of ICANN. (Response p.11).
- 42.4 In summary, the Applicant contends that 'the world of sport has not collapsed as a result of the Internet, and will not do so with a new gTLD that provides greater protections than cyberspace has ever known'. (Response p.13). It also asserts: 'In essence, the Objection contends that harm will result unless Objector runs the domain. That notion stands for the one proposition that ICANN has expressly stated cannot form the basis for a finding of detriment: "An allegation of detriment that consist of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment"'. (Response p.5).

43. The Expert's analysis of the foregoing factors identified by the parties is as follows:

43.1 The Applicant does not dispute that use of current TLDs includes abusive use that unfairly prejudices the intellectual property rights of members of the Organised Sports Movement. It simply says that there is no evidence that such abuse will be 'any greater or different' if the Applicant is delegated the <SPORTS> gTLD. That does not seem to the Expert to be a very attractive argument. The test is whether the Objector can show any detriment from the proposed use of the new gTLD; there is nothing to suggest that detriment of the type that it already suffers from abuse of the existing TLDs should be excluded for these purposes. And in any event, the creation of the new TLD would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the Organised Sports Movement to identify and try to take action against such abuse). And if it is correct that the new gTLD risks giving new sites and their content an aura of official sanction (which the Expert finds to be a reasonable assertion: see paragraph 43.3 below), then not only are there more opportunities for abuse, but the risk of detriment is greater from them. As a result, the Expert considers that this factor tips in favour of the Objector.

43.2 Furthermore, the Applicant openly acknowledges that it will grant use of domain names corresponding to non-trademark protected individuals, events and organisations to speculators. It simply says that this is not a detriment but a 'reasonable consequence' of the freedoms contemplated by the new gTLD programme. This seems to the Expert to boil down to the following question: assuming that such conduct does not infringe a formal legal 'right' of those members of the Organised Sports Movement, does the Organised Sports Movement nevertheless have a 'legitimate interest' in preventing speculators creating and exploiting an unauthorised association between their websites and the individuals, events and organisations in question for their own commercial and other purposes, and to the detriment of those individuals, events and organisations? The Expert sees no reason why this should not be recognised as a 'legitimate interest' in this context. The Applicant's assertion that doing so would 'hinder free speech, competition and innovation in the namespace' seems to the Expert to beg the question. The purpose of the new gTLD programme is indeed stated to be to promote free speech, competition and innovation. However, the creation of the 'Community Objection' mechanism reflects an acknowledgement that those are not absolute values, but instead can and should be subject to proportionate restrictions where necessary to avoid detriment to the rights and legitimate interests of a community. The balance is struck by putting the burden of proof on the party making the objection on behalf of the community to satisfy each of the elements of the Community Objection. Therefore, it adds nothing to say that the Objector's stance would 'hinder free speech, competition and innovation in the namespace'. The only question is whether the required likelihood of detriment to the rights or legitimate interests of the Organised Sports Movement has

been shown. If so, then any hindrance of free speech, competition and innovation that follows is necessarily justified, and so not a reason to reject the objection.

43.3 The Expert also considers that the Organised Sports Movement has a 'legitimate interest' in preserving the integrity of sport and the authenticity of results, and in ensuring the public has confidence in its readiness, willingness and ability to do so. Indeed, unless sport is not only 'straight' but seen to be 'straight', then the public's confidence in uncertainty of outcome – the very essence of sport -- will be compromised, which would be nothing short of disastrous for the Organised Sports Movement. Furthermore, the Expert agrees with the Objector that users of current TLDs (particularly supplement companies) often do seek to suggest that the content of their sites and/or the products they are selling are officially endorsed by the Organised Sports Movement. (See, e.g., Kendrick v. ITF, CAS 2011/A/2518, award dated 10 November 2011, where an athlete was misled into taking a supplement that contained a prohibited substance by the false claim on the manufacturer's website that the supplement had been 'approved' by the 'World Anti-Doping Association' [*sic*]). Therefore, if the Objector is correct that the <.SPORTS> gTLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction', the Expert would agree that a likelihood of detriment to the legitimate interests of the Organised Sports Movement has been established. The Expert has already found that there is a 'strong association' between the <.SPORTS> gTLD and the Organised Sports Movement, in that 'when that vast majority (many millions of organisations and individuals around the world) think of sports, they think of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model described above'. (See paragraph 16.1 above). That does not automatically mean that they would assume that sites (or content on sites) with that string in their domain name would necessarily be 'official' or 'sanctioned' content, but it is clearly reasonable to think there is a risk that they might. For example, it is easy to see that a website with the domain name 'olympic.sports' might be perceived by Internet users as having an aura of authenticity and official association with the International Olympic Committee and/or the Olympic Games. As a result, this is also a factor that tilts in favour of finding the detriment requirement met.

43.4 The Applicant does not make good its assertion that its intended registration policies will 'address the exact type of concerns raised by Objector'. In fact, the 'abuse' that the Applicant seeks to prevent in its policies appears to be confined to infringements of intellectual property rights and 'fraudulent activity' such as distribution of malware, phishing, DNS hijacking or poisoning and spam. (Response p.10 and Exh. 1 Q28.3 [TLD Anti-Abuse Policy]). As noted above, the Applicant openly says it would not prevent ambush marketing through unauthorised use of famous names (because it does not regard that as abusive). (See paragraph 42.3 above). Similarly, there is

nothing in the Applicant's policies that would prevent users from operating their sites and/or putting content on them in a manner that falsely suggested an association with or endorsement by the Organised Sports Movement. The Expert therefore accepts the Objector's submission that the Applicant 'will not be willing or able to monitor its name space with respect to doping-abetting content', thereby undermining the Organised Sports Movement's ability to fight against doping in sport. It is also relevant in this regard that ICANN has said that '[w]hile ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs'. (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda', p.21).

- 43.5 The Expert agrees with the Applicant that the Objector's assessment of economic and other losses (including opportunity costs) is not particularly compelling. In particular, the Objector has not been able to come up with a meaningful estimate of the economic damage it would suffer if the Application were granted. That is not surprising, however, given the nature of the potential detriment identified by the Objector. Furthermore, and in any event, the detriment test under section 3.5.4 of the Guidebook is that of 'a likelihood of material detriment', not an actual, quantified damage. The Expert does not regard this as a sufficiently strong negative factor to outweigh the factors set out above.
- 43.6 Finally, the Applicant is correct that the Guidebook states '[a]n allegation of detriment that consists of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment'. However, as far as the Expert is aware, the Objector has not applied to have the gTLD <.SPORTS> delegated to it (only <.SPORT>). (Objection p.10). And in any event, the sorts of protections that the Objector says would be required in connection with the exploitation of the <.SPORTS> gTLD (i.e., a sports-specific acceptable use policy and a mechanism for making the operator of the gTLD accountable to the Organised Sports Movement for enforcing that policy) seem to the Expert to be measures that could be put in place by any entity, not only an entity that was part of the Organised Sports Movement. As the Expert reads the Objection, the Objector does not suggest otherwise.
44. Balancing all of these factors, the Expert considers that the factors of detriment to the rights and legitimate interests of the Organised Sports Movement that have been established by the Objector outweigh the contrary factors cited by the Applicant, and therefore the Objector has met its burden of proof on this issue as well.

**E. DETERMINATION**

45. For the reasons set out above, and in accordance with Article 21(d) of the Procedure, the Expert renders the following Expert Determination:

- i. The objection is successful and therefore the Objector is the prevailing party.
- ii. The Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.



.....  
Jonathan Taylor, Expert

Dated: 21 January 2014

# EXHIBIT 15



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

By fax

Mr Paul J. Greene  
Preti Flaherty Beliveau & Pachios LLP  
Contact Information Redacted

Mr Jonathan Taylor  
Bird & Bird LLP  
Contact Information Redacted

Lausanne, 10 November 2011/WS/cm

**Re: CAS 2011/A/2518 Robert Kendrick v. International Tennis Federation**

Dear Sirs,

Please find enclosed the Arbitral Award, with grounds, issued by the Court of Arbitration for Sport in the above-referenced matter.

You will receive an original copy of the award, signed by all the arbitrators, in due course.

Please be advised that I remain at the parties' disposal for any further information.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'W. Sternheimer', is written over a horizontal line.

William STERNHEIMER  
Counsel to the CAS

Enc.  
c.c.: Panel



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2011/A/2518 Robert Kendrick v. ITF**

**ARBITRAL AWARD**

delivered by the

**COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

President: Mr Graeme Mew, barrister-at-law in Toronto, Canada

Arbitrators: Mr Jeffrey G. Benz, attorney-at-law in Los Angeles, California, USA

The Hon. Michael J. Beloff Q.C., barrister-at-law in London, United Kingdom

in the arbitration between

**ROBERT KENDRICK, USA**

Represented by Mr Brent J. Nowicki, attorney-at-law in Buffalo, New York, USA and Mr Paul J. Greene and Ms Erin Berry, attorneys-at-law in Portland, Maine, USA

- Appellant-

**and**

**INTERNATIONAL TENNIS FEDERATION, London, United Kingdom**

Represented by Mr Jonathan Taylor, solicitor in London, United Kingdom

- Respondent-

**1. THE PARTIES**

- 1.1 The Appellant, Robert Kendrick ("Kendrick") is a 31 year old professional tennis player from the United States.
- 1.2 The Respondent, International Tennis Federation ("ITF") is the world governing body for the sport of tennis. Its responsibilities include the management and enforcement of the Tennis Anti-Doping Programme (the "Programme").

**2. THE DECISION**

- 2.1 Kendrick appeals a decision of the Independent Anti-Doping Tribunal of the ITF (the "ITF Tribunal") dated 29 July 2011 (the "Decision") imposing sanctions upon him for a doping offence.
- 2.2 The appeal is against the sanctions only.

**3. FACTUAL BACKGROUND**

- 3.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
- 3.2 The facts in this case are straightforward and are not substantially in dispute.
- 3.3 Kendrick is an experienced 31 year old professional tennis player who was ranked in the top 100 in the ATP weekly rankings. He lives in Orlando, Florida, in the United States, but his tennis schedule requires him to travel internationally to compete in the top tennis events worldwide. He became a professional tennis player in 2000.
- 3.4 On 19 May 2011, Kendrick left his home in Florida to travel to Paris to participate in the Grand Slam French Open Championship (the "French Open") at Roland Garros. He arrived in Paris late the following morning and his first match was scheduled for 22 May 2011, just two days later.
- 3.5 Kendrick travelled to this tournament so close to his first competition date because his fiancée was very late in the term of her pregnancy with the couple's first child – she was 37 weeks pregnant - and he did not want to be away from her for longer than he was required to be. Kendrick was therefore keen to reduce his risk of suffering the negative effects of jetlag with respect to his participation in the French Open since he

had suffered episodes of jetlag arising from similar tight scheduling when he had competed in Barcelona and Munich earlier in 2011.

- 3.6 Sometime during the week of 9 May 2011, approximately a week prior to his departure for the French Open, Kendrick discussed his jetlag concerns with an acquaintance, Mr. Jim Rich ("Rich"), in the presence of his coach, Mr. Richard Schmidt ("Schmidt"), at Kendrick's home practice facility, the Winter Park Racquet Club in Florida, where Schmidt was the head teaching professional. Kendrick had known Rich for approximately four years. Rich was described as a US Tennis Association certified tennis teaching professional with over 30 years' experience who also coached at that facility.
- 3.7 During his discussions with Kendrick, Rich suggested that Kendrick should try a product called Zija XM3 ("Zija"). Rich also handed to Kendrick an unmarked package containing two Zija capsules. Rich represented to Kendrick that he had previously given the product to several other athletes to assist with jetlag problems and that he had always received positive feedback about their effect. Kendrick asked Rich if Zija contained anything that was illegal or banned and Rich assured him that it did not. According to Kendrick, Rich told him that Zija was "an all-natural and organic product from the Moringa tree." Rich also told Kendrick that he was not aware of any athlete ever having tested positive for a banned substance after taking Zija. Schmidt, Kendrick's long time coach, was present through this entire conversation and did not express concerns to Kendrick, although he did suggest to Kendrick that he should do Internet research on the product before taking it. Because Rich's wife was a distributor of Zija, Kendrick considered Rich a trustworthy source of information about Zija.
- 3.8 In his over 10 years on the professional circuit, Kendrick had been tested approximately 20-25 times prior to this episode without incident, so he was aware of his obligation to avoid ingesting prohibited substances and told us that, accordingly, he tried to fulfill it in this case. Kendrick also admitted at the hearing that he knew that nutritional supplements could be contaminated and could give rise to inadvertent positive tests for prohibited substances and that they "were a risk area."
- 3.9 Kendrick acknowledged having received a wallet card from the ITF containing information about the Programme and the Prohibited List and providing a telephone number for doping-related inquiries. He conceded, however, that he had not retained the card. There was testimony from Kendrick and other witnesses that athletes in ITF events generally did not pay much attention to the wallet card. The Panel must express their concern about this phenomenon which tends to undermine the fight against doping.
- 3.10 Kendrick was apparently not prepared to rely solely on Rich's representations and spent some time researching Zija on the Internet. Kendrick testified that he spent about 30 minutes on the Internet doing his research the first day, after returning from

the tennis facility, in trying to find an ingredient list for the product (in the proceeding below, Kendrick had estimated that he had spent an hour in this research). Kendrick also testified that he conducted further research the next day and “another day”. The amount of time he claimed to have spent varied between his testimony before the ITF Tribunal and before us, but as will be plain from our decision below, the amount of time under any of his estimates was not considerable and, in our judgment, insufficient given what was at stake. Kendrick was apparently unsuccessful in his efforts to locate an ingredients list or otherwise determine the ingredients contained in Zija on the Internet.

- 3.11 As a result of his search for “Zija XM3 and Approved by World Anti Doping Agency”, Kendrick located two web pages on the Internet that stated the following about Zija:

*APPROVED BY THE  
WORLD ANTI DOPING ASSOCIATION  
and WORLD ANTI DOPING ASSOCIATION APPROVED*

*Can you strength train and condition using the XM3 drink without the worry of a governing body (NCAA, NFL, MLB, NBA, IOC)?*

*The answer is a resounding yes!!! XM3 is legal under all FDA regulations because it does not contain the alkaloids restricted by the Food and Drug Administration . . .*

*With all the scrutiny regarding vitamins, hormones and supplements in today's athletic world, you can relax and enjoy the Zija XM3 with the knowledge that we are concerned for your health and follow the strictest protocols for acquisition of ingredients and manufacturing.*

*XM3 is used as a training mainstay for many professional and amateur athletes. Names such as Anton Apollo [sic] Ono (Olympic speed skater), Monterio Hardesty (running back of Cleveland Browns), Chris Scott (offensive lineman for the Pittsburgh Steelers), and Tyler Smith (Former Tennessee men's basketball star) make the SM3 energy drink a daily part of their training regimen . . .*

*XM3 is energy enhancement, appetite suppression and nutrition formulated from safe and all-natural ingredients.*

- 3.12 Kendrick also searched the web by searching in google.com the following search terms: “Zija”, “banned substance”, “approved by World Anti Doping Agency”, “organic”, “safe”, “moringa”, and “Apollo Anton Ohno.”

- 3.13 As a result of finding the above websites, the claimed use of Zija by other high level athletes and his inability to discover anything negative about Zija, in particular that it contained banned or prohibited substances on the Internet, Kendrick concluded that it would be appropriate for him to take one capsule of the Zija that had been given to him by Rich in the unmarked package.
- 3.14 Kendrick apparently overlooked numerous websites that would have been featured on the first page of his searches using his search terms that could have alerted him to the significant issues with the Zija websites he did find. Specifically, there was evidence that Kendrick missed websites listing the ingredients of Zija which showed that labelled packages for Zija indicating the presence of dimethylpentylamine, the ingredient for which Kendrick ultimately tested positive, was disclosed. In addition, there were blogs that were apparent from Internet searches using the terms used by Kendrick indicating that there were serious issues with the various claims made by the two webpages found by Kendrick, including the claim – incorrect as it emerged - that USADA and WADA had approved Zija and that Apolo Ohno used Zija.
- 3.15 Mr. Taylor, for the ITF, suggested to Kendrick that he was resiling from evidence that he gave to the ITF Tribunal concerning an Internet article entitled “Zija – Why I Don’t Like It”. A link to this article showed up on a Google search for “Zija XM3”. Before the ITF Tribunal, Kendrick said that while he recalled identifying the link to the article, he had not looked at the article itself. In his evidence to the Panel, Kendrick said that he had been nervous when he gave evidence to the ITF Tribunal. He testified that if he had in fact seen the link to the article, it would have raised a red flag and he was sure he would have followed the link to the article. Whichever the correct version of events, he, on his own admission, did not read the article to which a link was indeed available.
- 3.16 Following his arrival in Paris, Kendrick ingested one Zija capsule on 20 May 2011 with his lunch. Later that evening he also took Ambien, a prescription sleep aid. Kendrick knew he would be subject to in competition testing at the French Open but did not expect to test positive for a banned substance because, as a result of his research, he had no reason to believe that Zija contained any such substance.
- 3.17 Kendrick testified that at this time, due both to his fiancée being 37 weeks pregnant and to this being his swansong year on the tour, he had serious matters on his mind other than the tennis at hand, although he agreed that he nonetheless focused on competing the French Open.
- 3.18 On 22 May 2011, Kendrick played in his first round match in the French Open where he lost in four sets. Afterwards, Kendrick provided an in-competition urine sample. He did not disclose his use of either Ambien or Zija on the Doping Control Form which he completed at that time.

- 3.19 After being notified that his in competition urine sample had tested positive for the prohibited substance dimethylpentylamine aka methylhexaneamine or MHA, Kendrick, to his credit, promptly (within two days) accepted a voluntary suspension from competition, so that the ITF could embark on the proceedings that ultimately led to this appeal.
- 3.20 There is no dispute over whether or not Kendrick ingested Zija to enhance his athletic performance. The evidence was uncontroverted – and the ITF accepted – that Kendrick took Zija simply to counteract the negative effects of jetlag and he made some effort to determine that Zija did not contain prohibited substances, however deficient that effort might have been.
- 3.21 On 29 July 2011, a hearing took place in London before the Independent Anti-Doping Tribunal of the ITF, which heard from Kendrick (via videolink) and from Dr. Stuart Miller, the ITF Anti-Doping Manager. The ITF Tribunal also had before it affidavits from Jim Rich, Richard Smith and Kendrick himself. Following the hearing, the ITF Tribunal made the following determinations:

*... the Tribunal:*

*(1) Confirms the commission of the doping offence specified in the Charge;*

*(2) Orders that Mr Kendrick's individual result must be disqualified in respect of the French Open 2011, and in consequence rules that the 10 ranking points and €15,000 in prize money obtained by him from his participation in that event must be forfeited;*

*(3) Orders further that Mr Kendrick be permitted to retain the prize money obtained by him from his participation in the subsequent UNICEF Open;*

*(4) Finds that Mr Kendrick has established that the circumstances of his doping offence bring him within the provisions of Article M.4 of the Programme;*

*(5) Declares Mr Kendrick ineligible for a period of 12 months, commencing on 22 May 2011, from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or by any national or regional entity which is a member of the ITF or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.*

**4. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

- 4.1 On 2 August 2011 Kendrick filed an appeal with the Court of Arbitration for Sport (the "CAS") against the decision of the Independent Anti-Doping Tribunal of the ITF dated 29 July 2011 (the "ITF Decision") pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").
- 4.2 Pursuant to Article R52 of the Code, the CAS, with the agreement of the parties, proceeded in an expedited manner.
- 4.3 On 5 August 2011, in accordance with Article R51 of the Code and the procedural timetable agreed upon by the parties, Kendrick filed his appeal brief.
- 4.4 On 12 August 2011, in accordance with Article R55 of the Code and the procedural timetable agreed upon by the parties, the Respondent filed its answer.

**5. THE CONSTITUTION OF THE PANEL AND THE HEARING**

- 5.1 By notice dated 9 August 2011, the CAS notified the parties that the Panel to hear the appeal had been constituted as follows: Mr Graeme Mew, President of the Panel, Mr Jeffrey Benz and the Hon. Michael J. Beloff QC, arbitrators. The parties did not raise any objection as to the constitution and composition of the Panel then or at the hearing.
- 5.2 On 11 August 2011, an Order of Procedure was made (amended on 12 August 2011).
- 5.3 The Order of Procedure scheduled a hearing on 18 August 2011 in New York, NY, United States of America for reasons of urgency arising out of Kendrick's desire, if his appeal succeeded, to participate in the Grand Slam US Open Championship at New York, NY, from 23 August 2011.
- 5.4 On 18 August 2011, a hearing was duly held at the premises of the International Centre for Dispute Resolution, a division of the American Arbitration Association, in New York, NY..
- 5.5 The following persons attended the hearing:

For the Appellant: Mr Paul J. Greene, Mr Brent J. Nowicki and Ms Erin Berry,  
counsel for the Appellant  
Mr Robert Kendrick, the Appellant

For the Respondent: Mr Jonathan Taylor, counsel for the Respondent  
Dr Stuart Miller, ITF Anti-Doping Manager

5.6 The Panel was assisted at the hearing by Mr William Sternheimer, Counsel to the CAS.

5.7 At the hearing the Panel heard the detailed submissions of counsel as well as the evidence of the following witnesses:

- Kendrick, who testified on his own behalf concerning his background and experience as a tennis player, his knowledge of anti-doping measures, his use of Zija, the efforts taken by him to ensure that not prohibited substance entered his body and the consequences of the sanction imposed by the ITF Decision.
- Mr. Tom Gullikson, a national coach employed by the United States Tennis Association and a former professional tennis player, who testified by telephone about his acquaintance with Kendrick since Kendrick was a junior player, Kendrick's contributions to the sport as a player and role model and the consequences of the sanction imposed by the ITF Decision.
- Mr. James Blake, a professional tennis player and a member of the Players' Council for two years, who also testified by telephone that he and Kendrick had played together on the professional tennis circuit since 2000. He said that Kendrick was a responsible, well-liked and respected professional. He too spoke of the consequences for Kendrick of the sanction imposed by the ITF Decision and about the ITF anti-doping wallet card and its use by players.

## 6. JURISDICTION OF THE CAS AND ADMISSIBILITY

6.1 Article R47 of the Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

6.2 CAS jurisdiction in this matter is derived from Rule O of the Programme which states that a participant who is the subject of a decision may appeal an ITF decision regarding consequences for an Anti-Doping Rule Violation to the CAS within 21 days from the date of receipt of the decision.

6.3 The ITF Decision rendered its decision on 29 July 2011. Kendrick's statement of appeal was filed on 2 August 2011 and is therefore admissible.

## 7. APPLICABLE LAW

7.1 Article R58 of the Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

- 7.2 This appeal is governed by the Provisions of the Programme and the World Anti-Doping Code (the "WADC"), as interpreted and applied by the CAS (with relevant decisions of lower panels of persuasive authority). The comments to the WADC are to be used as a guide to the interpretation of the Programme, and English law applies complementarily (Programme, Article A.8)

## **8. ISSUES**

- 8.1 The standard of review on appeal and, in particular, whether there should be any deference to the ITF Decision; and
- 8.2 Whether Kendrick's degree of fault merits a reduction or change of the period of Ineligibility of 12 months imposed by the ITF Decision.

## **9. THE PARTIES' SUBMISSIONS**

### **A. Appellant's Submissions and Requests for Relief**

- 9.1 In summary, Kendrick submits the following in support of its appeal:
- 9.2 There should be no deference to the ITF Decision. Article R57 of the Code provides that the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged, or annul the decision and refer the case back to the previous instance body.
- 9.3 The 12 month sanction imposed by the ITF Decision was grossly disproportionate and should be reduced to three months, running from the date of sample collection (i.e. 22 May 2011).
- 9.4 Kendrick's adverse analytical finding arose from his use of a supplement – Zija – which was provided to him to assist with jetlag before he left Orlando to travel to Paris to participate at the 2011 French Open.
- 9.5 Kendrick received the Zija from Rich, a USTA professional tennis coach and a colleague of Kendrick's coach, Schmidt. Rich had told Kendrick that Zija was a 100% organic energy and nutritional supplement which would assist him in overcoming the effects of jetlag after his arrival in France. Kendrick took one of the two capsules of

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- Zija that he had been provided shortly after landing in Paris (and two days before he competed in the French Open).
- 9.6 The ITF Decision had accepted that Zija was the source of the MHA which was subsequently detected in Kendrick's system, and that Kendrick did not ingest Zija to enhance sport performance.
- 9.7 Before using Zija, Kendrick had received Rich's assurance that he had given Zija to other athletes and that it was "clean". Kendrick had known Rich for several years, and his conversation with Rich had taken place in the presence of Schmidt, Kendrick's coach. Kendrick's trust in Rich was reasonable.
- 9.8 In addition, Kendrick had undertaken his own research. He had noted the claim on the manufacturer's website that Zija XM3 was approved by the "World Anti-Doping Association". He had failed to realise that the correct name for WADA is the World Anti-Doping Agency but it was unfair to characterise that failure as evidence of a "casual attitude" on Kendrick's part (as found by the ITF Decision) or "reckless or "cavalier" behaviour.
- 9.9 Furthermore greater consideration should have been given to the Kendrick's personal circumstances at the time. His fiancée was 37 weeks pregnant and scheduled to give birth at any time, which is why he delayed his departure to Paris until the last moment.
- 9.10 As a result of the adverse analytical finding, Kendrick's expected losses from the 2011 French Open, and the Hertogenbosch and Wimbledon events are US\$46,000 – nearly half of his total earnings for the year to date. He will also have lost so many valuable ranking points that, if his sanction were not reduced to three months, he may have fallen too far back to even consider playing another year on tour.
- 9.11 As it is, Kendrick had planned to retire from the tour after playing in the 2011 US Open. Reduction of the period of ineligibility to three months would enable him to end his career in the major tournament in the country of which he is a national.
- 9.12 The WADC directs the Panel to consider an athlete's degree of fault for ingesting a Specified Substance when determining the applicable sanction. When considering fault, the Panel should focus on three points:
- a. The fault must be the player's own (Kendrick accepts that any fault associated with his actions is his own, notwithstanding what Mr. Rich may have said or the results of his internet research);
  - b. Culpable conduct that resulted in the commission of a doping offence exhibits a greater degree of degree of fault than mere inadvertence;
  - c. Where the player neither sought nor obtained any actual unfair sporting advantage from ingesting a banned substance and there is consequently no

unfairness to other players, respect for the “proportionality” makes it proper for the Panel to take into consideration the fact that the player will have suffered for his fault significantly by losing, among other things, ranking points and money.

9.13 Jurisprudence from the CAS as well as of other sports federations and associations supports the view that a 12 month sanction is grossly disproportionate in the light of similar MHA and Specified Substance cases which involved similar levels of lack of due diligence, and not in keeping with the WADC’s goal to “harmonize” sanctions throughout sport:

- a. *Foggo v National Rugby League*, CAS A2/2011 – a professional rugby league player purchased and used a supplement called “Jack3d” which had resulted in an adverse analytical finding from MHA. The use of pre workout supplements was encouraged by the athlete’s club. The athlete himself had received very limited formal anti-doping education. However the athlete had been assured by the store owner that the product was clean and had consulted his conditioning coach and undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of **six months** ineligibility was imposed.
- b. *Koubek v ITF*, CAS 2005/A/828 – a professional tennis player received a glucocorticosteroid from a doctor (who he had never previously consulted) to assist with pain in his wrist. He was informed by the doctor that the injection would not cause any difficulty with doping. However the player had not kept, and hence did not show the doctor, an anti-doping wallet card that had been provided to athletes. For that, and several other reasons, he was held not to have behaved with utmost caution. Two weeks later he was tested resulting in an adverse analytical finding. The sanction of **three months** ineligibility was imposed.
- c. *UKAD v Dooler*, UKNADP, 24 November 2010 – a semi-professional rugby league player tested positive for the presence of MHA. The source of this result was a product called “Xtreme Nox Pump” which he had taken at half time during a match to alleviate post-match fatigue and muscle pain. The product was in fact more directed towards improving training performance. He did not discuss his use of the product on match days with his team doctor and/or coaches. However, it was accepted that internet searches would not readily have identified that the product might contain MHA. A sanction of **four months** ineligibility was imposed.
- d. *RFU v Steenkamp* RFU Disciplinary Hearing, 22 March 2011 – a semi-professional rugby union player used what he believed to be an energy drink. The drink had been recommended by a qualified fitness instructor who had, after checking, assured him that the product contained no banned substances. He tested positive for MHA. A sanction of **three months** of ineligibility was imposed.

- e. *RFU v Wihongi* RFU Disciplinary Hearing, 16 March 2011 – a professional rugby union player picked up a green bottle in the team dressing room at half-time during a match, believing it to contain water. He started to drink the contents but quickly realised that it contained a sport drink that had been prepared by team coaching personnel for another player and stopped drinking. He subsequently tested positive for MHA. A sanction of **four months** ineligibility was imposed.
- f. *SARU v Ralapelle and Basson* (SARU Judicial Committee Hearing, 27 January 2011), in which international rugby two players tested positive for MHA, identified as sourced in a nutritional supplement which had been provided to the South African team touring Ireland and the UK. The SARU Doping Tribunal found that the players were not at fault but nevertheless imposed the sanction of a **reprimand** (the Panel notes that subsequent to the hearing in this matter a Judicial Committee of the International Rugby Board concluded that on the issue of fault, the SARU Judicial Committee in that case was incorrect and, consequently, that “the decision in *Ralapelle and Basson* should not be relied upon as authority for the proposition that players who rely on the professional assistance and judgment of team medical advisers in respect of supplement use will not be at fault if the supplements they use subsequently turn out to be the cause of an anti-doping rule violation”: *IRB v Gurusinghe, Swarnathilake and Kumara*, IRB Judicial Committee, 12 September 2011).

## B. Respondent’s Submissions and Requests for Relief

- 9.14 In summary, Respondent submits the following in response to the appeal:
- 9.15 A CAS panel has the power, but not the duty under the Code, to approach an appeal *de novo*, without giving any deference to the ITF Decision. Exercise of such power would not be appropriate where, as in the present case, the decision below was before a very experienced, independent, anti-doping tribunal and there was an absence of any procedural unfairness.
- 9.16 Due deference should therefore be given to the ITF Decision, and, in particular, its findings of fact. More specifically, the Panel should not interfere with the ITF Decision unless it believes that the sanction “is evidently and grossly disproportionate to the offence” (*WADA v Hardy & USADA*, CAS 2009/A/1870; *Wawrzyniak v Hellenic Football Federation* CAS 2009/A/1918).
- 9.17 In each case, an athlete’s fault should be measured against the fundamental duty he owes under the WADC and the Programme to do everything that he can to avoid ingesting any prohibited substances. The question is always how far he departed from the behaviour required of him in discharging that duty. Cases decided under Article M.5 of the Programme (Article 10.5 of the WADC) (“Elimination or Reduction of

Period of Ineligibility Based on Exceptional Circumstances") properly inform the analysis.

- 9.18 The ITF Decision correctly identified what behaviour was expected of Kendrick in avoiding the inadvertent ingestion of a prohibited substance through the taking of a supplement.
- 9.19 An athlete's onerous duty to use "utmost caution" to prevent banned substances from entering of his system is heightened still further in cases of medications and (especially) supplements. The risks involved in the use of supplement are so great and so well-known than an athlete will not be able to sustain a plea that his fault was "insignificant" even where the supplement was in fact contaminated, unless he can show that he made "a good faith effort to leave no reasonable stone unturned".
- 9.20 An athlete's personal circumstances, such as the amount of money he would lose during a ban, or the fact that he would miss out on specific competitions, or that the ban would "effectively end his career", are all irrelevant to the determination of sanction.
- 9.21 The authorities cited by Kendrick have been "cherry-picked" from the current MHA caselaw. Furthermore, the Panel should be very cautious about allowing sanctions decisions in other cases to determine its analysis of the sanction in this case because each case depends very much on its own particular facts, and it is not always easy from the reports of the case in question to understand why the particular decision on sanction was reached. The Panel should be particularly wary of giving precedent weight to cases in which there was no hearing but, rather, the sanction was the result of agreement between the parties.
- 9.22 With those reservations in mind the Panel should take into account the following:
- a. *Wawrzyniak vs. Hellenic Football Federation*, CAS 2009/A/1918 a very early MHA case. MHA was not, at the time, mentioned by name on the Prohibited List but was instead said to be banned as a "related substance" to another stimulant which was expressly named on the Prohibited List. The player in that case had consulted with the doctor of both his former and present club, who informed him (presumably because of the lack of mention of MHA on the Prohibited List) that there was no problem with taking the supplement. The applicable disciplinary code provisions stipulated that "at least a caution shall be given for the first offence and two-year suspension in the case of repetition". The panel imposed a ban of **three months**.
  - b. *RFU vs. Wihongi*, RFU Disciplinary Hearing, 16 March 2011 – relied upon by Kendrick – was a case in which, with very little fault on the part of the player, a ban of **four months** was nevertheless imposed. The fault of the player in that case was far less than that of Kendrick.

- c. *RFU vs. Stenkamp*, RFU Disciplinary Hearing, 22 March 2011 – also relied upon by Kendrick – involved a semi-professional rugby player with a punishing work and training schedule, who had received very little anti-doping education. He used a product on the recommendation of a qualified fitness instructor who said it was “a high energy drink like Red Bull but stronger” in order to combat drowsiness and to avoid falling asleep while driving on his job or to and from training. MHA was not listed as an ingredient of the energy drink. The case appears to have been one of contamination. Despite the good faith efforts of the Player to leave no unreasonable stone unturned, he was found to be at fault for failing to consult a doctor or anti-doping specialist, or to have the substance analysed, prior to using it. Again, the degree of fault of the Player in question – who received a **three month** ban – was far less than that of Kendrick.
- d. *UKAD vs. Dooler*, UKNAPD Hearing, 24 November 2010 – relied upon by Kendrick– the player had checked the ingredients of the supplement against the Prohibited List and found nothing amiss. His girlfriend had checked Global DRO (an anti-doping database maintained by UK Anti-Doping) to the same effect (the Dimethylpentylamine in the supplement was not listed as such, or as MHA, but instead as “geranium root extract”). A sanction of **four months** was imposed. The circumstances stand in contrast to the present case where Kendrick both failed to identify the ingredients of the supplement and check they did not include any Prohibited Substances, and failed to contact the product information line provided by the ITF.
- e. *Foggo vs. NRL*, CAS A2/2011 – relied upon by Kendrick – the reasoning behind a sanction of **six months** was limited. It appears as if the CAS panel in that matter may have measured the athlete’s fault not against the 0–24 month spectrum but, instead, relative to the fault of the athletes in *UKAD vs. Wallader*, UKNADP, 29 October 2010 and its progeny. This would be an error, especially given that the NADP tribunal in *Wallader* itself appears to have made a similar mistake in measuring the athlete’s fault not against the 0–24 month spectrum but, rather, against the nine months given to a footballer for inadvertent ingestion of a different substance as part of a cold remedy. Furthermore, *Foggo* involved a young player who had been given “very limited formal drug education”. The player had made inquiries not only with the store owner who sold him the product but also with one of his club’s coaches as well as conducting further searches with the mother. Crucially, the player had also located a list of the ingredients of the supplement and had made the effort to log onto the website of the Australian Sports Anti-Doping Authority and to check each of those ingredients against the information on that website. By contrast, Kendrick is an experienced professional who is well aware of his anti-doping responsibilities. If Kendrick had done what Foggo did, he would have found out that one of the ingredients of the Zija supplement that he was proposing to take was a banned stimulant.
- f. *NADP vs. Wallader*, UKNADP Hearing, 29 October 2010 – a female shot putter received a **four month** ban for testing positive for MHA caused by her use of a

supplement called “Endure”. The athlete was 21, a student, and was given the supplement by her very experienced coach, who had received specific assurances from the supplier that it was “legal”. The athlete had, herself, both checked the ingredients against the 2009 Prohibited List and found no matches (because neither MHA nor Dimethylpentylamine was included by name on the Prohibited List at that point), and checked against the Global DRO, again without any red flags appearing (this time because the name MHA was used in the database, but not the synonym Dimethylpentylamine). The athlete, who it was accepted by the Tribunal did not have had specialist medical assistance readily available to her – was found to have exercised “considerable diligence”. The tribunal assessed her fault as significantly less than that of a English footballer (Kenny) who had received a nine month ban for a Specified Substance (not MHA) that was an ingredient in a cold remedy.

- g. *UKAD vs. Duckworth*, UKNADP Hearing, 10 January 2011 – a 21 year old semi-professional rugby league player used a supplement called “Jack3d” which he had seen advertised for sportsmen. He was considered by the tribunal to be a young man to whom medical advice was not easily available. He had taken “reasonable (but not sufficient) steps to satisfy himself that the Jack3d could be taken safely”. In particular he had an e-mail from the supplier giving him assurances that the supplement was clean and he had again checked every ingredient of the supplement against the Global DRO. An appeal panel of the UKNADP imposed a sanction of **six months** Ineligibility.
- h. *DFSNZ vs. Brightwater-Wharf*, STNZ 29 November 2010 – the athlete took a supplement containing MHA to address “significant pre-menstrual effects”. She had previously sought and obtained confirmation from the supplier (and, via the supplier, the manufacturer) that the product contained no banned substances. Again, at that stage – 2009 – MHA and Dimethylpentylamine were not expressly included on the Prohibited List. She had, however, failed to take other steps readily open to her, such as consulting the hotline provided by Drug-Free Sport New Zealand. A term of **six months** Ineligibility was imposed.
- i. *DFSNZ vs. Jacobs*, STNZ 22 June 2011 - a club level swimmer who had never been part of any high performance programme (and who had, consequently, never participated in any anti-doping education) ingested MHA as an ingredient of the supplements in “Jack3d” and “Super Space Pump”. He had checked the labelling and believed from them that the supplements were energy drinks containing creatine and caffeine that would assist him in getting over the tiring effects of a working day and give him energy for training. He did nothing else to check for Prohibited Substances. He accepted that he had been wrong in relying upon informal assurances rather than making proper inquiry. The tribunal imposed a period of **twelve months** Ineligibility. Whereas Kendrick may well have done more than Jacobs, he was also considerably more experienced and educated as to his anti-doping responsibilities.

9.23 Judging against those decisions, but, more importantly, all the facts and circumstances of Kendrick's case, the ITF Decision was correct in all respects and should not be disturbed.

## 10. MERITS OF THE APPEAL

### A. The Scope of the Panel's Powers in an Appeal Procedure

10.1 As noted above, Mr Taylor for the ITF took a threshold point as to the scope of the Panel's powers in an appeal procedure. He contended that "due deference" should be paid to the ITF Decision and that the Panel should not simply substitute its own view as to appropriate sanction for that of the ITF tribunal, even if its assessment differed from theirs.

10.2 The Panel cannot accept this submission. Rule 57 of the Code, the source of the Panel's powers, is phrased in the widest terms. The power is firstly a "full one" and, secondly "to review the facts and the law"; i.e. both. It has been described in awards too numerous to name as a *de novo* power. The Panel can, as it did in this case, hear the key witnesses and indeed receive oral testimony by telephone from those who did not give such evidence below.

10.3 It may well be that the main inspiration for providing for appeals to CAS from the decisions of sports related bodies was to ensure that sportsmen and women were not wrongly disadvantaged by failures of due process or wrongly advantaged by "home town" decisions, but the text of the Rule does not confer upon CAS panels appellate powers limited to those - or any other - specified circumstances.

10.4 Mr Taylor said, however, that a consistent line of CAS jurisprudence supported his submission. He referred us in particular to *WADA v Hardy & USADA* CAS 2009/A/1870 where a CAS panel said (at para 48):

*In general terms, the Panel subscribes to the CAS jurisprudence under which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence.*

To similar effect is the pronouncement of the panel in *Wawrzniak v Hellenic Football Federation* CAS 2009/A/1918 at para 59.

10.5 In the Panel's view, Mr Taylor imposes more weight on those adverbs - "evidently and grossly" disproportionate - than they will properly bear. They can more compatibly with the rule be read as words of emphasis of the importance of proportionality in this context rather than as words imposing the limitation on a CAS panel's powers, which Mr Taylor contends for. It is notable that in neither case - nor in any other case known

to this Panel - did the panel say that it would itself have come to a different conclusion to the first instance body but refrained from allowing the appeal because of application of some concept of "due deference". Even if they meant what Mr Taylor says they meant, they would be *obiter dicta* only.

- 10.6 Where, as is the case with Article R57 of the Code, rules or legislation confer on an appellate body full power to review the facts and the law, no deference to the tribunal below is required beyond the customary caution appropriate where the tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. This is not, of course to say that the independence, expertise and quality of the first instance tribunal or the quality of its decision will be irrelevant to the CAS Panel. The more cogent and well-reasoned the decision itself, the less likely a CAS panel would be to overrule it; nor will a CAS panel concern itself in its appellate capacity with the periphery rather than the core of such a decision.
- 10.7 The Panel repeats and endorses what was said in the recent case of *Bucci v FEI CAS 2010/A/2283* where a similar argument was advanced and rejected. At para 14.36 of that decision the Panel said:

*The Panel would be prepared to accept that it would not easily "tinker" with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months' suspension for one of 18. It would naturally (as did the Panel in question) pay respect to a fully reasoned and well-evidenced decision of such a Tribunal in pursuit of a legitimate and explicit policy. However, the fact that it might not lightly interfere with such a Tribunal's decision, would not mean that there is in principle any inhibition on its power to do so.*

- 10.8 Finally on this issue, we consider that Mr Taylor's proposition that the time and money spent in constructing a fair and effective ITF tribunal system would be wasted, if an unrestricted appeal to CAS were permitted, is unduly pessimistic. If the ITF tribunal produces a convincing decision after observing due process, a sportsman or woman will be disinclined to appeal, bearing in mind the possibility of adverse costs sanctions and the prospect that on appeal a sanction could be increased.

## **B. The Evaluation of Fault**

- 10.9 The parties accept that the source of Kendrick's anti-doping rule violation was the Zija XM3 product that he used and that he did not take the supplement with the intent to enhance his sport performance or to mask the use of another illicit substance. Accordingly the preconditions of Article M.4 of the Programme (equivalent to Article 10.4 of the WADC) are met, so that the issue before the Panel is the appropriate sanction, which would include a period of Ineligibility in a range from 0 to 24 months, depending on our assessment of Kendrick's fault.

- 10.10 The Panel emphasises that even though the following discussions concern both Article M.4 of the Programme (Article 10.4 of the WADC) and Article M.5 of the Programme (Article 10.5 of the WADC) in order to value Kendrick's fault, only Article M.4 of the Programme is applicable to the present case.
- 10.11 Article M.4 of the Programme (Article 10.4 of the WADC) ("Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances"), like Article M.5 of the Programme (Article 10.5 of the WADC) ("Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances") applies to eliminate or reduce the presumptive sanction of two years Ineligibility for a first anti-doping rule violation for the presence of a Prohibited Substance.
- 10.12 Article M.5 applies to all Prohibited Substances (and Markers or Metabolites thereof) and enables a tribunal to reduce the otherwise applicable sanction by up to 50% if the athlete is able to establish that he or she bore No Significant Fault or Negligence for the anti-doping rule violation. If the athlete shows that the substance entered his or her system through No Fault or Negligence of his or her own, the otherwise applicable period of Ineligibility will be eliminated.
- 10.13 If the Athlete cannot surmount that evidential hurdle, then assuming that the athlete can show (i) how the substance got into his or her system, (ii) that the substance is a "Specified Substance", (iii) that he or she did not take it with intent to enhance his or her sport performance or for masking purposes, then the Panel has a discretion to reduce the 2-years presumptive sanction under Article M.4/Article 10.4 to something between zero and 24 months, and "[t]he Athlete's or other Person's degree of fault shall be the criterium considered in assessing any reduction in the period of Ineligibility." Alternatively, if it is not a "Specified Substance" case, the Panel has discretion to reduce the period of Ineligibility (by a maximum of 50%) if it finds No Significant Fault or Negligence under Article M.5.2/Article 10.5.2.
- 10.14 In each case, the Athlete's fault is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance. In *Vencill v. USADA*, CAS 2003/A/484 at para. 57 that panel stated:

*We begin with the basic principle, so critical to anti-doping efforts in international sport...that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens". The essential question is whether [the athlete] has lived up to this duty..."*

In *FIFA & WADA*, CAS 2005/C/976 & 986 a panel offered the following opinion at paras. 73 and 74:

*The WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body...The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition...It is this standard of utmost care against which the behaviour of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care.*

- 10.15 Any mitigating circumstances put forward on behalf of an athlete should be considered in the context of the standards which are expected of the athlete. To succeed with a plea of "No Fault or Negligence", an athlete must show that he or she used "utmost caution" to keep him- or herself clean of any prohibited substances, i.e. that the athlete did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost caution, that he or she had ingested the prohibited substance (*Puerta v. ITF*, CAS 2006/A/1025, para. 11.25; *FIFA & WADA*, CAS 2005/C/976 & 986, para. 74. The athlete must show that he or she "has fully complied" with this "duty of utmost caution" (*FIFA & WADA*, CAS 2005/C/976 & 986 at para. 74), that is, that he or she has "made every conceivable effort to avoid taking a prohibited substance" (*Knauss v. FIS*, CAS 2005/A/847 at para. 7.3.1) and that the substance got into his or her system "despite all due care" on his or part (commentary to WADC Article 10.5). If the athlete cannot surmount that evidential hurdle, then provided that he or she can meet the preconditions to Article M.4 of the Programme/Article 10.4 WADC (Specified Substances), he or she can get the period of Ineligibility reduced to between zero and 24 months, based on his or her relative fault.
- 10.16 The major difference between Article M.4/Article 10.4 and Article M.5/Article 10.5 is that there is no 50% cap limiting a panel's discretion to reduce the presumptive period of Ineligibility if it finds No Significant Fault or Negligence. Instead, the panel can, in a Specified Substances case, where the preconditions have been met, make whatever reduction it considers properly reflects the Athlete's degree of fault, within the zero to 24 month spectrum. We agree with the observation in the Decision that this is to provide the extra "flexibility" desired by stakeholders. We also agree with the submission of the ITF that the analysis of relative fault under Article 10.4 is exactly the same as under Article 10.5, that is, made by reference to the degree to which the Athlete has departed from the standards of behaviour expected of him or her. It follows that we disagree with Kendrick's argument that "the level of scrutiny and review under 10.5 is significantly higher when determining whether an athlete bears no significant fault or negligence for committing a doping violation, then it is under 10.4". It also follows that the Panel rejects the argument that Article 10.5 non-Specified Substances cases are irrelevant to an Article 10.4 case. Rather, when a tribunal decides on what reduction is warranted below the two-year sanction established by Article 10.2 – based on its assessment of the athlete's relative fault, i.e., the degree to which the athlete departed from the accepted standards of behaviour – the Panel is not limited a

50% reduction but instead can go to the place on the spectrum (between zero and 24 months) that best reflects its assessment of the Athlete's relative fault.

- 10.17 Our conclusion that the analysis of fault under Article 10.4 is not different from the analysis of fault under Article 10.5 is supported and underscored by the commentary to the WADC, which uses similar language to describe the analysis under both Articles which is an admissible aid to construction: section 24.2 of the WADC provides that The comments annotating various provisions of the WADC shall be used to interpret the WADC.

Thus, the comment to Article 10.4 explains:

*In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article*

The comment to Article 10.5 states:

*For the purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete has only a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.*

- 10.18 The ITF submits, and the Panel agrees, that that fact that the language is effectively identical confirms that the analysis required is the same, i.e., under each Article it is necessary to ascertain by how far the Athlete departed from the standards of care expected of him or her under the WADC. The Panel also notes that other CAS decisions and a decision of the NADP Appeal Tribunal in the U.K. have cited and applied Article 10.5.2 "non-Specified Substance" cases when assessing fault under Article 10.4: *Foggo v. NRL*, CAS A2/2011 at para. 54 citing *WADA v. Lund*, CAS OGO6/001; *UKAD v. Wallader*, NADP Award dated 29 October 2010 at para. 46, citing *WADA v. Hardy & USADA*, CAS 2009/A/1870. It is important to note that the Panel is not limited to seeking such guidance as may be useful from cases involving the same substances: in any event under the WADC the Panel is required to evaluate the facts and circumstances of each case and the athlete's degree of fault in each case, as it often happens that two athletes can ingest the same substance in situations that indicate very different degrees of fault.

10.19 The Panel had the advantage over the ITF Tribunal of hearing and seeing Kendrick face-to-face (rather than through the medium of videoconferencing, as had occurred at the hearing before the ITF Tribunal). We also had the benefit of receiving the evidence of Mr. Gullikson and Mr. Blake. As a result, we were able to revisit some of the evidence which had been regarded as unsatisfactory by the ITF Tribunal in the Decision (for example, the Decision had found a reference in Kendrick's affidavit to the distributor role of Mr. Rich's wife to be "likely to mislead"; Before the Panel Kendrick was able to provide an explanation which satisfied it that there was no intention to mislead).

10.20 In the Panel's view, circumstances favourable to Kendrick's position include the following:

- a. The manufacturer of Zija XM3 appears to have lied about its properties. The representations that the product was approved by the "World Anti-Doping Association" and that Apolo Ohno used it were false.
- b. Kendrick's anti-doping rule violation occurred at a very stressful time for him. The birth of his first child was imminent and he was preparing to participate in his swansong year as a top level professional tennis player before retiring from the sport.
- c. Kendrick did undertake some Internet research in respect of the product prior to use.
- d. Although Kendrick acknowledged that he could have consulted a doctor, he did not have his own personal doctor from whom he could have obtained immediate advice and plausibly (albeit wrongly) did not notice the discrepancy in the name "World Anti-Doping Association" (as opposed to "World Anti-Doping Agency"). He took further comfort from the references, in the online information he consulted, to the FDA (Food and Drug Administration), IOC (International Olympic Committee) and the names of various athletes who were said to use the product.
- e. Kendrick, upon reflection, did not recall seeing an Internet article "Zija – Why I Don't Like It" (having said to the ITF tribunal that "I probably read that" - see para 3.15 - and having heard and seen him we assess him as an honest witness and again accept what he says on this point.).
- f. Kendrick immediately accepted a provision suspension after learning of his positive test.
- g. He had character references from distinguished contemporary competitors about his awareness of the importance of the need to eliminate doping from tennis.

10.21 Circumstances adverse to Kendrick include the following:

- a. The Internet research which Kendrick undertook was inadequate, particularly for an experienced professional athlete who represented that he took great care not to ingest prohibited substances.
- b. Kendrick both failed to consult the wallet card that had been provided to him by the ITF and failed to make any or sufficient efforts to contact the ITF's hotline.
- c. Kendrick used a product which he received from someone who was not his own coach and which was contained in an unmarked wrapper.
- d. Kendrick relied on unqualified people for advice on whether the supplement he used was "safe" or not. In conducting superficial Internet searches he was content to rely on "puff pieces" without any critical consideration of what he was reviewing.
- e. While the stress which Kendrick was under may explain why he departed from the applicable standard of care, it does not reduce that standard of care.
- f. He failed to disclose his use of Zija on the Doping Control Form which he completed at the time of testing.

### C. The Appropriate Sanction

- 10.22 The Panel notes that the parties agree that whatever decision the Panel makes as to the length of the sanction, 22 May 2011 is the appropriate starting date.
- 10.23 We agree with Mr. Taylor that sanctions imposed by international federations and by national anti-doping organisations without adjudicated determination by an independent tribunal are of limited or no assistance. However, the decisions of national and international doping tribunals provide helpful guidance, particularly where they contain sufficient details of the circumstances and reasoning of the tribunal. Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark *inimical to the interests of sport*.
- 10.24 It seems to us that, absent circumstances evidencing a high degree of fault bordering on serious indifference, recklessness, or extreme carelessness, a twelve month sanction would be at the upper end of the range of sanctions to be imposed in a MHA case falling within Article M.4 of the Programme/Article 10.4 WADC. In the present case, however, Kendrick's serious lack of due diligence and his failure to recognise at the time the risk of using an unfamiliar product contained in an unmarked wrapper is somewhat mitigated by the stressful circumstances that he found himself in at the time of the anti-doping rule violation.
- 10.25 Having regard to all of the circumstances, including the evidence which was not before the ITF panel, we have come to the conclusion that the twelve month sanction imposed by the ITF Decision was too severe. This Panel has not, however, been persuaded that a three month sanction, put forward by Kendrick, would be appropriate. Having regard to Kendrick's degree of fault and, to both the mitigating and aggravating factors

listed above, the Panel concludes that an appropriate sanction would be a period of Ineligibility of eight months. This Panel emphasises that this is not simply a decision to, effectively, split the difference between the periods of Ineligibility urged by the parties but, rather, represents the Panel's own evaluation and weighing of the evidence and the submissions received, as well as our careful, if cautious, consideration of the authorities that we have found to have relevance.

## 11. CONCLUSION

11.1 The Panel would allow Kendrick's appeal to the extent that the twelve month period of Ineligibility imposed by the ITF Decision should be reduced to eight months. The starting date for the term of Ineligibility is 22 May 2011.

11.2 In coming to its decision, the Panel has attached considerable weight to the well reasoned and comprehensive decision of the ITF Panel. Our different conclusion is a reflection of the evidence that was presented at the appeal hearing (which differed in some respects from that heard by the ITF Tribunal) together with our independent view that a consideration of all of the circumstances warranted a more proportionate – and in this case lesser – sanction than that imposed by the Decision.

## 12. COSTS

12.1 For disciplinary cases of an international nature ruled in appeal, such as this case, Article R65 of the Code provides as follows:

*“R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.*

*Upon submission of the statement of appeal, Kendrick shall pay a Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.*

*R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*

*R65.4 If all circumstances so warrant, the President of the Appeals Arbitration Division may decide to apply Article R64 to an appeals arbitration, either ex officio or upon request of the President of the Panel”.*

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- 12.2 As this is a disciplinary case of an international nature, the proceedings will be free, except for the Court Office filing fee of CHF 1,000, which Kendrick already paid. This fee shall be retained by the CAS.
- 12.3 In accordance with the constant practice of the CAS, any amount granted on the basis of Article R65.3 of the Code is a contribution towards the legal fees and other expenses incurred by the prevailing party in connection with the proceedings and not the full amount spent by such party for his/her claim or defence.
- 12.4 In the present case, in consideration of the divided success achieved by the parties to this appeal, the Panel finds reasonable to order that each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings.

**ON THESE GROUNDS****The Court of Arbitration for Sport rules that:**

1. The appeal filed by Mr Robert Kendrick on 2 August 2011 against the International Tennis Federation (ITF) concerning the decision taken by the International Tennis Federation Independent Anti-Doping Tribunal on 29 July 2011 is partially upheld.
2. The decision of the International Tennis Federation Independent Anti-Doping Tribunal of 29 July 2011 is set aside.
3. Mr Robert Kendrick is suspended for a period of eight months from 22 May 2011.
4. Mr Robert Kendrick's individual results obtained at the French Open 2011 are disqualified. The 10 ranking points and EUR 15,000 in prize money obtained by Mr Robert Kendrick at the French Open 2011 are forfeited.
5. Mr Robert Kendrick is permitted to retain the prize money obtained by him from his participation in the subsequent UNICEF Open.
6. This award is pronounced without costs, except for the Court Office fee of CHF 1,000 paid by Mr Robert Kendrick which shall be retained by the CAS.
7. Each party shall bear his/its legal and other costs incurred in connection with these arbitration proceedings.
8. All other or further claims are dismissed.

Operative part of the award issued on 22 August 2011  
Lausanne, 10 November 2011

**THE COURT OF ARBITRATION FOR SPORT**

Graeme Mew  
President of the Panel

EXHIBITS 16-17  
INTENTIONALLY OMITTED

# EXHIBIT 18



## New gTLD Application Submitted to ICANN by: Wild Lake, LLC

String: ski

Originally Posted: 13 June 2012

Application ID: 1-1636-27531

### Applicant Information

#### 1. Full legal name

Wild Lake, LLC

#### 2. Address of the principal place of business

Contact Information Redacted

#### 3. Phone number

Contact Information Redacted

#### 4. Fax number

Contact Information Redacted

5. If applicable, website or URL

## Primary Contact

### 6(a). Name

Daniel Schindler

### 6(b). Title

EVP, Donuts Inc.

### 6(c). Address

### 6(d). Phone Number

Contact Information Redacted

### 6(e). Fax Number

### 6(f). Email Address

Contact Information Redacted

## Secondary Contact

### 7(a). Name

Jonathon Nevett

### 7(b). Title

EVP, Donuts Inc.

### 7(c). Address

### 7(d). Phone Number

Contact Information Redacted

### 7(e). Fax Number

### 7(f). Email Address

Contact Information Redacted

## Proof of Legal Establishment

### 8(a). Legal form of the Applicant

Limited Liability Company

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

Delaware.

<http://delcode.delaware.gov/title6/c018/sc01/index.shtml>

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

Covered TLD, LLC

9(c). If the applying entity is a joint venture, list all joint venture partners.

## Applicant Background

11(a). Name(s) and position(s) of all directors

N/A	N/A
-----	-----

11(b). Name(s) and position(s) of all officers and partners

N/A	N/A
-----	-----

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Covered LTD, LLC	N/A
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11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Paul Stahura	CEO, Donuts Inc.
--------------	------------------

## Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

ski

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Donuts has conducted technical analysis on the applied-for string, and concluded that there are no known potential operational or rendering issues associated with the string.

The following sections discuss the potential operational or rendering problems that can arise, and how Donuts mitigates them.

#### ## Compliance and Interoperability

The applied-for string conforms to all relevant RFCs, as well as the string requirements set forth in Section 2.2.1.3.2 of the Applicant Guidebook.

#### ## Mixing Scripts

If a domain name label contains characters from different scripts, it has a higher likelihood of encountering rendering issues. If the mixing of scripts occurs within the top-level label, any rendering issue would affect all domain names registered under it. If occurring within second level labels, its ill-effects are confined to the domain names with such labels.

All characters in the applied-for gTLD string are taken from a single script. In addition, Donuts's IDN policies are deliberately conservative and compliant with the ICANN Guidelines for the Implementation of IDN Version 3.0. Specifically, Donuts does not allow mixed-script labels to be registered at the second level, except for languages with established orthographies and conventions that require the commingled use of multiple scripts, e.g. Japanese.

#### ## Interaction Between Labels

Even with the above issue appropriately restricted, it is possible that a domain name composed of labels with different properties such as script and directionality may introduce unintended rendering behaviour.

Donuts adopts a conservative strategy when offering IDN registrations. In particular, it ensures that any IDN language tables used for offering IDN second level registrations involve only scripts and characters that would not pose a risk when combined with the top level label.

## ## Immature Scripts

Scripts or characters added in Unicode versions newer than 3.2 (on which IDNA2003 was based) may encounter interoperability issues due to the lack of software support.

Donuts does not currently plan to offer registration of labels containing such scripts or characters.

## ## Other Issues

To further contain the risks of operation or rendering problems, Donuts currently does not offer registration of labels containing combining characters or characters that require IDNA contextual rules handling. It may reconsider this decision in cases where a language has a clear need for such characters.

Donuts understands that the following may be construed as operational or rendering issues, but considers them out of the scope of this question. Nevertheless, it will take reasonable steps to protect registrants and Internet users by working with vendors and relevant language communities to mitigate such issues.

- missing fonts causing string to fail to render correctly; and
- universal acceptance of the TLD;

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

## Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

Q18A CHAR: 6361

### ABOUT DONUTS

Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model. To achieve its objectives, Donuts has recruited seasoned executive management with proven track records of excellence in the industry. In addition to this business and operational experience, the Donuts team also has contributed broadly to industry policymaking and regulation, successfully launched TLDs, built industry-leading companies from the ground up, and brought innovation, value and choice to the domain name marketplace.

### THE .SKI TLD

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD 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.

This TLD 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 consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

The .SKI TLD will be appealing to the millions of people and organizations who are involved with or who simply enjoy the many variations of skiing, including snow, cross-country, telemark, water, and sand skiing. Participation in these recreational activities is extensive and includes professionals, individuals, families, tour operators, resorts, coaches, tournaments, equipment manufacturers, retailers, boat manufacturers, ski associations, and many others. This inclusive TLD would be operated securely and legitimately and would be made available inclusively to all registrants and users interested in the term SKI.

#### DONUTS' APPROACH TO PROTECTIONS

No entity, or group of entities, has exclusive rights to own or register second level names in this TLD. There are superior ways to minimize the potential abuse of second level names, and in this application Donuts will describe and commit to an extensive array of protections against abuse, including protections against the abuse of trademark rights.

We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD. As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.

By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.

#### OUR PROTECTIONS

Donuts has consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs, and bring to the Internet namespace nearly two dozen new rights and protection mechanisms to raise user safety and protection to a new level.

These include eight, innovative and forceful mechanisms and resources that far exceed the already powerful protections in the applicant guidebook. These are:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

They also include fourteen new measures that were developed specifically by ICANN for the new TLD process. These are:

1. Controls to ensure proper access to domain management functions;

2. 24/7/365 abuse point of contact at registry;
3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;
4. Thick WhoIs;
5. Use of the Trademark Clearinghouse;
6. A Sunrise process;
7. A Trademark Claims process;
8. Adherence to the Uniform Rapid Suspension system;
9. Adherence to the Uniform Domain Name Dispute Resolution Policy;
10. Adherence to the Post Delegation Dispute Resolution Policy;
11. Detailed security policies and procedures;
12. Strong security controls for access, threat analysis and audit;
13. Implementation DNSSEC; and
14. Measures for the prevention of orphan glue records.

#### DONUTS' INTENTION FOR THIS TLD

As a senior government authority has recently said, "a successful applicant is entrusted with operating a critical piece of global Internet infrastructure." Donuts' plan and intent is for this TLD to serve the international community by bringing new users online through opportunities for economic growth, increased productivity, the exchange of ideas and information and greater self-expression.

## 18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Q18B CHAR: 8712

#### DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:

1. to make sure that the Internet remains as safe, stable and secure as possible, while
2. helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits. While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1. Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;
2. Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3. Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4. Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

#### ABOUT DONUTS' RESOURCES

Donuts' financial resources are extensive. The company has raised more than US\$100 million from a number of capital sources including multiple multi-billion dollar venture capital and private equity funds, a top-tier bank, and other well-capitalized investors. Should circumstances warrant, Donuts is prepared to raise additional funding from current or new investors. Donuts also has in place pre-funded, Continued Operations Instruments to protect future registrants. These resource commitments mean Donuts has the capability and intent to launch, expand and operate its TLDs in a secure manner, and to properly protect Internet users and rights-holders from potential abuse.

Donuts firmly believes a capable and skilled organization will operate multiple TLDs and

benefit Internet users by:

1. Providing the operational and financial stability necessary for TLDs of all sizes, but particularly for those with smaller volume (which are more likely to succeed within a shared resources and shared services model);
2. Competing more powerfully against incumbent gTLDs; and
3. More thoroughly and uniformly executing consumer and rights holder protections.

Donuts will be the industry leader in customer service, reputation and choice. The reputation of this, and other TLDs in the Donuts portfolio, will be built on:

1. Our successful launch and marketplace reach;
2. The stability of registry operations; and
3. The effectiveness of our protection mechanisms.

#### THE GOAL OF THIS TLD

This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences. In reviewing potential strings, we deeply researched discrete industries and sectors of human activity and consulted extensive data sources relevant to the online experience. Our methodology resulted in the selection of this TLD – one that offers a very high level of user utility, precision in content delivery, and ability to contribute positively to economic growth.

#### SERVICE LEVELS

Donuts will endeavor to provide a service level that is higher than any existing TLD. Donuts' commitment is to meet and exceed ICANN-mandated availability requirements, and to provide industry-leading services, including non-mandatory consumer and rights protection mechanisms (as described in answers to Questions 28, 29, and 30) for a beneficial customer experience.

#### REPUTATION

As noted, Donuts management enjoys a reputation of excellence as domain name industry contributors and innovators. This management team is committed to the successful expansion of the Internet, the secure operation of the DNS, and the creation of a new segment of the web that will be admired and respected.

The Donuts registry and its operations are built on the following principles:

1. More meaningful product choice for registrants and users;
2. Innovative services;
3. Competitive pricing; and
4. A more secure environment with better protections.

These attributes will flow to every TLD we operate. This string's reputation will develop as a compelling product choice, with innovative offerings, competitive pricing, and safeguards for consumers, businesses and other users.

Finally, the Donuts team has significant operational experience with registrars, and will collaborate knowledgeably with this channel to deliver new registration opportunities to end-users in way that is consistent with Donuts principles.

#### NAMESPACE COMPETITION

This TLD will contribute significantly to the current namespace. It will present multiple new domain name alternatives compared to existing generic and country code TLDs. The DNS today offers very limited addressing choices, especially for registrants who seek a specific identity.

#### INNOVATION

Donuts will provide innovative registration methods that allow registrants the opportunity to secure an important identity using a variety of easy-to-use tools that fit individual needs and preferences.

Consistent with our principle of innovation, Donuts will be a leader in rights protection, shielding those that deserve protection and not unfairly limiting or directing those that don't. As detailed in this application, far-reaching protections will be provided in this TLD. Nevertheless, the Donuts approach is inclusive, and second level registrations in this TLD will be available to any responsible registrant with an affinity for this string. We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility.

This TLD will contribute to the user experience by offering registration alternatives that better meet registrants' identity needs, and by providing more intuitive methods for users to locate products, services and information. This TLD also will contribute to marketplace diversity, an important element of user experience. In addition, Donuts will offer its sales channel a suite of innovative registration products that are inviting, practical and useful to registrants.

As noted, Donuts will be inclusive in its registration policies and will not limit registrant eligibility at the second level at the moment of registration. Restricting access to second level names in this broadly generic TLD would cause more harm than benefit by denying domain access to legitimate registrants. Therefore, rather than artificially limiting registrant access, we will control abuse by carefully and uniformly implementing our extensive range of user and rights protections.

Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behavior of registrants, not their identity.

Donuts will specifically adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies. Further, Donuts will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.

Donuts TLDs will comply with all applicable laws and regulations regarding privacy and data protection. Donuts will provide a highly secure registry environment for registrant and user data (detailed information on measures to protect data is available in our technical response).

Donuts will permit the use of proxy and privacy services for registrations in this TLD, as there are important, legitimate uses for such services (including free speech rights and the avoidance of spam). Donuts will limit how such proxy and privacy services are offered (details on these limitations are provided in our technical response). Our approach balances the needs of legitimate and responsible registrants with the need to identify registrants who illegally use second level domains.

Donuts will build on ICANN's outreach and media coverage for the new TLD Program and will initiate its own effort to educate Internet users and rights holders about the launch of this TLD. Donuts will employ three specific communications efforts. We will:

1. Communicate to the media, analysts, and directly to registrants about the Donuts enterprise.
2. Build on existing relationships to create an open dialogue with registrars about what to expect from Donuts, and about the protections required by any registrar selling this TLD.
3. Communicate directly to end-users, media and third parties interested in the attributes and benefits of this TLD.

## 18(c). What operating rules will you adopt to eliminate or minimize social costs?

Q18C Standard CHAR: 1440

Generally, during the Sunrise phase of this TLD, Donuts will conduct an auction if there are two or more competing applications from validated trademark holders for the same second level name. Alternatively, if there is a defined trademark classification reflective of this TLD, Donuts may give preference to second-level applicants with rights in that classification of goods and services. Post-Sunrise, requests for registration will generally be on a first-come, first-served basis.

Donuts may offer reduced pricing for registrants interested in long-term registration, and potentially to those who commit to publicizing their use of the TLD. Other advantaged pricing may apply in selective cases, including bulk purchase pricing.

Donuts will comply with all ICANN-related requirements regarding price increases: advance notice of any renewal price increase (with the opportunity for existing registrants to renew for up to ten years at their current pricing); and advance notice of any increase in initial registration pricing.

The company does not otherwise intend, at this time, to make contractual commitments regarding pricing. Donuts has made every effort to correctly price its offerings for end-user value prior to launch. Our objective is to avoid any disruption to our customers after they have registered. We do not plan or anticipate significant price increases over time.

## Community-based Designation

### 19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the

applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

## Geographic Names

21(a). Is the application for a geographic name?

No

## Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

Q22 CHAR: 4979

As previously discussed (in our response to Q18: Mission / Purpose) Donuts believes in an open Internet. Consistent with this we also believe in an open DNS, where second level domain names are available to all registrants who act responsibly.

The range of second level names protected by Specification 5 of the Registry Operator contract is extensive (approx. 2,000 strings are blocked). This list resulted from a lengthy process of collaboration and compromise between members of the ICANN community, including the Governmental Advisory Committee. Donuts believes this list represents a healthy balance between the protection of national naming interests and free speech on the Internet.

Donuts does not intend to block second level names beyond those detailed in Specification 5. Should a geographic name be registered in this TLD and used for illegal or abusive activity Donuts will remedy this by applying the array of protections implemented in this TLD. (For details about these protections please see our responses to Questions 18, 28, 29 and 30).

Donuts will strictly adhere to the relevant provisions of Specification 5 of the New gTLD Agreement. Specifically:

1. All two-character labels will be initially reserved, and released only upon agreement between Donuts and the relevant government and country code manager.
2. At the second level, country and territory names will be reserved at the second and other levels according to these standards:
  - 2.1. Short form (in English) of country and territory names documented in the ISO 3166-1 list;
  - 2.2. Names of countries and territories as documented by the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
  - 2.3. The list of United Nations member states in six official UN languages, as prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Donuts will initially reserve country and territory names at the second level and at all other levels within the TLD. Donuts supports this requirement by using the following internationally recognized lists to develop a comprehensive master list of all geographic names that are initially reserved:

1. The short form (in English) of all country and territory names contained on the ISO 3166-1 list, including the European Union, which is exceptionally reserved on the ISO 3166-1 List, and its scope extended in August 1999 to any application needing to represent the name European Union [[http://www.iso.org/iso/support/country\\_codes/iso\\_3166\\_code\\_lists/iso-3166-1\\_decoding\\_table.htm#EU](http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU)].
2. The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World.
3. The list of UN member states in six official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names
4. The 2-letter alpha-2 code of all country and territory names contained on the ISO 3166-1 list, including all reserved and unassigned codes

This comprehensive list of names will be ineligible for registration. Only in consultation with the GAC and ICANN would Donuts develop a proposal for release of these reserved names, and seek approval accordingly. Donuts understands governmental processes require time-consuming, multi-department consultations. Accordingly, we will apportion more than adequate time for the GAC and its members to review any proposal we provide.

Donuts recognizes the potential use of country and territory names at the third level. We will address and mitigate attempted third-level use of geographic names as part of our operations.

Donuts' list of geographic names will be transmitted to Registrars as part of the onboarding process and will also be made available to the public via the TLD website. Changes to the list are anticipated to be rare; however, Donuts will regularly review and revise the list as changes are made by government authorities.

For purposes of clarity the following will occur for a domain that is reserved by the registry:

1. An availability check for a domain in the reserved list will result in a "not available" status. The reason given will indicate that the domain is reserved.
2. An attempt to register a domain name in the reserved list will result in an error.
3. An EPP info request will result in an error indicating the domain name was not found.

4. Queries for a reserved name in the WHOIS system will display information indicating the reserved status and indicate it is not registered nor is available for registration.
5. Reserved names will not be published or used in the zone in any way.
6. Queries for a reserved name in the DNS will result in an NXDOMAIN response.

## Registry Services

### 23. Provide name and full description of all the Registry Services to be provided.

Q23 CHAR: 22971

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

The following response describes our registry services, as implemented by Donuts and our partners. Such partners include Demand Media Europe Limited (DMEL) for back-end registry services; AusRegistry Pty Ltd. (ARI) for Domain Name System (DNS) services and Domain Name Service Security Extensions (DNSSEC); an independent consultant for abuse mitigation and prevention consultation; Equinix and SuperNap for datacenter facilities and infrastructure; and Iron Mountain Intellectual Property Management, Inc. (Iron Mountain) for data escrow services. For simplicity, the term “company” and the use of the possessive pronouns “we”, “us”, “our”, “ours”, etc., all refer collectively to Donuts and our subcontracted service providers.

DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD). DMEL is structured to operate a robust and reliable Shared Registration System by leveraging the infrastructure and expertise of DMIH and Demand Media, Inc., which includes years of experience in the operation side for domain names in both gTLDs and ccTLDs for over 10 years.

#### 1.0. EXECUTIVE SUMMARY

We offer all of the customary services for proper operation of a gTLD registry using an approach designed to support the security and stability necessary to ensure continuous uptime and optimal registry functionality for registrants and Internet users alike.

#### 2.0. REGISTRY SERVICES

##### 2.1. Receipt of Data from registrars

The process of registering a domain name and the subsequent maintenance involves interactions between registrars and the registry. These interactions are facilitated by the registry through the Shared Registration System (SRS) through two interfaces:

- EPP: A standards-based XML protocol over a secure network channel.
- Web: A web based interface that exposes all of the same functionality as EPP yet accessible through a web browser.

Registrants wishing to register and maintain their domain name registrations must do so through an ICANN accredited registrar. The XML protocol, called the Extensible Provisioning Protocol (EPP) is the standard protocol widely used by registrars to communicate provisioning actions. Alternatively, registrars may use the web interface to create and manage registrations.

The registry is implemented as a "thick" registry meaning that domain registrations must have contact information associated with each. Contact information will be collected by registrars and associated with domain registrations.

#### 2.1.1. SRS EPP Interface

The SRS EPP Interface is provided by a software service that provides network based connectivity. The EPP software is highly compliant with all appropriate RFCs including:

- RFC 5730 Extensible Provisioning Protocol (EPP)
- RFC 5731 Extensible Provisioning Protocol (EPP) Domain Name Mapping
- RFC 5732 Extensible Provisioning Protocol (EPP) Host Mapping
- RFC 5733 Extensible Provisioning Protocol (EPP) Contact Mapping
- RFC 5734 Extensible Provisioning Protocol (EPP) Transport over TCP
- RFC 5910 Domain Name System (DNS) Security Extensions for Extensible Provisioning Protocol (EPP)
- RFC 3915 Domain Registry Grace Period Mapping for EPP

##### 2.1.1.1. SRS EPP Interface Security Considerations

Security precautions are put in place to ensure transactions are received only from authorized registrars in a private, secure manner. Registrars must provide the registry with narrow subnet ranges, allowing the registry to restrict network connections that originate only from these pre-arranged networks. The source IP address is verified against the authentication data received from the connection to further validate the source of the connection. Registrars may only establish a limited number of connections and the network traffic is rate limited to ensure that all registrars receive the same quality of service. Network connections to the EPP server must be secured with TLS. The revocation status and validity of the certificate are checked.

Successful negotiation of a TLS session begins the process of authentication using the protocol elements of EPP. Registrars are not permitted to continue without a successful EPP session establishment. The EPP server validates the credential information passed by the registrar along with validation of:

- Certificate revocation status
- Certificate chain
- Certificate Common Name matches the Common Name the registry has listed for the source IP address
- User name and password are correct and match those listed for the source IP address

In the event a registrar creates a level of activity that threatens the service quality of other registrars, the service has the ability to rate limit individual registrars.

##### 2.1.1.2. SRS EPP Interface Stability Considerations

To ensure the stability of the EPP Interface software, strict change controls and access controls are in place. Changes to the software must be approved by management and go through a rigorous testing and staged deployment procedure.

Additional stability is achieved by carefully regulating the available computing resources. A

policy of conservative usage thresholds leaves an equitable amount of computing resources available to handle spikes and service management.

### 2.1.2. SRS Web Interface

The SRS web interface is an alternative way to access EPP functionality using a web interface, providing the features necessary for effective operations of the registry. This interface uses the HTTPS protocol for secure web communication. Because users can be located worldwide, as with the EPP interface, the web interface is available to all registrars over multiple network paths.

Additional functionality is available to registrars to assist them in managing their account. For instance, registrars are able to view their account balance in near real time as well as the status of the registry services. In addition, notifications that are sent out in email are available for viewing.

#### 2.1.2.1. Web Interface Security Considerations

Only registrars are authorized to use the SRS web interface, and therefore the web interface has several security measures to prevent abuse. The web interface requires an encrypted network channel using the HTTPS protocol. Attempts to access the interface through a clear channel are redirected to the encrypted channel.

The web interface restricts access by requiring each user to present authentication credentials before proceeding. In addition to the typical user name and password combinations, the web interface also requires the user to possess a hardware security key as a second factor of authentication.

Registrars are provided a tool to create and manage users that are associated with their account. With these tools, they can set access and authorization levels for their staff.

#### 2.1.2.2. Web Interface Stability Considerations

Both the EPP interface and web interface use a common service provider to perform the work required to fulfill their requests. This provides consistency across both interfaces and ensures all policies and security rules are applied.

The software providing services for both interfaces executes on a farm of servers, distributing the load more evenly ensuring stability is maintained.

## 2.2. Dissemination of TLD Zone Files

### 2.2.1. Communication of Status Information of TLD Zone Servers to Registrars

The status of TLD zone servers and their ability to reflect changes in the SRS is of great importance to registrars and Internet users alike. We ensure that any change from normal operations is communicated to the relevant stakeholders as soon as is appropriate. Such communication might be prior to the status change, during the status change and/or after the status change (and subsequent reversion to normal) – as appropriate to the party being informed and the circumstance of the status change.

Normal operations are:

- DNS servers respond within SLAs for DNS resolution.
- Changes in the SRS are reflected in the zone file according to the DNS update time SLA.

The SLAs are those from Specification 10 of the Registry Agreement.

A deviation from normal operations, whether it is registry wide or restricted to a single DNS node, will result in the appropriate status communication being sent.

### 2.2.2. Communication Policy

We maintain close communication with registrars regarding the performance and consistency of the TLD zone servers.

A contact database containing relevant contact information for each registrar is maintained. In many cases, this includes multiple forms of contact, including email, phone and physical mailing address. Additionally, up-to-date status information of the TLD zone servers is provided within the SRS Web Interface.

Communication using the registrar contact information discussed above will occur prior to any maintenance that has the potential to effect the access to, consistency of, or reliability of the TLD zone servers. If such maintenance is required within a short timeframe, immediate communication occurs using the above contact information. In either case, the nature of the maintenance and how it affects the consistency or accessibility of the TLD zone servers, and the estimated time for full restoration, are included within the communication.

That being said, the TLD zone server infrastructure has been designed in such a way that we expect no downtime. Only individual sites will potentially require downtime for maintenance; however the DNS service itself will continue to operate with 100% availability.

### 2.2.3. Security and Stability Considerations

We restrict zone server status communication to registrars, thereby limiting the scope for malicious abuse of any maintenance window. Additionally, we ensure registrars have effective operational procedures to deal with any status change of the TLD nameservers and will seek to align its communication policy to those procedures.

### 2.3. Zone File Access Provider Integration

Individuals or organizations that wish to have a copy of the full zone file can do so using the Zone Data Access service. This process is still evolving; however the basic requirements are unlikely to change. All registries will publish the zone file in a common format accessible via secure FTP at an agreed URL.

DMEL will fully comply with the processes and procedures dictated by the Centralized Zone Data Access Provider (CZDA Provider or what it evolves into) for adding and removing Zone File access consumers from its authentication systems. This includes:

- Zone file format and location.
- Availability of the zone file access host via FTP.
- Logging of requests to the service (including the IP address, time, user and activity log).
- Access frequency.

### 2.4. Zone File Update

To ensure changes within the SRS are reflected in the zone file rapidly and securely, we update the zone file on the TLD zone servers following a staged but rapid propagation of zone update information from the SRS, outwards to the TLD zone servers - which are visible to the Internet. As changes to the SRS data occur, those changes are updated to isolated systems which act as the authoritative primary server for the zone, but remain inaccessible to systems outside our network. The primary servers notify the designated secondary servers, which service queries for the TLD zone from the public. Upon notification, the secondary servers transfer the incremental changes to the zone and publicly present those changes.

The mechanisms for ensuring consistency within and between updates are fully implemented in our TLD zone update procedures. These mechanisms ensure updates are quickly propagated while the data remains consistent within each incremental update, regardless of the speed or order of individual update transactions.

### 2.5. Operation of Zone Servers

ARI maintains TLD zone servers which act as the authoritative servers to which the TLD is delegated.

### 2.5.1. Security and Operational Considerations of Zone Server Operations

The potential risks associated with operating TLD zone servers are recognized by us such that we will perform the steps required to protect the integrity and consistency of the information they provide, as well as to protect the availability and accessibility of those servers to hosts on the Internet. The TLD zone servers comply with all relevant RFCs for DNS and DNSSEC, as well as BCPs for the operation and hosting of DNS servers. The TLD zone servers will be updated to support any relevant new enhancements or improvements adopted by the IETF.

The DNS servers are geographically dispersed across multiple secure data centers in strategic locations around the world. By combining multi-homed servers and geographic diversity, ARI's zone servers remain impervious to site level, supplier level or geographic level operational disruption.

The TLD zone servers are protected from accessibility loss by malicious intent or misadventure, via the provision of significant over-capacity of resources and access paths. Multiple independent network paths are provided to each TLD zone server and the query servicing capacity of the network exceeds the extremely conservatively anticipated peak load requirements by at least 10 times, to prevent loss of service should query loads significantly increase.

As well as the authentication, authorization and consistency checks carried out by the registrar access systems and DNS update mechanisms, ARI reduces the scope for alteration of DNS data by following strict DNS operational practices:

- TLD zone servers are not shared with other services.
- The primary authoritative TLD zone server is inaccessible outside ARI's network.
- TLD zone servers only serve authoritative information.
- The TLD zone is signed with DNSSEC and a DNSSEC Practice/Policy Statement published.

### 2.6. Dissemination of Domain Registration Information

Domain name registration information is required for a variety of purposes. Our registry provides this information through the required WHOIS service through a standard text based network protocol on port 43. Whois also is provided on the registry's web site using a standard web interface. Both interfaces are publically available at no cost to the user and are reachable worldwide.

The information displayed by the Whois service consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use of it does not require prior authorization or permission.

#### 2.6.1. Whois Port 43 Interface

The Whois port 43 interface consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted ASCII text. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

#### 2.6.2. Whois Web Interface

The Whois web interface also uses clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel

on port 43 using the HTTPS protocol.

### 2.6.3. Security and Stability Considerations

Abuse of the Whois system through data mining is a concern as it can impact system performance and reduce the quality of service to legitimate users. The Whois system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

In addition, the Whois web interface adds a simple challenge-response CAPCHA that requires a user to type in the characters displayed in image format.

Both systems have blacklist functionality to provide a complete block to individual IPs or IP ranges.

### 2.7. Internationalized Domain Names (IDNs)

An Internationalized Domain Name (IDN) contains at least one label that is displayed in a specific language script in IDN aware software. We will offer registration of second level IDN labels at launch,

IDNs are published into the TLD zone. The SRS EPP and Web Interfaces also support IDNs.

The IDN implementation is fully compliant with the IDNA 2008 suite of standards (RFC 5890, 5891, 5892 and 5893) as well as the ICANN Guidelines for the Implementation of IDN Version 3.0 (<http://www.icann.org/en/resources/idn/implementation-guidelines>). To ensure stability and security, we have adopted a conservative approach in our IDN registration policies, as well as technical implementation.

All IDN registrations must be requested using the A-label form, and accompanied by an RFC 5646 language tag identifying the corresponding language table published by the registry. The candidate A-label is processed according to the registration protocol as specified in Section 4 of RFC 5891, with full U-label validation. Specifically, the "Registry Restrictions" steps specified in Section 4.3 of RFC 5891 are implemented by validating the U-label against the identified language table to ensure that the set of characters in the U-label is a proper subset of the character repertoire listed in the language table.

#### 2.7.1. IDN Stability Considerations

To avoid the intentional or accidental registration of visually similar characters, and to avoid identity confusion between domains, there are several restrictions on the registration of IDNs.

Domains registered within a particular language are restricted to only the characters of that language. This avoids the use of visually similar characters within one language which mimic the appearance of a label within another language, regardless of whether that label is already within the DNS or not.

Child domains are restricted to a specific language and registrations are prevented in one language being confused with a registration in another language; for example Cyrillic a (U+0430) and Latin a (U+0061).

### 2.8. DNSSEC

DNSSEC provides a set of extensions to the DNS that allow an Internet user (normally the resolver acting on a user's behalf) to validate that the DNS responses they receive were not manipulated en-route.

This type of fraud, commonly called 'man in the middle', allows a malicious party to misdirect Internet users. DNSSEC allows a domain owner to sign their domain and to publish the signature, so that all DNS consumers who visit that domain can validate that the responses they receive are as the domain owner intended.

Registries, as the operators of the parent domain for registrants, must publish the DNSSEC material received from registrants, so that Internet users can trust the material they receive from the domain owner. This is commonly referred to as a "chain of trust." Internet users

trust the root (operated by IANA), which publishes the registries' DNSSEC material, therefore registries inherit this trust. Domain owners within the TLD subsequently inherit trust from the parent domain when the registry publishes their DNSSEC material.

In accordance with new gTLD requirements, the TLD zone will be DNSSEC signed and the receipt of DNSSEC material from registrars for child domains is supported in all provisioning systems.

### 2.8.1. Stability and Operational Considerations for DNSSEC

#### 2.8.1.1. DNSSEC Practice Statement

ARI's DNSSEC Practice Statement is included in our response to Question 43. The DPS following the guidelines set out in the draft IETF DNSOP DNSSEC DPS Framework document.

#### 2.8.1.2. Resolution Stability

DNSSEC is considered to have made the DNS more trustworthy; however some transitional considerations need to be taken into account. DNSSEC increases the size and complexity of DNS responses. ARI ensures the TLD zone servers are accessible and offer consistent responses over UDP and TCP.

The increased UDP and TCP traffic which results from DNSSEC is accounted for in both network path access and TLD zone server capacity. ARI will ensure that capacity planning appropriately accommodates the expected increase in traffic over time.

ARI complies with all relevant RFCs and best practice guides in operating a DNSSEC-signed TLD. This includes conforming to algorithm updates as appropriate. To ensure Key Signing Key Rollover procedures for child domains are predictable, DS records will be published as soon as they are received via either the EPP server or SRS Web Interface. This allows child domain operators to rollover their keys with the assurance that their timeframes for both old and new keys are reliable.

### 3.0. APPROACH TO SECURITY AND STABILITY

Stability and security of the Internet is an important consideration for the registry system. To ensure that the registry services are reliably secured and remain stable under all conditions, DMEL takes a conservative approach with the operation and architecture of the registry system.

By architecting all registry services to use the least privileged access to systems and data, risk is significantly reduced for other systems and the registry services as a whole should any one service become compromised. By continuing that principal through to our procedures and processes, we ensure that only access that is necessary to perform tasks is given. ARI has a comprehensive approach to security modeled of the ISO27001 series of standards and explored further in the relevant questions of this response.

By ensuring all our services adhering to all relevant standards, DMEL ensures that entities which interact with the registry services do so in a predictable and consistent manner. When variations or enhancements to services are made, they are also aligned with the appropriate interoperability standards.

## Demonstration of Technical & Operational Capability

## 24. Shared Registration System (SRS) Performance

Q24 CHAR: 19964

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

### 1.0. INTRODUCTION

Our Shared Registration System (SRS) complies fully with Specification 6, Section 1.2 and the SLA Matrix provided with Specification 10 in ICANN's Registry Agreement and is in line with the projections outlined in our responses to Questions 31 and 46. The services provided by the SRS are critical to the proper functioning of a TLD registry.

We will adhere to these commitments by operating a robust and reliable SRS founded on best practices and experience in the domain name industry.

### 2.0. TECHNICAL OVERVIEW

A TLD operator must ensure registry services are available at all times for both registrants and the Internet community as a whole. To meet this goal, our SRS was specifically engineered to provide the finest levels of service derived from a long pedigree of excellence and experience in the domain name industry. This pedigree of excellence includes a long history of technical excellence providing long running, highly available and high-performing services that help thousands of companies derive their livelihoods.

Our SRS services will give registrars standardized access points to provision and manage domain name registration data. We will provide registrars with two interfaces: an EPP protocol over TCP/IP and a web site accessible from any web browser (note: throughout this document, references to the SRS are inclusive of both these interfaces).

Initial registration periods will comply with Specification 6 and will be in one (1) year increments up to a maximum of ten (10) years. Registration terms will not be allowed to exceed ten (10) years. In addition, renewal periods also will be in one-year increments and renewal periods will only allow an extension of the registration period of up to ten years from the time of renewal.

The performance of the SRS is critical for the proper functioning of a TLD. Poor performance of the registration systems can adversely impact registrar systems that depend on its responsiveness. Our SRS is committed to exceeding the performance specifications described in Specification 10 in all cases. To ensure that we are well within specifications for performance, we will test our system on a regular basis during development to ensure that changes have not impacted performance in a material way. In addition, we will monitor production systems to ensure compliance. If internal thresholds are exceeded, the issue will be escalated, analyzed and addressed.

Our SRS will offer registry services that support Internationalized Domain Names (IDNs). Registrations can be made through both the EPP and web interfaces.

### 3.0. ROBUST AND RELIABLE ARCHITECTURE

To ensure quality of design, the SRS software was designed and written by seasoned and experienced software developers. This team designed the SRS using modern software architecture principles geared toward ensuring flexibility in its design not only to meet business needs but also to make it easy to understand, maintain and test.

A classic 3-tier design was used for the architecture of the system. 3-tier is a well-proven architecture that brings flexibility to the system by abstracting the application layer from

the protocol layer. The data tier is isolated and only accessible by the services tier. 3-tier adds an additional layer of security by minimizing access to the data tier through possible exploits of the protocol layer.

The protocol and services layers are fully redundant. A minimum of three physical servers is in place in both the protocol and services layers. Communications are balanced across the servers. Load balancing is accomplished with a redundant load balancer pair.

#### 4.0. SOFTWARE QUALITY

The software for the SRS, as well as other registry systems, was developed using an approach that ensures that every line of source code is peer reviewed and source code is not checked into the source code repository without the accompanying automated tests that exercise the new functionality. The development team responsible for building the SRS and other registry software applies continuous integration practices to all software projects; all developers work on an up-to-date code base and are required to synchronize their code base with the master code base and resolve any incompatibilities before checking in. Every source code check-in triggers an automated build and test process to ensure a minimum level of quality. Each day an automated "daily build" is created, automatically deployed to servers and a fully-automated test suite run against it. Any failures are automatically assigned to developers to resolve in the morning when they arrive.

When extensive test passes are in order for release candidates, these developers use a test harness designed to run usability scenarios that exercise the full gamut of use cases, including accelerated full registration life cycles. These scenarios can be entered into the system using various distributions of activity. For instance, the test harness can be run to stress the system by changing the distribution of scenarios or to stress the system by exaggerating particular scenarios to simulate land rushes or, for long running duration scenarios, a more common day-to-day business distribution.

#### 5.0. SOFTWARE COMPLIANCE

The EPP interface to our SRS is compliant with current RFCs relating to EPP protocols and best practices. This includes RFCs 5910, 5730, 5731, 5732, 5733 and 5734. Since we are also supporting Registry Grace Period functionality, we are also compliant with RFC 3915. Details of our compliance with these specifications are provided in our response to Question 25. We are also committed to maintaining compliance with future RFC revisions as they apply as documented in Section 1.2 of Specification 6 of the new gTLD Agreement.

We strive to be forward-thinking and will support the emerging standards of both IPv6 and DNSSEC on our SRS platform. The SRS was designed and has been tested to accept IPv6 format addresses for nameserver glue records and provision them to the gTLD zone. In addition, key registry services will be accessible over both IPv4 and IPv6. These include both the SRS EPP and SRS web-based interfaces, both port 43 and web-based WHOIS interfaces and DNS, among others. For details regarding our IPv6 reachability plans, please refer to our response to Question 36.

DNSSEC services are provided, and we will comply with Specification 6. Additionally, our DNSSEC implementation complies with RFCs 4033, 4034, 4035, and 4509; and we commit to complying with the successors of these RFCs and following the best practices described in RFC 4641. Additional compliance and commitment details on our DNSSEC services can be found in our response to Question 43.

#### 6.0. DATABASE OPERATIONS

The database for our gTLD is Microsoft SQL Server 2008 R2. It is an industry-leading database engine used by companies requiring the highest level of security, reliability and trust. Case studies highlighting SQL Server's reliability and use indicate its successful application in many industries, including major financial institutions such as Visa, Union Bank of Israel, KeyBank, TBC Bank, Paymark, Coca-Cola, Washington State voter registration and many others. In addition, Microsoft SQL Server provides a number of features that ease the management and

maintenance of the system. Additional details about our database system can be found in our response to Question 33.

Our SRS architecture ensures security, consistency and quality in a number of ways. To prevent eavesdropping, the services tier communicates with the database over a secure channel. The SRS is architected to ensure all data written to the database is atomic. By convention, leave all matters of atomicity are left to the database. This ensures consistency of the data and reduces the chance of error. So that we can examine data versions at any point in time, all changes to the database are written to an audit database. The audit data contains all previous and new values and the date/time of the change. The audit data is saved as part of each atomic transaction to ensure consistency.

To minimize the chance of data loss due to a disk failure, the database uses an array of redundant disks for storage. In addition, maintain an exact duplicate of the primary site is maintained in a secondary datacenter. All hardware is fully duplicated and set up to take over operations at any time. All database operations are replicated to the secondary datacenter via synchronous replication. The secondary datacenter always maintains an exact copy of our live data as the transactions occur.

#### 7.0. REDUNDANT HARDWARE

The SRS is composed of several pieces of hardware that are critical to its proper functioning, reliability and scale. At least two of each hardware component comprises the SRS, making the service fully redundant. Any component can fail, and the system is designed to use the facility of its pair. The EPP interface to the SRS will operate with more than two servers to provide the capacity required to meet our projected scale as described in Question 46: Projections Template.

#### 8.0. HORIZONTALLY SCALABLE

The SRS is designed to scale horizontally. That means that, as the needs of the registry grow, additional servers can be easily added to handle additional loads.

The database is a clustered 2-node pair configured for both redundancy and performance. Both nodes participate in serving the needs of the SRS. A single node can easily handle the transactional load of the SRS should one node fail. In addition, there is an identical 2-node cluster in our backup datacenter. All data from the primary database is continuously replicated to the backup datacenter.

Not only is the registry database storage medium specified to provide the excess of capacity necessary to allow for significant growth, it is also configured to use techniques, such as data sharing, to achieve horizontal scale by distributing logical groups of data across additional hardware. For further detail on the scalability of our SRS, please refer to our response to Question 31.

#### 9.0. REDUNDANT HOT FAILOVER SITE

We understand the need for maximizing uptime. As such, our plan includes maintaining at all times a warm failover site in a separate datacenter for the SRS and other key registry services. Our planned failover site contains an exact replica of the hardware and software configuration contained in the primary site. Registration data will be replicated to the failover site continuously over a secure connection to keep the failover site in sync.

Failing over an SRS is not a trivial task. In contrast, web site failover can be as simple as changing a DNS entry. Failing over the SRS, and in particular the EPP interface, requires careful planning and consideration as well as training and a well-documented procedure. Details of our failover procedures as well as our testing plans are detailed in our response to Question 41.

#### 10.0. SECURE ACCESS

To ensure security, access to the EPP interface by registrars is restricted by IP/subnet. Access Control Lists (ACLs) are entered into our routers to allow access only from a restricted, contiguous subnet from registrars. Secure and private communication over mutually authenticated TLS is required. Authentication credentials and certificate data are exchanged in an out-of-band mechanism. Connections made to the EPP interface that successfully establish an EPP session are subject to server policies that dictate connection maximum lifetime and minimal activity to maintain the session.

To ensure fair and equal access for all registrars, as well as maintain a high level of service, we will use traffic shaping hardware to ensure all registrars receive an equal number of resources from the system.

To further ensure security, access to the SRS web interface is over the public Internet via an encrypted HTTPS channel. Each registrar will be issued master credentials for accessing the web interface. Each registrar also will be required to use 2-factor authentication when logging in. We will issue a set of Yubikey (<http://yubico.com>) 2-factor, one-time password USB keys for authenticating with the web site. When the SRS web interface receives the credentials plus the one-time password from the Yubikey, it communicates with a RADIUS authentication server to check the credentials.

## 11.0. OPERATING A ROBUST AND RELIABLE SRS

### 11.1. AUTOMATED DEPLOYMENT

To minimize human error during a deployment, we use a fully-automated package and deployment system. This system ensures that all dependencies, configuration changes and database components are included every time. To ensure the package is appropriate for the system, the system also verifies the version of system we are upgrading.

### 11.2. CHANGE MANAGEMENT

We use a change management system for changes and deployments to critical systems. Because the SRS is considered a critical system, it is also subject to all change management procedures. The change management system covers all software development changes, operating system and networking hardware changes and patching. Before implementation, all change orders entered into the system must be reviewed with careful scrutiny and approved by appropriate management. New documentation and procedures are written; and customer service, operations, and monitoring staff are trained on any new functionality added that may impact their areas.

### 11.3. PATCH MANAGEMENT

Upon release, all operating system security patches are tested in the staging environment against the production code base. Once approved, patches are rolled out to one node of each farm. An appropriate amount of additional time is given for further validation of the patch, depending on the severity of the change. This helps minimize any downtime (and the subsequent roll back) caused by a patch of poor quality. Once validated, the patch is deployed on the remaining servers.

### 11.4. REGULAR BACKUPS

To ensure that a safe copy of all data is on hand in case of catastrophic failure of all database storage systems, backups of the main database are performed regularly. We perform full backups on both a weekly and monthly basis. We augment these full backups with differential backups performed daily. The backup process is monitored and any failure is immediately escalated to the systems engineering team. Additional details on our backup strategy and procedures can be found in our response to Question 37.

### 11.5. DATA ESCROW

Data escrow is a critical registry function. Escrowing our data on a regular basis ensures that a safe, restorable copy of the registration data is available should all other attempts

to restore our data fail. Our escrow process is performed in accordance with Specification 2. Additional details on our data escrow procedures can be found in our response to Question 38.

#### 11.6. REGULAR TRAINING

Ongoing security awareness training is critical to ensuring users are aware of security threats and concerns. To sustain this awareness, we have training programs in place designed to ensure corporate security policies pertaining to registry and other operations are understood by all personnel. All employees must pass a proficiency exam and sign the Information Security Policy as part of their employment. Further detail on our security awareness training can be found in our response to Question 30a.

We conduct failover training regularly to ensure all required personnel are up-to-date on failover process and have the regular practice needed to ensure successful failover should it be necessary. We also use failover training to validate current policies and procedures. For additional details on our failover training, please refer to our response to Question 41.

#### 11.7. ACCESS CONTROL

User authentication is required to access any network or system resource. User accounts are granted the minimum access necessary. Access to production resources is restricted to key IT personnel. Physical access to production resources is extremely limited and given only as needed to IT-approved personnel. For further details on our access control policies, please refer to our response to Question 30a.

#### 11.8. 24/7 MONITORING AND REGISTRAR TECHNICAL SUPPORT

We employ a full-time staff trained specifically on monitoring and supporting the services we provide. This staff is equipped with documentation outlining our processes for providing first-tier analysis, issue troubleshooting, and incident handling. This team is also equipped with specialty tools developed specifically to safely aid in diagnostics. On-call staff second-tier support is available to assist when necessary. To optimize the service we provide, we conduct ongoing training in both basic and more advanced customer support and conduct additional training, as needed, when new system or tool features are introduced or solutions to common issues are developed.

#### 12.0. SRS INFRASTRUCTURE

As shown in Attachment A, Figure 1, our SRS infrastructure consists of two identically provisioned and configured datacenters with each served by multiple bandwidth providers.

For clarity in Figure 1, connecting lines through the load balancing devices between the Protocol Layer and the Services Layer are omitted. All hardware connecting to the Services Layer goes through a load-balancing device. This device distributes the load across the multiple machines providing the services. This detail is illustrated more clearly in subsequent diagrams in Attachment A.

#### 13.0 RESOURCING PLAN

Resources for the continued development and maintenance of the SRS and ancillary services have been carefully considered. We have a significant portion of the required personnel on hand and plan to hire additional technical resources, as indicated below. Resources on hand are existing full time employees whose primary responsibility is the SRS.

For descriptions of the following teams, please refer to the resourcing section of our response to Question 31, Technical Review of Proposed Registry. Current and planned allocations are below.

##### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software

Engineers, two, Sr. Database Engineer, Quality Assurance Engineer

- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 25. Extensible Provisioning Protocol (EPP)

Q25 CHAR: 20820

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

### 1.0. INTRODUCTION

Our SRS EPP interface is a proprietary network service compliant with RFC 3735 and RFCs 5730-4. The EPP interface gives registrars a standardized programmatic access point to provision and manage domain name registrations.

### 2.0. IMPLEMENTATION EXPERIENCE

The SRS implementation for our gTLD leverages extensive experience implementing long-running, highly available network services accessible. Our EPP interface was written by highly experienced engineers focused on meeting strict requirements developed to ensure quality of service and uptime. The development staff has extensive experience in the domain name industry.

### 3.0. TRANSPORT

The EPP core specification for transport does not specify that a specific transport method be used and is, thus, flexible enough for use over a variety of transport methods. However, EPP is most commonly used over TCP/IP and secured with a Transport Layer Security (TLS) layer for domain registration purposes. Our EPP interface uses the industry standard TCP with TLS.

#### 4.0. REGISTRARS' EXPERIENCE

Registrars will find our EPP interface familiar and seamless. As part of the account creation process, a registrar provides us with information we use to authenticate them. The registrar provides us with two subnets indicating the connection's origination. In addition, the registrar provides us with the Common Name specified in the certificate used to identify and validate the connection.

Also, as part of the account creation process, we provide the registrar with authentication credentials. These credentials consist of a client identifier and an initial password and are provided in an out-of-band, secure manner. These credentials are used to authenticate the registrar when starting an EPP session.

Prior to getting access to the production interfaces, registrars have access to an Operational Test and Evaluation (OT&E) environment. This environment is an isolated area that allows registrars to develop and test against registry systems without any impact to production. The OT&E environment also provides registrars the opportunity to test implementation of custom extensions we may require.

Once a registrar has completed testing and is prepared to go live, the registrar is provided a Scripted Server Environment. This environment contains an EPP interface and database pre-populated with known data. To verify that the registrar's implementations are correct and minimally suitable for the production environment, the registrar is required to run through a series of exercises. Only after successful performance of these exercises is a registrar allowed access to production services.

#### 5.0. SESSIONS

The only connections that are allowed are those from subnets previously communicated during account set up. The registrar originates the connection to the SRS and must do so securely using a Transport Layer Security (TLS) encrypted channel over TCP/IP using the IANA assigned standard port of 700.

The TLS protocol establishes an encrypted channel and confirms the identity of each machine to its counterpart. During TLS negotiation, certificates are exchanged to mutually verify identities. Because mutual authentication is required, the registrar certificate must be sent during the negotiation. If it is not sent, the connection is terminated and the event logged.

The SRS first examines the Common Name (CN). The SRS then compares the Common Name to the one provided by the registrar during account set up. The SRS then validates the certificate by following the signature chain, ensures that the chain is complete, and terminates against our store of root Certificate Authorities (CA). The SRS also verifies the revocation status with the root CA. If these fail, the connection is terminated and the event logged.

Upon successful completion of the TLS handshake and the subsequent client validation, the SRS automatically sends the EPP greeting. Then the registrar initiates a new session by sending the login command with their authentication credentials. The SRS passes the credentials to the database for validation over an encrypted channel. Policy limits the number of failed login attempts. If the registrar exceeds the maximum number of attempts, the connection to the server is closed. If authentication was successful, the EPP session is allowed to proceed and a response is returned indicating that the command was successful.

An established session can only be maintained for a finite period. EPP server policy specifies the timeout and maximum lifetime of a connection. The policy requires the registrar to send a protocol command within a given timeout period. The maximum lifetime policy for our registry

restricts the connection to a finite overall timespan. If a command is not received within the timeout period or the connection lifetime is exceeded, the connection is terminated and must be reestablished. Connection lifecycle details are explained in detail in our Registrar Manual.

The EPP interface allows pipelining of commands. For consistency, however, the server only processes one command at a time per session and does not examine the next command until a response to the previous command is sent. It is the registrar's responsibility to track both the commands and their responses.

## 6.0. EPP SERVICE SCALE

Our EPP service is horizontally scalable. Its design allows us to add commodity-grade hardware at any time to increase our capacity. The design employs a 3-tier architecture which consists of protocol, services and data tiers. Servers for the protocol tier handle the loads of SSL negotiation and protocol validation and parsing. These loads are distributed across a farm of numerous servers balanced by load-balancing devices. The protocol tier connects to the services tier through load-balancing devices.

The services tier consists of a farm of servers divided logically based on the services provided. Each service category has two or more servers. The services tier is responsible for registry policy enforcement, registration lifecycle and provisioning, among other services. The services tier connects to the data tier which consists of Microsoft SQL Server databases for storage.

The data tier is a robust SQL Server installation that consists of a 2-node cluster in an active/active configuration. Each node is designed to handle the entire load of the registry should the alternate node go offline.

Additional details on scale and our plans to service the load we anticipate are described in detail on questions 24: SRS Performance and 32: Architecture.

## 7.0. COMPLIANCE WITH CORE AND EPP EXTENSION RFCs

The EPP interface is highly compliant with the following RFCs:

- RFC 5730 Extensible Provisioning Protocol
- RFC 5731 EPP Domain Name Mapping
- RFC 5732 EPP Host Mapping
- RFC 5733 EPP Contact Mapping
- RFC 5734 EPP Transport over TCP
- RFC 3915 Domain Registry Grace Period Mapping
- RFC 5910 Domain Name System (DNS) Security Extensions Mapping

The implementation is fully compliant with all points in each RFC. Where an RFC specifies optional details or service policy, they are explained below.

### 7.1. RFC 5730 EXTENSIBLE PROVISIONING PROTOCOL

Section 2.1 Transport Mapping Considerations - ack.

Transmission Control Protocol (TCP) in compliance with RFC 5734 with TLS.

Section 2.4 Greeting Format - compliant

The SRS implementation responds to a successful connection and subsequent TLS handshake with the EPP Greeting. The EPP Greeting is also transmitted in response to a `<hello/>` command. The server includes the EPP versions supported which at this time is only 1.0. The Greeting contains namespace URIs as `<objURI/>` elements representing the objects the server manages.

The Greeting contains a `<svcExtension>` element with one `<extURI>` element for each extension namespace URI implemented by the SRS.

### Section 2.7 Extension Framework - compliant

Each mapping and extension, if offered, will comply with RFC 3735 Guidelines for Extending EPP.

### Section 2.9 Protocol Commands - compliant

Login command's optional `<options>` element is currently ignored. The `<version>` is verified and 1.0 is currently the only acceptable response. The `<lang>` element is also ignored because we currently only support English (en). This server policy is reflected in the greeting.

The client mentions `<objURI>` elements that contain namespace URIs representing objects to be managed during the session inside `<svcs>` element of Login request. Requests with unknown `<objURI>` values are rejected with error information in the response. A `<logout>` command ends the client session.

### Section 4 Formal syntax - compliant

All commands and responses are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against base schema (epp-1.0), common elements schema (eppcom-1.0) and object-specific schema.

### Section 5 Internationalization Considerations - compliant

EPP XML recognizes both UTF-8 and UTF-16. All date-time values are presented in Universal Coordinated Time using Gregorian calendar.

## 7.2. RFC 5731 EPP DOMAIN NAME MAPPING

### Section 2.1 Domain and Host names - compliant

The domain and host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

### Section 2.2 Contact and Client Identifiers - compliant

All EPP contacts are identified by a server-unique identifier. Contact identifiers conform to "clIDType" syntax described in RFC 5730.

### Section 2.3 Status Values - compliant

A domain object always has at least one associated status value. Status value can only be set by the sponsoring client or the registry server where it resides. Status values set by server cannot be altered by client. Certain combinations of statuses are not permitted as described by RFC.

### Section 2.4 Dates and Times - compliant

Date and time attribute values are represented in Universal Coordinated Time (UTC) using Gregorian calendar, in conformance with XML schema.

### Section 2.5 Validity Periods - compliant

Our SRS implementation supports validity periods in unit year ("y"). The default period is 1y.

### Section 3.1.1 EPP `<check>` Command - compliant

A maximum of 5 domains can be checked in a single command request as defined by server policy.

### Section 3.1.2 EPP `<info>` Command - compliant

EPP `<info>` command is used to retrieve information associated with a domain object. If the querying Registrar is not the sponsoring registrar and the registrar does not provide valid authorization information, the server does not send any domain elements in response per server policy.

### Section 3.1.3 EPP `<transfer>` Query Command - compliant

EPP `<transfer>` command provides a query operation that allows a client to determine the real-time status of pending and completed transfer requests. If the authInfo element is not provided or authorization information is invalid, the command is rejected for authorization.

#### Section 3.2.4 EPP <transfer> Command - compliant

All subordinate host objects to the domain are transferred along with the domain object.

### 7.3. RFC 5732 EPP HOST MAPPING

#### Section 2.1 Host Names - compliant

The host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

#### Section 2.2 Contact and Client Identifiers - compliant

All EPP clients are identified by a server-unique identifier. Client identifiers conform to "clIDType" syntax described in RFC 5730.

#### Section 2.5 IP Addresses - compliant

The syntax for IPv4 addresses conform to RFC0791. The syntax for IPv6 addresses conform to RFC4291.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of five host names can be checked in a single command request set by server policy.

#### Section 3.1.2 EPP <info> Command - compliant

If the querying client is not a sponsoring client, the server does not send any host object elements in response and the request is rejected for authorization according to server policy.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the host is not delegated.

#### Section 3.2.2 EPP <update> Command - compliant

Any request to change host name of an external host that has associations with objects that are sponsored by a different client fails.

### 7.4. RFC 5733 EPP CONTACT MAPPING

#### Section 2.1 Contact and Client Identifiers - compliant

Contact identifiers conform to "clIDType" syntax described in RFC 5730.

#### Section 2.6 Email Addresses - compliant

Email address validation conforms to syntax defined in RFC5322.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of 5 contact id can be checked in a single command request.

#### Section 3.1.2 EPP <info> Command - compliant

If querying client is not sponsoring client, server does not send any contact object elements in response and the request is rejected for authorization.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the contact object is not associated with other known objects.

### 7.5. RFC 5734 EPP TRANSPORT OVER TCP

#### Section 2 Session Management - compliant

The SRS implementation conforms to the required flow mentioned in the RFC for initiation of a connection request by a client, to establish a TCP connection. The client has the ability to end the session by issuing an EPP <logout> command, which ends the session and closes the TCP connection. Maximum life span of an established TCP connection is defined by server policy. Any connections remaining open beyond that are terminated. Any sessions staying inactive beyond the timeout policy of the server are also terminated similarly. Policies regarding timeout and lifetime values are clearly communicated to registrars in documentation provided to them.

### Section 3 Message Exchange - compliant

With the exception of EPP server greeting, EPP messages are initiated by EPP client in the form of EPP commands. Client-server interaction works as a command-response exchange where the client sends one command to the server and the server returns one response to the client in the exact order as received by the server.

### Section 8 Security considerations - ack.

TLS 1.0 over TCP is used to establish secure communications from IP restricted clients. Validation of authentication credentials along with the certificate common name, validation of revocation status and the validation of the full certificate chain are performed. The ACL only allows connections from subnets prearranged with the Registrar.

### Section 9 TLS Usage Profile - ack.

The SRS uses TLS 1.0 over TCP and matches the certificate common name. The full certificate chain, revocation status and expiry date is validated. TLS is implemented for mutual client and server authentication.

## 8.0. EPP EXTENSIONS

### 8.1. STANDARDIZED EXTENSIONS

Our implementation includes extensions that are accepted standards and fully documented. These include the Registry Grace Period Mapping and DNSSEC.

### 8.2. COMPLIANCE WITH RFC 3735

RFC 3735 are the Guidelines for Extending the Extensible Provisioning Protocol. Any custom extension implementations follow the guidance and recommendations given in RFC 3735.

### 8.3. COMPLIANCE WITH DOMAIN REGISTRY GRACE PERIOD MAPPING RFC 3915

#### Section 1 Introduction - compliant

Our SRS implementation supports all specified grace periods particularly, add grace period, auto-renew grace period, renew grace period, and transfer grace period.

#### Section 3.2 Registration Data and Supporting Information - compliant

Our SRS implementation supports free text and XML markup in the restore report.

#### Section 3.4 Client Statements - compliant

Client can use free text or XML markup to make 2 statements regarding data included in a restore report.

#### Section 5 Formal syntax - compliant

All commands and responses for this extension are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against RGP specific schema (rgp-1.0).

### 8.4. COMPLIANCE WITH DOMAIN NAME SYSTEM (DNS) SECURITY EXTENSIONS MAPPING RFC 5910

RFC 5910 describes an Extensible Provisioning Protocol (EPP) extension mapping for the provisioning and management of Domain Name System Security Extensions (DNSSEC) for domain names stored in a shared central repository. Our SRS and DNS implementation supports DNSSEC.

The information exchanged via this mapping is extracted from the repository and used to publish DNSSEC Delegate Signer (DS) resource records (RR) as described in RFC 4034.

#### Section 4 DS Data Interface and Key Data Interface - compliant

Our SRS implementation supports only DS Data Interface across all commands applicable with DNSSEC extension.

#### Section 4.1 DS Data Interface - compliant

The client can provide key data associated with the DS information. The collected key data along with DS data is returned in an info response, but may not be used in our systems.

#### Section 4.2 Key Data Interface - compliant

Since our gTLD's SRS implementation does not support Key Data Interface, when a client sends a command with Key Data Interface elements, it is rejected with error code 2306.

#### Section 5.1.2 EPP <info> Command - compliant

This extension does not add any elements to the EPP <info> command. When an <info> command is processed successfully, the EPP <resData> contains child elements for EPP domain mapping. In addition, it contains a child <secDNS:infData> element that identifies extension namespace if the domain object has data associated with this extension. It is conditionally based on whether or the client added the <extURI> element for this extension in the <login> command. Multiple DS data elements are supported.

#### Section 5.2.1 EPP <create> Command - compliant

The client must add an <extension> element, and the extension element MUST contain a child <secDNS:create> element if the client wants to associate data defined in this extension to the domain object. Multiple DS data elements are supported. Since the SRS implementation does not support maxSigLife, it returns a 2102 error code if the command included a value for maxSigLife.

#### Section 5.2.5 EPP <update> Command - compliant

Since the SRS implementation does not support the <secDNS:update> element's optional "urgent" attribute, an EPP error result code of 2102 is returned if the "urgent" attribute is specified in the command with value of Boolean true.

### 8.5. PROPRIETARY EXTENSION DOCUMENTATION

We are not proposing any proprietary EPP extensions for this TLD.

### 8.6. EPP CONSISTENT WITH THE REGISTRATION LIFECYCLE DESCRIBED IN QUESTION 27

Our EPP implementation makes no changes to the industry standard registration lifecycle and is consistent with the lifecycle described in Question 27.

### 9.0. RESOURCING PLAN

For descriptions of the following teams, please refer to our response to Question 31. Current and planned allocations are below.

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, 2 Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 26. Whois

Q26 CHAR: 19908

### 1.0. INTRODUCTION

Our registry provides a publicly available Whois service for registered domain names in the top-level domain (TLD). Our planned registry also offers a searchable Whois service that includes web-based search capabilities by domain name, registrant name, postal address, contact name, registrar ID and IP addresses without an arbitrary limit. The Whois service for our gTLD also offers Boolean search capabilities, and we have initiated appropriate precautions to avoid abuse of the service. This searchable Whois service exceeds requirements and is eligible for a score of 2 by providing the following:

- Web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit.
- Boolean search capabilities.
- Appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users).
- Compliance with any applicable privacy laws or policies.

The Whois service for our planned TLD is available via port 43 in accordance with RFC 3912. Also, our planned registry includes a Whois web interface. Both provide free public query-based access to the elements outlined in Specification 4 of the Registry Agreement. In addition, our registry includes a searchable Whois service. This service is available to authorized entities and accessible from a web browser.

### 2.0. HIGH-LEVEL WHOIS SYSTEM DESCRIPTION

The Whois service for our registry provides domain registration information to the public. This information consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use does not require prior authorization or permission. To maximize accessibility to the data, Whois service is provided over two mediums, as described below. Where the medium is not specified, any reference to Whois pertains to both mediums. We describe our searchable Whois solution in Section 11.0.

One medium used for our gTLD's Whois service is port 43 Whois. This consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted text. If no query is received by the server within the allotted time or a

malformed query is detected, the connection is closed. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

The other medium used for Whois is via web interface using clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 443 using the HTTPS protocol.

The steps for accessing the web-based Whois will be prominently displayed on the registry home page. The web-based Whois is for interactive use by individual users while the port 43 Whois system is for automated use by computers and lookup clients.

Both Whois service offerings comply with Specification 4 of the New GTLD Agreement. Although the Whois output is free text, it follows the output format as described for domain, registrar and nameserver data in Sections 1.4, 1.5 and 1.6 of Specification 4 of the Registry Agreement.

Our gTLD's WHOIS service is mature, and its current implementation has been in continuous operation for seven years. A dedicated support staff monitors this service 24/7. To ensure high availability, multiple redundant servers are maintained to enable capacity well above normal query rates.

Most of the queries sent to the port 43 Whois service are automated. The Whois service contains mechanisms for detecting abusive activity and, if abuse is detected, reacts appropriately. This capability contributes to a high quality of service and availability for all users.

## 2.1. PII POLICY

The services and systems for this gTLD do not collect, process or store any personally identifiable information (PII) as defined by state disclosure and privacy laws. Registry systems collect the following Whois data types: first name, last name, address and phone numbers of all billing, administration and technical contacts. Any business conducted where confidential PII consisting of customer payment information is collected uses systems that are completely separate from registry systems and segregated at the network layer.

## 3.0. RELEVANT NETWORK DIAGRAM(S)

Our network diagram (Q 26 - Attachment A, Figure 1) provides a quick-reference view of the Whois system. This diagram reflects the Whois system components and compliance descriptions and explanations that follow in this section.

### 3.1. NARRATIVE FOR Q26 - FIGURE 1 OF 1 (SHOWN IN ATTACHMENT A)

The Whois service for our gTLD operates from two datacenters from replicated data. Network traffic is directed to either of the datacenters through a global load balancer. Traffic is directed to an appropriate server farm, depending on the service interface requested. The load balancer within the datacenter monitors the load and health of each individual server and uses this information to select an appropriate server to handle the request.

The protocol server handling the request communicates over an encrypted channel with the Whois service provider through a load-balancing device. The WHOIS service provider communicates directly with a replicated, read-only copy of the appropriate data from the registry database. The Whois service provider is passed a sanitized and verified query, such as a domain name. The database attempts to locate the appropriate records, then format and return them. Final output formatting is performed by the requesting server and the results are returned back to the original client.

## 4.0. INTERCONNECTIVITY WITH OTHER REGISTRY SYSTEMS

The Whois port 43 interface runs as an unattended service on servers dedicated to this task. As shown in Attachment A, Figure 1, these servers are delivered network traffic by redundant load-balancing hardware, all of which is protected by access control methods. Balancing the load across many servers helps distribute the load and allows for expansion. The system's design allows for the rapid addition of new servers, typically same-day, should load require them.

Both our port 43 Whois and our web-based Whois communicate with the Whois service provider in the middle tier. Communication to the Whois service provider is distributed by a load balancing pair. The Whois service provider calls the appropriate procedures in the database to search for the registration records.

The Whois service infrastructure operates from both datacenters, and the global load balancer distributes Whois traffic evenly across the two datacenters. If one datacenter is not responding, the service sends all traffic to the remaining datacenter. Each datacenter has sufficient capacity to handle the entire load.

To avoid placing an abnormal load on the Shared Registration System (SRS), both service installations read from replicated, read-only database instances (see Figure 1). Because each instance is maintained via replication from the primary SRS database, each replicated database contains a copy of the authoritative data. Having the Whois service receive data from this replicated database minimizes the impact of services competing for the same data and enables service redundancy. Data replication is also monitored to prevent detrimental impact on the primary SRS.

#### 5.0. FREQUENCY OF SYNCHRONIZATION BETWEEN SERVERS

As shown in Figure 1, the system replicates WHOIS services data continuously from the authoritative database to the replicated database. This persistent connection is maintained between the databases, and each transaction is queued and published as an atomic unit. Delays, if any, in the replication of registration information are minimal, even during periods of high load. At no time will the system prioritize replication over normal operations of the SRS.

#### 6.0. POTENTIAL FORMS OF ABUSE

Potential forms of abuse of this feature, and how they are mitigated, are outlined below. For additional information on our approach to preventing and mitigating Whois service abuse, please refer to our response to Question 28.

##### 6.1. DATA MINING ABUSE

This type of abuse consists primarily of a user using queries to acquire all or a significant portion of the registration database.

The system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate-limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

##### 6.2. INVALID DATA INJECTION

This type of abuse is mitigated by 1) ensuring that all Whois systems are strictly read-only; and 2) ensuring that any input queries are properly sanitized to prevent data injection.

##### 6.3. DISCLOSURE OF PRIVATE INFORMATION

The Whois system mitigates this type of abuse by ensuring all responses, while complete, only contain information appropriate to Whois output and do not contain any private or non-public information.

## 7.0. COMPLIANCE WITH WHOIS SPECIFICATIONS FOR DATA OBJECTS, BULK ACCESS, AND LOOKUPS

Whois specifications for data objects, bulk access, and lookups for our gTLD are fully compliant with Specifications 4 and 10 to the Registry Agreement, as explained below.

### 7.1. COMPLIANCE WITH SPECIFICATION 4

Compliance of Whois specifications with Specification 4 is as follows:

- Registration Data Directory Services Component: Specification 4.1 is implemented as described. Formats follow the outlined semi-free text format. Each data object is represented as a set of key/value pairs with lines beginning with keys followed by a colon and a space as delimiters, followed by the value. Fields relevant to RFCs 5730-4 are formatted per Section 1.7 of Specification 4.
- Searchability compliance is achieved by implementing, at a minimum, the specifications in section 1.8 of specification 4. We describe this searchability feature in Section 11.0.
- Co-operation, ICANN Access and Emergency Operator Access: Compliance with these specification components is assured.
- Bulk Registration Data Access to ICANN: Compliance with this specification component is assured.

Evidence of Whois system compliance with this specification consists of:

- Matching existing Whois output with specification output to verify that it is equivalent.

### 7.2. COMPLIANCE WITH SPECIFICATION 10 FOR WHOIS

Our gTLD's Whois complies fully with Specification 10. With respect to Section 4.2, the approach used ensures that Round-Trip Time (RTT) remains below five times the corresponding Service Level Requirement (SLR).

#### 7.2.1. Emergency Thresholds

To achieve compliance with this Specification 10 component, several measures are used to ensure emergency thresholds are never reached:

- 1) Provide staff training as necessary on Registry Transition plan components that prevent Whois service interruption in case of emergency (see the Question 40 response for details).
- 2) Conduct regular failover testing for Whois services as outlined in the Question 41 response.
- 3) Adhere to recovery objectives for Whois as outlined in the Question 39 response.

#### 7.2.2. Emergency Escalation

Compliance with this specification component is achieved by participation in escalation procedures as outlined in this section.

## 8.0. COMPLIANCE WITH RFC 3912

Whois service for our gTLD is fully compliant with RFC 3912 as follows:

- RFC 3912 Element, "A Whois server listens on TCP port 43 for requests from Whois clients": This requirement is properly implemented, as described in Section 1 above. Further, running Whois on ports other than port 43 is an option.
- RFC 3912 Element, "The Whois client makes a text request to the Whois server, then the Whois server replies with text content": The port 43 Whois service is a text-based query and response system. Thus, this requirement is also properly implemented.
- RFC 3912 Element, "All requests are terminated with ASCII CR and then ASCII LF. The response might contain more than one line of text, so the presence of ASCII CR or ASCII LF characters does not indicate the end of the response": This requirement is properly implemented for our TLD.

- RFC 3912 Element, "The Whois server closes its connection as soon as the output is finished": This requirement is properly implemented for our TLD, as described in Section 1 above.
- RFC 3912 Element, "The closed TCP connection is the indication to the client that the response has been received": This requirement is properly implemented.

## 9.0. RESOURCING PLAN

Resources for the continued development and maintenance of the Whois have been carefully considered. Many of the required personnel are already in place. Where gaps exist, technical resource addition plans are outlined below as "First Year New Hires." Resources now in place, shown as "Existing Department Personnel", are employees whose primary responsibility is the registry system.

### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 11.0. PROVISION FOR SEARCHABLE WHOIS CAPABILITIES

The searchable Whois service for our gTLD provides flexible and powerful search ability for users through a web-based interface. This service is provided only to entities with a demonstrated need for it. Where access to registration data is critical to the investigation of cybercrime and other potentially unlawful activity, we authorize access for fully vetted law enforcement and other entities as appropriate. Search capabilities for our gTLD's searchable Whois meet or exceed the requirements indicated in section 1.8 of specification 4.

Once authorized to use the system, a user can perform exact and partial match searches on the following fields:

- Domain name
- Registrant name
- Postal address including street, city and state, etc., of all registration contacts
- Contact names
- Registrant email address
- Registrar name and ID
- Nameservers
- Internet Protocol addresses

In addition, all other EPP Contact Object fields and sub-fields are searchable as well. The following Boolean operators are also supported: AND, OR, NOT. These operators can be used for joining or excluding results.

Certain types of registry related abuse are unique to the searchable Whois function. Providing searchable Whois warrants providing protection against this abuse. Potential problems include:

- Attempts to abuse Whois by issuing a query that essentially returns the entire database in the result set.
- Attempts to run large quantities of queries sufficient to reduce the performance of the registry database.

Precautions for preventing and mitigating abuse of the Whois search service include:

- Limiting access to authorized users only.
- Establishing legal agreements with authorized users that clearly define and prohibit system abuse.
- Queuing search queries into a job processing system.
- Executing search queries against a replicated read-only copy of the database.
- Limiting result sets when the query is clearly meant to cause a wholesale dump of registration data.

Only authorized users with a legitimate purpose for searching registration data are permitted to use the searchable Whois system. Examples of legitimate purpose include the investigation of terrorism or cybercrime by authorized officials, or any of many other official activities that public officials must conduct to fulfill their respective duties. We grant access for these and other purposes on a case-by-case basis.

To ensure secure access, a two-factor authentication device is issued to each authorized user of the registry. Subsequent access to the system requires the user name, password and a one-time generated password from the issued two-factor device.

Upon account creation, users are provided with documentation describing our terms of service and policies for acceptable use. Users must agree to these terms to use the system. These terms clearly define and illustrate what constitutes legitimate use and what constitutes abuse. They also inform the user that abuse of the system is grounds for limiting or terminating the user's account.

For all queries submitted, the searchable Whois system first sanitizes the query to deter potential harm to our internal systems. The system then submits the query to a queue for job processing. The system processes each query one by one and in the order received. The number of concurrent queries executed varies, depending on the current load.

To ensure Whois search capabilities do not affect other registry systems, the system executes queries against a replicated read-only version of the database. The system updates this database frequently as registration transactions occur. These updates are performed in a manner that ensures no detrimental load is placed on the production SRS.

To process successfully, each query must contain the criteria needed to filter its results down to a reasonable result set (one that is not excessively large). If the query does not meet this, the user is notified that the result set is excessive and is asked to verify the search criteria. If the user wishes to continue without making the indicated changes, the user

must contact our support team to verify and approve the query. Each successful query submitted results in immediate execution of the query.

Query results are encrypted using the unique shared secret built into each 256-bit Advanced Encryption Standard (AES) two-factor device. The results are written to a secure location dedicated for result storage and retrieval. Each result report has a unique file name in the user's directory. The user's directory is assigned the permissions needed to prevent unauthorized access to report files. For the convenience of Registrars and other users, each query result is stored for a minimum of 30 days. At any point following this 30-day period, the query result may be purged by the system.

## 27. Registration Life Cycle

Q27 CHAR: 19951

### 1.0. INTRODUCTION

To say that the lifecycle of a domain name is complex would be an understatement. A domain name can traverse many states throughout its lifetime and there are many and varied triggers that can cause a state transition. Some states are triggered simply by the passage of time. Others are triggered by an explicit action taken by the registrant or registrar. Understanding these is critical to the proper operation of a gTLD registry. To complicate matters further, a domain name can contain one or more statuses. These are set by the registrar or registry and have a variety of uses.

When this text discusses EPP commands received from registrars, with the exception of a transfer request, the reader can assume that the command is received from the sponsoring registrar and successfully processed. The transfer request originates from the potential gaining registrar. Transfer details are explicit for clarity.

### 2.0. INDUSTRY STANDARDS

The registration life cycle approach for our gTLD follows industry standards for registration lifecycles and registration statuses. By implementing a registration life cycle that adheres to these standards, we avoid compounding an already confusing topic for registrants. In addition, since registrar systems are already designed to manage domain names in a standard way, a standardized registration lifecycle also lowers the barrier to entry for registrars.

The registration lifecycle for our gTLD follows core EPP RFCs including RFC 5730 and RFC 5731 and associated documentation of lifecycle information. To protect registrants, EPP Grace Period Mapping for domain registrations is implemented, which affects the registration lifecycle and domain status. EPP Grace Period Mapping is documented in RFC 3915.

### 3.0. REGISTRATION STATES

For a visual guide to this registration lifecycle discussion, please refer to the attachment, Registration Lifecycle Illustrations. Please note that this text makes many references to the status of a domain. For brevity, we do not distinguish between the domain mapping status `<domain:status>` and the EPP Grace Period Mapping status `<rgp:rgpStatus>` as making this differentiation in every case would make this document more difficult to read and in this context does not improve understanding.

### 4.0. AVAILABILITY

The lifecycle for any domain registration begins with the Available state. This is not necessarily a registration state, per se, but indicates the lack of domain registration implied and provides an entry and terminal point for the state diagram provided. In addition to the state diagram, please refer to Fig. 2 - Availability Check for visual representation of the process flow.

Before a user can register a new domain name, the registry performs an availability check.

Possible outcomes of this availability check include:

1. Domain name is available for registration.
2. Domain name is already registered, regardless of the current state and not available for registration.
3. Domain name has been reserved by the registry.
4. Domain name string has been blocked because of a trademark claim.

#### 5.0. INITIAL REGISTRATION

The first step in domain registration is the availability check as described above and shown in Fig. 2 - Availability Check. A visual guide to the description for domain registration in this section can be found in Fig. 3 - Domain Registration. If the domain is available for registration, a registrar submits a registration request.

With this request, the registrar can include zero or more nameserver hosts for zone delegation. If the registrar includes zero or one nameserver host(s), the domain is registered but the EPP status of the domain is set to inactive. If the registrar includes two or more, the EPP status of the domain is set to ok.

The request may also include a registration period (the number of years the registrar would like the domain registered). If this time period is omitted, the registry may use a default initial registration period. The policy for this aligns with the industry standard of one year as the default period. If the registrar includes a registration period, the value must be between one and ten years as specified in the gTLD Registry Agreement.

Once the registration process is complete within the registry, the domain registration is considered to be in the REGISTERED state but within the Add Grace Period.

#### 6.0. REGISTERED STATE - ADD GRACE PERIOD

The Add Grace Period is a status given to a new domain registration. The EPP status applied in this state is addPeriod. The Add Grace Period is a state in which the registrar is eligible for a refund of the registration price should the registration be deleted while this status is applied. The status is removed and the registration transitions from the Add Grace Period either by an explicit delete request from the registrar or by the lapse of five days. This is illustrated in Fig. 1 and Fig. 3 of the illustrations attachment.

If the registrar deletes the domain during the Add Grace Period, the domain becomes immediately available for registration. The registrar is refunded the original cost of the registration.

If the five-day period lapses without receiving a successful delete command, the addPeriod status is removed from the domain.

#### 7.0. REGISTERED STATE

A domain registration spends most of its time in the REGISTERED state. A domain registration period can initially be between one year and ten years in one-year increments as specified in the new gTLD Registry Agreement. At any time during the registration's term, several things can occur to either affect the registration period or transition the registration to another state. The first three are the auto-renew process, an explicit renew EPP request and a successful completion of the transfer process.

#### 8.0. REGISTRATION PERIOD EXTENSION

The registration period for a domain is extended either through a successful renew request by the registrar, through the successful completion of the transfer process or through the auto-renew process. This section discusses each of these three options.

##### 8.1. EXTENSION VIA RENEW REQUEST

One way that a registrar can extend the registration period is by issuing a renew request. Each renew request includes the number of years desired for extension of the registration up to ten years. Please refer to the flow charts found in both Fig. 4 - Renewal and Fig. 5 -

Renewal Grace Period for a visual representation of the following.

Because the registration period cannot extend beyond ten years, any request for a registration period beyond ten years fails. The domain must not contain the status `renewProhibited`. If this status exists on the domain, the request for a renewal fails.

Upon a successful renew request, the registry adds the `renewPeriod` status to the domain. This status remains on the domain for a period of five days. The number of years in the renew request is added to the total registration period of the domain. The registrar is charged for each year of the additional period.

While the domain has the `renewPeriod` status, if the sponsoring registrar issues a successful delete request, the registrar receives a credit for the renewal. The `renewPeriod` status is removed and the domain enters the Redemption Grace Period (RGP) state. The status `redemptionPeriod` is added to the status of the domain.

## 8.2. EXTENSION VIA TRANSFER PROCESS

The second way to extend the registration is through the Request Transfer process. A registrar may transfer sponsorship of a domain name to another registrar. The exact details of a transfer are explained in the Request Transfer section below. The successful completion of the Request Transfer process automatically extends the registration for one year. The registrar is not charged separately for the addition of the year; it comes automatically with the successful transfer. The `transferPeriod` status is added to the domain.

If the gaining registrar issues a successful delete request during the `transferPeriod`, the gaining registrar receives a credit for the transfer. The status `redemptionPeriod` is added to the status of the domain and `transferPeriod` is removed. The domain then enters the RGP state.

## 8.3. EXTENSION VIA AUTO-RENEW

The last way a registration period can be extended is passive and is the simplest way because it occurs without any action by the Registrar. When the registration period expires, for the convenience of the registrar and registrant, the registration renews automatically for one year. The registrar is charged for the renewal at this time. This begins the Auto Renew Grace Period. The `autoRenewPeriod` status is added to the domain to represent this period.

The Auto Renew Grace Period lasts for 45 days. At any time during this period, the Registrar can do one of four things: 1) passively accept the renewal; 2) actively renew (to adjust renewal options); 3) delete the registration; or 4) transfer the registration.

To passively accept the renewal, the registrar need only allow the 45-day time span to pass for the registration to move out of the Auto Renew Grace Period.

Should the registrar wish to adjust the renewal period in any way, the registrar can submit a renew request via EPP to extend the registration period up to a maximum of ten years. If the renew request is for a single year, the registrar is not charged. If the renew request is for more than a single year, the registrar is charged for the additional years that the registration period was extended. If the command is a success, the `autoRenewPeriod` status is removed from the domain.

Should the registrar wish to delete the registration, the registrar can submit a delete command via EPP. Once a delete request is received, the `autoRenewPeriod` status is removed from the domain and the `redemptionPeriod` status is added. The registrar is credited for the renewal fees. For illustration of this process, please refer to Fig. 6 - Auto Renew Grace Period.

The last way move a domain registration out of the Auto Renew state is by successful completion of the Request Transfer process, as described in the following section. If the transfer completes successfully, the `autoRenewPeriod` status is removed and the `transferPeriod` status is added.

## 9.0. REQUEST TRANSFER

A customer can change the sponsoring registrar of a domain registration through the Request Transfer process. This process is an asynchronous, multi-step process that can take many as five days but may occur faster, depending on the level of support from participating Registrars.

The initiation of the transfer process is illustrated in Fig. 8 - Request Transfer. The transfer process begins with a registrar submitting a transfer request. To succeed, the request must meet several criteria. First, the domain status must not contain `transferProhibited` or `pendingTransfer`. Second, the initial domain registration must be at least 60 days old or, if transferred prior to the current transfer request, must not have been transferred within the last 60 days. Lastly, the transfer request must contain the correct `authInfo` (authorization information) value. If all of these criteria are met, the transfer request succeeds and the domain moves into the Pending Transfer state and the `pendingTransfer` status is added to the domain.

There are four ways to complete the transfer (and move it out of Pending Transfer status):

1. The transfer is auto-approved.
2. The losing registrar approves the transfer.
3. The losing registrar rejects the transfer.
4. The requesting registrar cancels the transfer.

After a successful transfer request, the domain continues to have the `pendingTransfer` status for up to five days. During this time, if no other action is taken by either registrar, the domain successfully completes the transfer process and the requesting registrar becomes the new sponsor of the domain registration. This is illustrated in Fig. 9 - Auto Approve Transfer.

At any time during the Pending Transfer state, either the gaining or losing registrar can request the status of a transfer provided they have the correct domain `authInfo`. Querying for the status of a transfer is illustrated in Fig. 13 - Query Transfer.

During the five-day Pending Transfer state, the losing registrar can accelerate the process by explicitly accepting or rejecting the transfer. If the losing registrar takes either of these actions, the `pendingTransfer` status is removed. Both of these actions are illustrated in Fig. 10 - Approve Transfer and Fig. 11 - Reject Transfer.

During the five-day Pending Transfer state, the requesting registrar may cancel the transfer request. If the registrar sends a cancel transfer request, the `pendingTransfer` status is removed. This is shown in Fig. 12 - Cancel Transfer.

If the transfer process is a success, the registry adds the `transferPeriod` status and removes the `pendingTransfer` status. If the domain was in the Renew Period state, upon successful completion of the transfer process, this status is removed.

The `transferPeriod` status remains on the domain for five days. This is illustrated in Fig. 14 - Transfer Grace Period. During this period, the gaining Registrar may delete the domain and obtain a credit for the transfer fees. If the gaining registrar issues a successful delete request during the `transferPeriod`, the gaining registrar receives a credit for the transfer. The `statusRedemptionPeriod` is added to the status of the domain and `transferPeriod` is removed. The domain then enters the RGP state.

#### 10.0. REDEMPTION GRACE PERIOD

The Redemption Grace Period (RGP) is a service provided by the registry for the benefit of registrars and registrants. The RGP allows a registrar to recover a deleted domain registration. The only way to enter the RGP is through a delete command sent by the sponsoring registrar. A domain in RGP always contains a status of `redemptionPeriod`. For an illustrated logical flow diagram of this, please refer to Fig. 15 - Redemption Grace Period.

The RGP lasts for 30 days. During this time, the sponsoring registrar may recover the domain through a two-step process. The first step is to send a successful restore command to the

registry. The second step is to send a restore report to the registry.

Once the restore command is processed, the registry adds the domain status of pendingRestore to the domain. The domain is now in the Pending Restore state, which lasts for seven days. During this time, the registry waits for the restore report from the Registrar. If the restore report is not received within seven days, the domain transitions back to the RGP state. If the restore report is successfully processed by the registry, the domain registration is restored back to the REGISTERED state. The statuses of pendingRestore and redemptionPeriod are removed from the domain.

After 30 days in RGP, the domain transitions to the Pending Delete state. A status of pendingDelete is applied to the domain and all other statuses are removed. This state lasts for five days and is considered a quiet period for the domain. No commands or other activity can be applied for the domain while it is in this state. Once the five days lapse, the domain is again available for registration.

#### 11.0. DELETE

To delete a domain registration, the sponsoring registrar must send a delete request to the registry. If the domain is in the Add Grace Period, deletion occurs immediately. In all other cases, the deleted domain transitions to the RGP. For a detailed visual diagram of the delete process flow, please refer to Fig. 7 - Delete.

For domain registration deletion to occur successfully, the registry must first ensure the domain is eligible for deletion by conducting two checks. The registry first checks to verify that the requesting registrar is also the sponsoring registrar. If this is not the case, the registrar receives an error message.

The registry then checks the various domain statuses for any restrictions that might prevent deletion. If the domain's status includes either the transferPending or deleteProhibited, the name is not deleted and an error is returned to the registrar.

If the domain is in the Add Grace Period, the domain is immediately deleted and any registration fees paid are credited back to the registrar. The domain is immediately available for registration.

If the domain is in the Renew Grace Period, the Transfer Grace Period or the Auto Renew Grace Period, the respective renewPeriod, transferPeriod or autoRenewPeriod statuses are removed and the corresponding fees are credited to the Registrar. The domain then moves to the RGP as described above.

#### 12.0. ADDITIONAL STATUSES

There are additional statuses that the registry or registrar can apply to a domain registration to limit what actions can be taken on it or to limit its usefulness. This section addresses such statuses that have not already addressed in this response.

Some statuses are applied by the registrar and others are exclusively applied by the registry. Registry-applied statuses cannot be altered by registrars. Status names that registrars can add or remove begin with "client". Status names that only the registry can add or remove begin with "server". These statuses can be applied by a registrar using the EPP domain update request as defined in RFC 5731.

To prevent a domain registration from being deleted, the status values of clientDeleteProhibited or serverDeleteProhibited may be applied by the appropriate party.

To withhold delegation of the domain to the DNS, clientHold or serverHold is applied. This prevents the domain name from being published to the zone file. If it is already published, the domain name is removed from the zone file.

To prevent renewal of the domain registration clientRenewProhibited or serverRenewProhibited is applied by the appropriate party.

To prevent the transfer of sponsorship of a registration, the states `clientTransferProhibited` or `serverTransferProhibited` is applied to the domain. When this is done, all requests for transfer are rejected by the registry.

If a domain registration contains no host objects, the registry applies the status of `inactive`. Since there are no host objects associated with the domain, by definition, it cannot be published to the zone. The `inactive` status cannot be applied by registrars.

If a domain has no prohibitions, restrictions or pending operations and the domain also contains sufficient host object references for zone publication, the registry assigns the status of `ok` if there is no other status set.

There are a few statuses defined by the domain mapping RFC 5731 that our registry does not use. These statuses are: `pendingCreate`, `pendingRenew` and `pendingUpdate`. RFC 5731 also defines some status combinations that are invalid. We acknowledge these and our registry system disallows these combinations.

### 13.0. RESOURCING

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer

- New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, 2 Sr. Systems Administrators, 2 Systems Administrators, 2 Sr. Systems Engineers, 2 Systems Engineers

- New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, 2 Network Engineers

- New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

#### Network Operations Center:

- Existing Department Personnel: Manager, 2 NOC Supervisors, 12 NOC Analysts

- New Hires: Eight NOC Analysts

## 28. Abuse Prevention and Mitigation

Q28 Standard CHAR: 29543

### 1.0. INTRODUCTION

Donuts will employ strong policies and procedures to prevent and mitigate abuse. Our intention is to ensure the integrity of this top-level domain (TLD) and maintain it as a trusted space on the Internet. We will not tolerate abuse and will use professional, consistent, and fair policies and procedures to identify and address abuse in the legal, operational, and technical realms

Our approach to abuse prevention and mitigation includes the following:

- An Anti-Abuse Policy that clearly defines malicious and abusive behaviors;
- An easy-to-use single abuse point of contact (APOC) that Internet users can use to report the malicious use of domains in our TLD;
- Procedures for investigating and mitigating abuse;
- Procedures for removing orphan glue records used to support malicious activities;
- Dedicated procedures for handling legal requests, such as inquiries from law enforcement bodies, court orders, and subpoenas;
- Measures to deter abuse of the Whois service; and

- Policies and procedures to enhance Whois accuracy, including compliance and monitoring programs.

Our abuse prevention and mitigation solution leverages our extensive domain name industry experience and was developed based on extensive study of existing gTLDs and ccTLDs for best registry practices. This same experience will be leveraged to manage the new TLD.

## 2.0. ANTI-ABUSE POLICY

The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants, registrars, and resellers. This policy will also be posted on the registry web site and accompanied by abuse point-of-contact contact information (see below). Internet users can report suspected abuse to the registry and sponsoring registrar, and report an orphan glue record suspected of use in connection with malicious conduct (see below).

The policy is especially designed to address the malicious use of domain names. Its intent is to:

1. Make clear that certain types of behavior are not tolerated;
2. Deter both criminal and non-criminal but harmful use of domain names; and
3. Provide the registry with clearly stated rights to mitigate several types of abusive behavior when found.

This policy does not take the place of the Uniform Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism.

Below is a policy draft based on the anti-abuse policies of several existing TLD registries with exemplary practices (including .ORG, .CA, and .INFO). We plan to adopt the same, or a substantially similar version, after the conclusion of legal reviews.

## 3.0. TLD ANTI-ABUSE POLICY

The registry reserves the right, at its sole discretion and at any time and without limitation, to deny, suspend, cancel, redirect, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status as it determines necessary for any of the following reasons:

- (1) to protect the integrity and stability of the registry;
- (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process;
- (3) to avoid any liability, civil or criminal, on the part of the registry operator, its affiliates, subsidiaries, officers, directors, or employees;
- (4) to comply with the terms of the registration agreement and the registry's Anti-Abuse Policy;
- (5) registrant fails to keep Whois information accurate and up-to-date;
- (6) domain name use violates the registry's acceptable use policies, or a third party's rights or acceptable use policies, including but not limited to the infringement of any copyright or trademark;
- (7) to correct mistakes made by the registry operator or any registrar in connection with a domain name registration; or
- (8) as needed during resolution of a dispute.

Abusive use of a domain is an illegal, malicious, or fraudulent action and includes, without limitation, the following:

- Distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include computer viruses, worms, keyloggers, trojans, and fake antivirus products;
- Phishing: attempts to acquire sensitive information such as usernames, passwords, and credit

card details by masquerading as a trustworthy entity in an electronic communication;

- DNS hijacking or poisoning;
- Spam: The use of electronic messaging systems to send unsolicited bulk messages. This includes but is not limited to email spam, instant messaging spam, mobile messaging spam, and the spamming of Internet forums;
- Use of botnets, including malicious fast-flux hosting;
- Denial-of-service attacks;
- Child pornography/child sexual abuse images;
- The promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law; and
- Illegal access of computers or networks.

#### 4.0. SINGLE ABUSE POINT OF CONTACT

Our prevention and mitigation plan includes use of a single abuse point of contact (APOC). This contact will be a role-based e-mail address in the form of "abuse@registry.tld". This e-mail address will allow multiple staff members to monitor abuse reports. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered an Internet abuse desk best practice.

The APOC e-mail address will be listed on the registry web site. We also will provide a convenient web form for complaints. This form will prompt complainants to provide relevant information. (For example, complainants who wish to report spam will be prompted to submit the full header of the e-mail.) This will help make their reports more complete and accurate.

Complaints from the APOC e-mail address and web form will go into a ticketing system, and will be routed to our abuse handlers (see below), who will evaluate the tickets and execute on them as needed.

The APOC is mainly for complaints about malicious use of domain names. Special addresses may be set up for other legal needs, such as civil and criminal subpoenas, and for Sunrise issues.

#### 5.0. ABUSE INVESTIGATION AND MITIGATION

Our designated abuse handlers will receive and evaluate complaints received via the APOC. They will decide whether a particular issue merits action, and decide what action is appropriate.

Our designated abuse handlers have domain name industry experience receiving, investigating and resolving abuse reports. Our registry implementation plan will leverage this experience and deploy additional resources in an anti-abuse program tailored to running a registry.

We expect that abuse reports will be received from a wide variety of parties, including ordinary Internet users; security researchers and Internet security companies; institutions, such as banks; and law enforcement agencies.

Some of these parties typically provide good forensic data or supporting evidence of the alleged malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide evidence. It is not unusual, in the Internet industry, that a certain percentage of abuse reports are not actionable because there is insufficient evidence to support the complaint, even after additional investigation.

The abuse handling function will be staffed with personnel who have experience handling abuse complaints. This group will function as an abuse desk to "triage" and investigate reports. Over the past several years, this group has investigated allegations about a variety of problems, including malware, spam, phishing, and child pornography/child sexual abuse images.

#### 6.0. POLICIES, PROCEDURES, AND SERVICE LEVELS

Our abuse prevention and mitigation plan includes development of an internal manual for assessing and acting upon abuse complaints. Our designated abuse handlers will use this to ensure consistent and fair processes. To prevent exploitation of internal procedures by

malefactors, these procedures will not be published publicly.

Assessing abuse reports requires great care. The goals are accuracy, a zero false-positive rate to prevent harm to innocent registrants, and good documentation.

Different types of malicious activities require different methods of investigation and documentation. The procedures we deploy will address all the abuse types listed in our Anti-Abuse Policy (above). This policy will also contain procedures for assessing complaints about orphan nameservers used for malicious activities.

One of the first steps in addressing abusive or harmful activities is to determine the type of domain involved. Two types of domains may be involved: 1) a "compromised domain"; and/or 2) a maliciously registered domain.

A "compromised" domain is one that has been hacked or otherwise compromised by criminals; the registrant is not responsible for the malicious activity taking place on the domain. For example, most domain names that host phishing sites are compromised. The goal in such cases is to inform the registrant of the problem via the registrar. Ideally, such domains are not suspended, since suspension disrupts legitimate activity on the domain.

The second type of potentially harmful domain, the maliciously registered domain, is one registered by a bad actor for the purpose of abuse. Since it has no legitimate use, this type of domain is a candidate for suspension.

In general, we see the registry as the central entity responsible for monitoring abuse of the TLD and passing any complaints received to the domains' sponsoring registrars. In an alleged (though credible) case of malicious use, the case will be communicated to the domain's sponsoring registrar requesting that the registrar investigate, act appropriately, and report on it within a defined time period. Our abuse handlers will also provide any evidence they collect to the registrar.

There are several good reasons for passing a case of malicious domain name use on to the registrar. First, the registrar has a direct relationship and contract with the registrant. It is important to respect this relationship as it pertains both to business in general and any legal perspectives involved. Second, the registrar holds a better position to evaluate and act because the registrar typically has vital information the registry operator does not, including domain purchase details and payment method (i.e., credit card, etc.); the identity of a proxy-protected registrant; the IP address from which the domain purchase was made; and whether a reseller is involved. Finally, it is important the registrar know if a registrant is in violation of registry or registrar policies and terms—the registrar may wish to suspend the registrant's account, or investigate other domains the registrar has registered in this TLD or others.

The registrar is also often best for determining if questionable registrant activity violates the registrar's legal terms of service or the registry Anti-Abuse Policy, and deciding whether to take any action. Registrars will be required to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action and allows the registrar to suspend or cancel a domain name.

If a registrar does not take action within the time indicated by us in the report (i.e., 24 hours), we may take action ourselves. In some cases, we may suspend the domain name(s), and we reserve the right to act directly and immediately. We plan to take action directly if time is of the essence, such as with a malware attack that may cause significant harm to Internet users.

It is important to note that strict service level agreements (SLAs) for abuse response and mitigation are not always appropriate, additional tailoring of any SLAs may be required, depending on the problem. For example, suspending a domain within 24 hours may not be the best course of action when working with law enforcement or a national clearinghouse to address reports of child pornography. Officials may need more than 24 hours to investigate and gather evidence.

## 7.0. ABUSE MONITORING AND METRICS

In addition to addressing abuse complaints, we will actively monitor the overall abuse status of the TLD, gather intelligence and track abuse metrics to address criminal use of domains in the TLD.

To enable active reporting of problems to the sponsoring registrars, our plan includes proactive monitoring for malicious use of the domains in the TLD. Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors such as LegitScript ([www.legitscript.com](http://www.legitscript.com)) may be used to identify and close down illegal “rogue” Internet pharmacies.

Our approach also incorporates recordkeeping and metrics regarding abuse and abuse reports. These may include:

- The number of abuse reports received by the registry’s abuse point of contact described above and the domains involved;
- The number of cases and domains referred to registrars for resolution;
- The number of cases and domains for which the registry took direct action;
- Resolution times (when possible or relevant, as resolution times for compromised domains are difficult to measure).

We expect law enforcement to be involved in only a small percentage of abuse cases and will call upon relevant law enforcement as needed.

## 8.0. HANDLING REPORTS FROM LAW ENFORCEMENT, COURT ORDERS

The new gTLD Registry Agreement contains this requirement: “Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.” (Article 2.8)

We will be responsive as required by Article 2.8. Our abuse handling team will comply with legal processes and leverage both experience and best practices to work effectively with law enforcement and other government agencies. The registry will post a Criminal Subpoena Policy and Procedure page, which will detail how law enforcement and government agencies may submit criminal and civil subpoenas. When we receive valid court orders or seizure warrants from courts or law enforcement agencies of relevant jurisdiction, we will expeditiously review and comply with them.

## 9.0. PROHIBITING DOMAIN HIJACKINGS AND UNAPPROVED UPDATES

Our abuse prevention and mitigation plan also incorporates registrars that offer domain protection services and high-security access and authentication controls. These include services designed to prevent domain hijackings and inhibit unapproved updates (such as malicious changes to nameserver settings). Registrants will then have the opportunity to obtain these services should they so elect.

## 10.0. ABUSE POLICY: ADDRESSING INTELLECTUAL PROPERTY INFRINGEMENT

Intellectual property infringement involves three distinct but sometimes intertwined problems: cybersquatting, piracy, and trademark infringement:

- Cybersquatting is about the presence of a trademark in the domain string itself.
- Trademark infringement is the misuse or misappropriation of trademarks – the violation of the exclusive rights attached to a trademark without the authorization of the trademark owner or any licensees. Trademark infringement sometimes overlaps with piracy.
- Piracy involves the use of a domain name to sell unauthorized goods, such as copyrighted

music, or trademarked physical items, such as fake brand-name handbags. Some cases of piracy involve trademark infringement.

The Uniform Dispute Resolution Process (UDRP) and the new Uniform Rapid Suspension System (URS) are anti-cybersquatting policies. They are mandatory and all registrants in the new TLD will be legally bound to them. Please refer to our response to Question #29 for details on our plans to respond to URS orders.

The Anti-Abuse Policy for our gTLD will be used to address phishing cases that involve trademarked strings in the domain name. The Anti-Abuse Policy prohibits violation of copyright or trademark; such complaints will be routed to the sponsoring Registrar.

#### 11.0. PROPOSED MEASURES FOR REMOVAL OF ORPHAN GLUE RECORDS

Below are the policies and procedures to be used for our registry in handling orphan glue records. The anti-abuse documentation for our gTLD will reflect these procedures.

By definition, a glue record becomes an "orphan" when the delegation point Name Server (NS) record referencing it is removed without also removing the corresponding glue record. The delegation point NS record is sometimes referred to as the parent NS record.

As ICANN's SSAC noted in its Advisory SAC048 "SSAC Comment on Orphan Glue Records in the Draft Applicant Guidebook" (<http://www.icann.org/en/committees/security/sac048.pdf>), "Orphaned glue can be used for abusive purposes; however, the dominant use of orphaned glue supports the correct and ordinary operation of the Domain Name System (DNS)." For example, orphan glue records may be created when a domain (example.tld) is placed on Extensible Provisioning Protocol (EPP) ServerHold or ClientHold status. This use of Hold status is an essential tool for suspending malicious domains. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve.

We will use the following procedure—used by several existing registries and considered a generally accepted DNS practice—to manage orphan glue records.. When a registrar submits a request to delete a domain, the registry first checks for the existence of glue records. If glue records exist, the registry checks to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records, then registrar EPP requests to delete the domain will fail until no other domains are using the glue records. (This functionality is currently in place for the .ORG registry.) However, if a registrar submits a complaint that orphan glue is being used maliciously and the malicious conduct is confirmed, the registry operator will remove the orphan glue record from the zone file via an exceptional process.

#### 12.0. METHODS TO PROMOTE WHOIS ACCURACY

##### 12.1. ENFORCING REQUIRED CONTACT DATA FIELDS

We will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows for better access to domain data and provides uniformity in storing the information.

As per the EPP specification, certain contact data fields are mandatory. Our registry will enforce those, plus certain other fields as necessary. This ensures that registrars are providing required domain registration data. The following fields (indicated as "MANDATORY") will be mandatory at a minimum:

Contact Name [MANDATORY]  
Street1 [MANDATORY]  
City [MANDATORY]  
State/Province [optional]

Country [MANDATORY]  
Postal Code [optional]  
Registrar Phone [MANDATORY]  
Phone Ext [optional]  
Fax [optional]  
Fax Ext [optional]  
Email [MANDATORY]

In addition, our registry will verify formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers) and will reject any improperly formatted submissions. Only valid country codes will be allowed, as defined by the ISO 3166 code list.

We will reject entries that are clearly invalid. For example, a contact that contains phone numbers such as 555.5555, or registrant names that consist only of hyphens, will be rejected.

## 12.2. POLICIES AND PROCEDURES TO ENHANCE WHOIS ACCURACY COMPLIANCE

We generally will rely on registrars to enforce WHOIS accuracy measures, but will also rely on review and audit procedures to enhance compliance.

As part of our RRA (Registry-Registrar Agreement), we will require each registrar to be responsible for ensuring the input of accurate Whois data by its registrants. The Registrar/Registered Name Holder Agreement will include specific clauses to ensure accuracy of Whois data, as per ICANN requirements, and to give the registrar the right to cancel or suspend registrations if the registered name holder fails to respond to the registrar's query regarding accuracy of data. In addition, the Anti-Abuse Policy for our registry will give the registry the right to suspend, cancel, etc., domains that have invalid Whois data.

As part of our RRA (Registry-Registrar Agreement), we will include a policy similar to the one below, currently used by the Canadian Internet Registration Authority (CIRA), the operator of the .CA registry. It will require the registrar to help us verify contact data.

“CIRA is entitled at any time and from time to time during the Term...to verify: (a) the truth, accuracy and completeness of any information provided by the Registrant to CIRA, whether directly, through any of the Registrars of Record or otherwise; and (b) the compliance by the Registrant with the provisions of the Agreement and the Registry PRP. The Registrant shall fully and promptly cooperate with CIRA in connection with such verification and shall give to CIRA, either directly or through the Registrar of Record such assistance, access to and copies of, such information and documents as CIRA may reasonably require to complete such verification. CIRA and the Registrant shall each be responsible for their own expenses incurred in connection with such verification.”

<http://www.cira.ca/assets/Documents/Legal/Registrants/registratoragreement.pdf>

On a periodic basis, we will perform spot audits of the accuracy of Whois data in the registry. Questionable data will be sent to the sponsoring registrars as per the above policy.

All accredited registrars have agreed with ICANN to obtain contact information from registrants, and to take reasonable steps to investigate and correct any reported inaccuracies in contact information for domain names registered through them. As part of our RRA (Registry-Registrar Agreement), we will include a policy that allows us to de-accredit any registrar who a) does not respond to our Whois accuracy requests, or b) fails to update Whois data or delete the name within 15 days of our report of invalid WHOIS data. In order to allow for inadvertent and unintentional mistakes by a registrar, this policy may include a “three strikes” rule under which a registrar may be de-accredited after three failures to comply.

## 12.3. PROXY/PRIVACY SERVICE POLICY TO CURB ABUSE

In our TLD, we will allow the use of proxy/privacy services. We believe that there are important, legitimate uses for such services. (For example, to protect free speech rights and avoid receiving spam.)

However, we will limit how proxy/privacy services are offered. The goal of this policy is to make proxy/privacy services unattractive to abusers, namely the spammers and e-criminals who use such services to hide their identities. We believe the policy below will enhance WHOIS accuracy, will help deter the malicious use of domain names in our TLD, and will aid in the investigation and mitigation of abuse complaints.

Registry policy will require the following, and all registrars and their registrants and resellers will be bound to it contractually:

- a. Registrants must provide complete and accurate contact information to their registrar (or reseller, if applicable).. Domains that do not meet this policy may be suspended.
- b. Registrars and resellers must provide the underlying registrant information to the registry operator, upon written request, during an abuse investigation. This information will be held in confidence by the registry operator.
- c. The registrar or reseller must publish the underlying registrant information in the Whois if it is determined by the registry operator or the registrar that the registrant has breached any terms of service, such as the TLD Anti-Abuse Policy.

The purpose of the above policy is to ensure that, in case of an abuse investigation, the sponsoring registrar has access to the registrant's true identity, and can provide that data to the registry. If it is clear the registrant has violated the TLD's Anti-Abuse Policy or other terms of service, the registrant's identity will be published publicly via the Whois, where it can be seen by the public and by law enforcement.

#### 13.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO ABUSE

Donuts does not currently intend to become a registrar for this TLD. Donuts and our back-end technical operator will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. For abuse issues, we will comply by establishing an adequate "firewall" between our registry operations and the operations of any affiliated registrar. As the Code requires, the registry will not "directly or indirectly show any preference or provide any special consideration to any Registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps to be taken to enforce this:

- Abuse complaints and cases will be evaluated and executed upon using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Registry personnel will not discuss abuse cases with non-registry personnel or personnel from separate entities operating under the company. This policy is designed to both enhance security and prevent conflict of interest.
- If a compliance function is involved, the compliance staff will have responsibilities to the registry only, and not to a registrar we may be "affiliated" with at any point in the future. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that person will have no duty to any registrar business we may be operating at the time. The person will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry impartially and effectively.

#### 14.0. CONTROLS TO ENSURE PROPER ACCESS TO DOMAIN FUNCTIONS

Our registry incorporates several measures to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, SSL certificates, and proper authentication will be used to control registrar access to the registry system. Registrars will be given access only to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code as per EPP RFCs. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. (It is the

"password" to the domain name.) Registrars must use the domain's password to initiate a Registrar-to-Registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are undertaken by the proper registrant, and that this registrant is adequately notified of domain update activity. Only the sponsoring Registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Our Registry-Registrar contract will require that each registrar assign a unique AUTH-INFO code to every domain it creates. Due to security risk, registrars should not assign the same AUTH-INFO code to multiple domains.

Information about other registry security measures such as encryption and security of Registrar channels are confidential to ensure the security of the registry system. Details can be found in our response to Question #30(b).

## 15.0. RESOURCING PLAN

Our back-end registry operator will perform the majority of Abuse Prevention and Mitigation services for this TLD, as required by our agreement with them. Donuts staff will supervise the activity of the provider. In some cases Donuts staff will play a direct role in the handling of abuse cases.

The compliance department of our registry operator has two full time staff members who are trained in DNS, the investigation of abuse complaints, and related specialties. The volume of abuse activity will be gauged and additional staff hired by our back-end registry operator as required to meet their SLA commitments. In addition to the two full-time members, they expect to retain the services of one or more outside contractors to provide additional security and anti-abuse expertise - including advice on the effectiveness of our policies and procedures.

Finally, Donuts' Legal Department will have one attorney whose role includes the oversight of legal issues related to abuse, and interaction with courts and law enforcement.

## 29. Rights Protection Mechanisms

Q29 Standard CHAR: 25023

### 1.0. INTRODUCTION

To minimize abusive registrations and other activities that affect the legal rights of others, our approach includes well-developed policies for rights protection, both during our TLD's rollout period and on an ongoing basis. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods, we will use the Trademark Clearinghouse, and we will implement Uniform Rapid Suspension (URS) on an ongoing basis. In addition to these newly mandated ICANN protections, we will implement two other trademark protections that were developed specifically for the new TLD program. These additional protections are: (i) a Domain Protected Marks List (DPML) for the blocking of trademarked strings across multiple TLDs; and (ii) a Claims Plus product to alert registrars to registrations that potentially infringe existing marks.

Below we detail how we will fulfill these requirements and further meet or exceed ICANN's requirements. We also describe how we will provide additional measures specific to rights protection above ICANN's minimum, including abusive use policies, takedown procedures, and other covenants.

Our RPM approach leverages staff with extensive experience in a large number of gTLD and ccTLD

rollouts, including the Sunrises for .CO, .MOBI, .ASIA, .EU, .BIZ, .US., .TRAVEL, TEL, .ME, and .XXX. This staff will utilize their first-hand, practical experience and will effectively manage all aspects of Sunrise, including domain application and domain dispute processes.

The legal regime for our gTLD will include all of the ICANN-mandated protections, as well as some independently developed RPMs proactively included in our Registry-Registrar Agreement. Our RPMs exceed the ICANN-required baseline. They are:

- Reserved names: to protect names specified by ICANN, including the necessary geographic names.
- A Sunrise Period: adhering to ICANN requirements, and featuring trademark validation via the Trademark Clearinghouse.
- A Trademark Claims Service: offered as per ICANN requirements, and active after the Sunrise period and for the required time during wider availability of the TLD.
- Universal Rapid Suspension (URS)
- Uniform Dispute Resolution Process (UDRP)
- Domain Protected Marks List (DPML)
- Claims Plus
- Abusive Use and Takedown Policies

## 2.0. NARRATIVE FOR Q29 FIGURE 1 OF 1

Attachment A, Figure 1, shows Rollout Phases and the RPMs that will be used in each. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods. In addition, we will use the Trademark Clearinghouse to implement URS on an ongoing basis.

## 3.0. PRE-SUNRISE: RESERVED AND PREMIUM NAMES

Our Pre-sunrise phase will include a number of key practices and procedures. First, we will reserve the names noted in the gTLD Registry Agreement Specification 5. These domains will not be available in Sunrise or subsequent registration periods. As per Specification 5, Section 5, we will provide national governments the opportunity to request the release of their country and territory names for their use. Please also see our response to Question 22, "Protection of Geographic Names."

We also will designate certain domains as "premium" domains. These will include domains based on generic words and one-character domains. These domains will not be available in Sunrise, and the registry may offer them via special means such as auctions and RFPs.

As an additional measure, if a trademark owner objects to a name on the premium name list, the trademark owner may petition to have the name removed from the list and made available during Sunrise. The trademark must meet the Sunrise eligibility rules (see below), and be an exact match for the domain in question. Determinations of whether such domains will be moved to Sunrise will be at the registry's sole discretion.

## 4.0. SUNRISE

### 4.1. SUNRISE OVERVIEW

Sunrise registration services will be offered for a minimum of 30 days during the pre-launch phase. We will notify all relevant trademark holders in the Trademark Clearinghouse if any party is seeking a Sunrise registration that is an identical match to the name to be registered during Sunrise.

As per the Sunrise terms, affirmed via the Registry-Registrar Agreement and the Registrar-Registrant Agreement, the domain applicant will assert that it is qualified to hold the domain applied for as per the Sunrise Policy and Rules.

We will use the Trademark Clearinghouse to validate trademarks in the Sunrise.

If there are multiple valid Sunrise applications for the same domain name string, that string will be subject to auction between only the validated applicants. After receipt of payment from the auction winning bidder, that party will become the registrant of the domain name. (note: in the event one of the identical, contending marks is in a trademark classification reflective of the TLD precedence to that mark may be given during Sunrise).

Sunrise applicants may not use proxy services during the application process.

#### 4.2. SUNRISE: ELIGIBLE RIGHTS

Our Sunrise Eligibility Requirements (SERs) are:

##### 1. Ownership of a qualifying mark.

a. We will honor the criteria in ICANN's Trademark Clearinghouse document section 7.2, number (i): The registry will recognize and honor all word marks that are nationally or regionally [see Endnote 1] registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.

b. In addition, we may accept marks that are not found in the Trademark Clearinghouse, but meet other criteria, such as national trademark registrations or common law rights.

##### 2. Representation by the applicant that all provided information is true and correct; and

3. Provision of data sufficient to document rights in the trademark. (See information about required Sunrise fields, below).

#### 4.3. SUNRISE TRADEMARK VALIDATION

Our goal is to award Sunrise names only to applicants who are fully qualified to have them. An applicant will be deemed to be qualified if that applicant has a trademark that meets the Sunrise criteria, and is seeking a domain name that matches that trademark, as per the Sunrise rules.

Accordingly, we will validate applications via the Trademark Clearinghouse. We will compare applications to the Trademark Clearinghouse database, and those that match (as per the Sunrise rules) will be considered valid applications.

An application validated according to Sunrise rules will be marked as “validated,” and will proceed. (See “Contending Applications,” below.) If an application does not qualify, it will be rejected and will not proceed.

To defray the costs of trademark validation and the Trademark Claims Service, we will charge an application and/or validation fee for every application.

In January 2012, the ICANN board was briefed that “An ICANN cross-functional team is continuing work on implementation of the Trademark Clearinghouse according to a project plan providing for a launch of clearinghouse operations in October 2012. This will allow approximately three months for rights holders to begin recording trademark data in the Clearinghouse before any new gTLDs begin accepting registrations (estimated in January 2013).” (<http://www.icann.org/en/minutes/board-briefing-materials-4-05jan12-en.pdf>) The Clearinghouse Implementation Assistance Group (IAG), which Donuts is participating in, is working through a large number of process and technical issues as of this writing. We will follow the progress of this work, and plan our implementation details based on the final specifications.

Compliant with ICANN policy, our registry software is designed to properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special

symbols.

#### 4.5. CONTENDING APPLICATIONS, SUNRISE AUCTIONS

After conclusion of the Sunrise Period, the registry will finish the validation process. If there is only one valid application for a domain string, the domain will be awarded to that applicant. If there are two or more valid applications for a domain string, only those applicants will be invited to participate in a closed auction for the domain name. The domain will be awarded to the auction winner after payment is received.

After a Sunrise name is awarded to an applicant, it will then remain under a "Sunrise lock" status for a minimum of 60 days in order to allow parties to file Sunrise Challenges (see below). Locked domains cannot be updated, transferred, or deleted.

When a domain is awarded and granted to an applicant, that domain will be available for lookup in the public Whois. Any party may then see what domains have been awarded, and to which registrants. Parties will therefore have the necessary information to consider Sunrise Challenges.

Auctions will be conducted by very specific rules and ethics guidelines. All employees, partners, and contractors of the registry are prohibited from participating in Sunrise auctions.

#### 4.6. SUNRISE DISPUTE RESOLUTION PROCESS (SUNRISE CHALLENGES)

We will retain the services of a well-known dispute resolution provider (such as WIPO) to help formulate the language of our Sunrise Dispute Resolution Process (SDRP, or "Sunrise Challenge") and hear the challenges filed under it. All applicants and registrars will be contractually obligated to follow the decisions handed down by the dispute resolution provider.

Our SDRP will allow challenges based on the following grounds, as required by ICANN. These will be part of the Sunrise eligibility criteria that all registrants (applicants) will be bound to contractually:

- (i) at the time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty;
- (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration;
- (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or
- (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Our SDRP will be based generally on some SDRPs that have been used successfully in past TLD launches. The Sunrise Challenge Policies and Rules used in the .ASIA and .MOBI TLDs (minus their unique eligibility criteria) are examples.

We expect that that there will be three possible outcomes to a Sunrise Challenge:

1. Original registrant proves his/her right to the domain. In this case the registrant keeps the domain and it is unlocked for his/her use.
2. Original registrant is not eligible or did not respond, and the challenger proved his/her right to the domain. In this case the domains is awarded to the complainant.
3. Neither the original registrant nor the complainant proves rights to the domain. In this

case the domain is cancelled and becomes available at a later date via a mechanism to be determined by the registry operator.

After any Sunrise name is awarded to an applicant, it will remain under a "Sunrise Lock" status for at least 60 days so that parties can file Sunrise Challenges. During this Sunrise Lock period, the domain will not resolve and cannot be modified, transferred, or deleted by the sponsoring registrar. A domain name will be unlocked at the end of that lock period only if it is not subject to a Sunrise Challenge. Challenged domains will remain locked until the dispute resolution provider has issued a decision, which the registry will promptly execute.

#### 5.0. TRADEMARK CLAIMS SERVICES

The Trademark Claims Service requirements are well-defined in the Applicant Guidebook, in Section 6 of the "Trademark Clearinghouse" attachment. We will comply with the details therein. We will provide Trademark Claims services for marks in the Trademark Clearinghouse post-Sunrise and then for at least the first 60 days that the registry is open for general registration (i.e. during the first 60 days in the registration period(s) after Sunrise). The Trademark Claims service will provide clear notice to a prospective registrant that another party has a trademark in the Clearinghouse that matches the applied-for domain name—this is a notice to the prospective registrant that it might be infringing upon another party's rights.

The Trademark Clearinghouse database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. We will build, test, and implement an interface to the Trademark Clearinghouse before opening our Sunrise period. As domain name applications come into the registry, those strings will be compared to the contents of the Clearinghouse.

If the domain name is registered in the Clearinghouse, the registry will promptly notify the applicant. We will use the notice form specified in ICANN's Module 4, "Trademark Clearinghouse" document. The specific statement by the prospective registrant will warrant that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

The Trademark Claims Notice will provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice. The notice will be provided in real time (or as soon as possible) without cost to the prospective registrant or to those notified.

"Identical Match" is defined in ICANN's Module 4, "Trademark Clearinghouse" document, paragraph 6.1.5. We will examine the Clearinghouse specifications and protocol carefully when they are published. To comply with ICANN policy, the software for our registry will properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

#### 6.0. GENERAL REGISTRATION

This is the general registration period open to all registrants. No trademark or other qualification will be necessary in order to apply for a domain in this period.

Domain names awarded via the Sunrise process, and domain strings still being contended via the Sunrise process cannot be registered in this period. This will protect the interests of all Sunrise applicants.

#### 7.0. UNIFORM RAPID SUSPENSION (URS)

We will implement decisions rendered under the URS on an ongoing basis. (URS will not apply to Sunrise names while they are in Sunrise Lock period; during that time those domains are subject to Sunrise policy and Sunrise Challenge instead.)

As per URS policy, the registry will receive notice of URS actions from ICANN-approved URS providers. As per ICANN's URS requirements, we will lock the domain within 24 hours of receipt of the Notice of Complaint from the URS Provider. Locking means that the registry restricts all changes to the registration data, including transfer and deletion of domain names, though names will continue to resolve.

Our registry's compliance team will oversee URS procedures. URS e-mails from URS providers will be directed immediately to the registry's Support staff, which is on duty 24/7/365. Support staff will be responsible for executing the directives from the URS provider, and all support staff will receive training in the proper procedures.

Support staff will notify the URS Provider immediately upon locking the domain name, via e-mail.

Support staff for the registry will retain all copies of e-mails from the URS providers. Each case or order will be assigned a tracking or ticket number. This number will be used to track the status of each opened URS case through to resolution via a database.

Registry staff will then execute further operations upon notice from the URS providers. Each URS provider is required to specify the remedy and required actions of the registry, with notification to the registrant, the complainant, and the sponsoring registrar.

The guidelines provide that if the complainant prevails, the registry "shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration." We will execute the DNS re-pointing required by the URS guidelines, and the domain and its WHOIS data will remain unaltered until the domain expires, as per the ICANN requirements.

#### 8.0. ONGOING RIGHTS PROTECTION MECHANISMS - UDRP

As per ICANN policy, all domains in the TLD will be subject to a Uniform Dispute Resolution Process (UDRP). (Sunrise domains will first be subject to the ICANN-mandated Sunrise SDRP until the Sunrise Challenge period is over, after which those domains will then be subject to UDRP.)

#### 9.0 ADDITIONAL RIGHTS PROTECTION MECHANISMS NOT REQUIRED BY ICANN

All Donuts TLDs have two new trademark protection mechanisms developed specifically for the new TLD program. These mechanisms exceed the extensive protections mandated by ICANN. These new protections are:

9.1 Claims Plus: This service will become available at the conclusion of the Trademark Claims service, and will remain available for at least the first five years of registry operations. Trademark owners who are fully registered in the Trademark Clearinghouse may obtain Claims Plus for their marks. We expect the service will be at low or no cost to trademark owners (contingent on Trademark Clearinghouse costs to registries). Claims Plus operates much like Trademark Claims with the exception that notices of potential trademark infringement are sent by the registry to any registrar whose customer performs a check-command or Whois query for a string subject to Claims Plus. Registrars may then take further implementation steps to advise their customers, or use this data to better improve the customer experience. In addition, the Whois at the registry website will output a full Trademark Claims notice for any query of an unregistered name that is subject to Claims Plus. (Note: The ongoing availability of Claims Plus will be contingent on continued access to a Trademark Clearinghouse. The technical viability of some Claims Plus features will be affected by eventual Trademark Clearinghouse rules on database caching).

9.2 Domain Protected Marks List: The DPML is a rights protection mechanism to assist

trademark holders in protecting their intellectual property against undesired registrations of strings containing their marks. The DPML prevents (blocks) registration of second level domains that contain a trademarked term (note: the standard for DPML is “contains”— the protected string must contain the trademarked term). DPML requests will be validated against the Trademark Clearinghouse and the process will be similar to registering a domain name so the process will not be onerous to trademark holders. An SLD subject to DPML will be protected at the second level across all Donuts TLDs (i.e. all TLDs for which this SLD is available for registration). Donuts may cooperate with other registries to extend DPML to TLDs that are not operated by Donuts. The cost of DPML to trademark owners is expected to be significantly less than the cost of actually registering a name.

#### 10.0 ABUSIVE USE POLICIES AND TAKEDOWN PROCEDURES

In our response to Question #28, we describe our anti-abuse program, which is designed to address malware, phishing, spam, and other forms of abuse that may harm Internet users. This program is designed to actively discover, verify, and mitigate problems without infringing upon the rights of legitimate registrants. This program is designed for use in the open registration period. These procedures include the reporting of compromised websites/domains to registrars for cleanup by the registrants and their hosting providers. It also describes takedown procedures, and the timeframes and circumstances that apply for suspending domain names used improperly. Please see the response to Question #28 for full details.

We will institute a contractual obligation that proxy protection be stripped away if a domain is proven to be used for malicious purposes. For details, please see “Proxy/Privacy Service Policy to Curb Abuse” in the response to Question 28.

#### 11.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO RIGHTS PROTECTION

We will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. In rights protection matters, we will comply by establishing an adequate “firewall” between the operations of any registrar we establish and the operations of the registry. As the Code requires, we will not “directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services”. Here is a non-exhaustive list of specific steps we will take to accomplish this:

- We will evaluate and execute upon all rights protection tasks impartially, using the same criteria and procedures, regardless of a domain’s sponsoring registrar.
- Any registrar we establish or have established at the time of registry launch will not receive preferential access to any premium names, any auctions, etc. Registry personnel and any registrar personnel that we may employ in the future will be prohibited from participating as bidders in any auctions for Landrush names.
- Any registrar staff we may employ in the future will have access to data and records relating only to the applications and registrations made by any registrar we establish, and will not have special access to data related to the applications and registrations made by other registrars.
- If a compliance function is involved, the compliance staffer will be responsible to the registry only, and not to a registrar we own or are “affiliated” with. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that staffer will not have duties with the registrar business. The staffer will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry effectively and impartially, regardless of the consequences to the registrar.

#### 12.0. RESOURCING PLAN

Overall management of RPMs is the responsibility of Donuts’ VP of Business Operations. Our back-end registry operator will perform the majority of operational work associated with RPMs, as required by our agreement with them. Donuts VP of Business Operations will supervise the activity of this vendor.

Resources applied to RPMs include:

#### 1. Legal team

a. We will have at least one legal counsel who will be dedicated to the registry with previous experience in domain disputes and Sunrise periods and will oversee the compliance and support teams with regard to the legal issues related to Sunrise and RPM's

b. We have outside counsel with domain and rights protection experience that is available to us as necessary

2. Dispute Resolution Provider (DRP): The DRP will help formulate Sunrise Rules and Policy, Sunrise Dispute Resolution Policy. The DRP will also examine challenges, but the challenger will be required to pay DRP fees directly to the DRP.

3. Compliance Department and Tech Support: There will be three dedicated personnel assigned to these areas. This staff will oversee URS requests and abuse reports on an ongoing basis.

4. Programming and technical operations. There are four dedicated personnel assigned to these functions.

5. Project Manager: There will be one person to coordinate the technical needs of this group with the registry IT department.

#### 13.0. ENDNOTES

1 "Regional" is understood to be a trans-national trademark registry, such as the European Union registry or the Benelux Office for Intellectual Property.

## 30(a). Security Policy: Summary of the security policy for the proposed registry

Q30A Standard CHAR: 19646

#### 1.0. INTRODUCTION

Our Information Security (IS) Program and associated IS Policy, Standards and Procedures apply to all Company entities, employees, contractors, temps, systems, data, and processes. The Security Program is managed and maintained by the IS Team, supported by Executive Management and the Board of Directors.

Data and systems vary in sensitivity and criticality and do not unilaterally require the same control requirements. Our security policy classifies data and systems types and their applicable control requirements. All registry systems have the same data classification and are all managed to common security control framework. The data classification applied to all registry systems is our highest classification for confidentiality, availability and integrity, and the supporting control framework is consistent with the technical and operational requirements of a registry, and any supporting gTLD string, regardless of its nature or size. We have the experienced staff, robust system architecture and managed security controls to operate a registry and TLD of any size while providing reasonable assurance over the security, availability, and confidentiality of the systems supporting critical registry functions (i.e., registration services, registry databases, zone administration, and provision of domain name resolution services).

This document describes the governance of our IS Program and the control frameworks our security program aligns to (section 1.0), Security Policy requirements (section 2.0); security assessments conducted (see section 3.0), our process for executive oversight and visibility of risks to ensure continuous improvement (section 4.0), and security commitments to registrants (section 5). Details regarding how these control requirements are implemented, security roles and responsibilities and resources supporting these efforts are included in Security Policy B response.

## 2.0. INFORMATION SECURITY PROGRAM

The IS Program for our registry is governed by an IS Policy aligned to the general clauses of ISO 27001 requirements for an Information Security Management System (ISMS) and follows the control objectives where appropriate, given the data type and resulting security requirements. (ISO 27001 certification for the registry is not planned, however, our DNS/DNSSEC solution is 27001 certified). The IS Program follows a Plan-Do-Check-Act (PDCA) model of continuous improvement to ensure that the security program grows in maturity and that we provide reasonable assurance to our shareholders and Board of Directors that our systems and data are secure.

The High Security Top Level Domain (HSTLD) control framework incorporates ISO 27002, the code of practice for implementing an ISO 27001 ISMS. Therefore, our security program is already closely aligned HSTLD control framework. Furthermore, we agree to abide by the HSTLD Principle 1 and criteria 1.1 - 1.3. (See specifics in Security Policy B response):

Registry systems will be in-scope for Sarbanes-Oxley (SOX) compliance and will follow the SOX control framework governing access control, account management, change management, software development life cycle (SDLC), and job monitoring of all systems. Registry systems will be tested frequently by the IS team for compliance and audited by our internal audit firm, Protiviti, and external audit firm, Price Waterhouse Coopers (PWC), for compliance.

### 2.1. SECURITY PROGRAM GOVERNANCE

Our Information Security Program is governed by IS Policy, supported by standards, and guided by procedures to ensure uniformed compliance to the program. Standards and associated procedures in support of the policy are shown in Attachment A, Figure 1. Security Program documents are updated annually or upon any system or environment change, new legal or regulatory requirements, and/or findings from risk assessments. Any updates to security program are reviewed and approved by the Executive Vice President (EVP) of Information Technology (IT), EVP of Legal & General Counsel, and the EVP of People Operations before dissemination to all employees.

All employees are required to sign the IS Policy upon hire, upon any major changes, and/or annually. By signing the IS Policy, employees agree to abide by the supporting Standards and Procedures applicable to their job roles. To enable signing of the IS Policy, employees must pass a test to ensure competent understanding of the IS Policy and its key requirements.

## 3.0. INFORMATION SECURITY POLICY

### 3.1. INFORMATION ASSET CLASSIFICATION

The following data classification is applied to registry systems: High Business Impact (HBI): Business Confidential in accordance with the integrity, availability and confidentiality requirements of registry operations. All registry systems will follow Security Policy requirements for HBI systems regardless of the nature of the TLD string, financial materiality or size. HBI data if not properly secured, poses a high degree of risk to the Company and includes data pertaining to the Company's adherence to legal, regulatory and compliance requirements, mergers and acquisitions (M&A), and confidential data inclusive of, but is not limited to: Personally Identifiable Information (PII) (credit card data, Social Security Numbers (SSN) and account numbers); materially important financial information (before public disclosure), and information which the Board of Directors/Executive team deems to be a trade secret, which, if compromised, would cause grave harm to the execution of our business model.

HBI safeguards are designed, implemented and measured in alignment with confidentiality, integrity, availability and privacy requirements characterized by legal, regulatory and compliance obligations, or through directives issued by the Board of Directors (BOD) and Executive team. Where guidance is provided, such as the Payment Card Industry (PCI) Data Security Standard (DSS) Internal Audit Risk Control Matrices (RCMs), local, state and federal laws, and other applicable regulations, we put forth the appropriate level of effort and resources to meet those obligations. Where there is a lack of guidance or recommended

safeguards, Risk Treatment Plans (RTP's) are designed in alignment with our standard risk management practices.

Other data classifications for Medium Business Impact (MBI): Business Sensitive and Low Business Impact (LBI): Public do not apply to registry systems.

### 3.2. INFORMATION ASSET MANAGEMENT

All registry systems have a designated owner and/or custodian who ensures appropriate security classifications are implemented and maintained throughout the lifecycle of the asset and that a periodic review of that classification is conducted. The system owner is also responsible for approving access and the type of access granted. The IS team, in conjunction with Legal, is responsible for defining the legal, regulatory and compliance requirements for registry system and data.

### 3.3. INFORMATION ASSET HANDLING, STORAGE & DISPOSAL

Media and documents containing HBI data must adhere to their respective legal, regulatory and compliance requirements and follow the HBI Handling Standard and the retention requirements within the Document Retention Policy.

### 3.4. ACCESS CONTROL

User authentication is required to access our network and system resources. We follow a least-privileged role based access model. Users are only provided access to the systems, services or information they have specifically been authorized to use by the system owner based on their job role. Each user is uniquely identified by an ID associated only with that user. User IDs must be disabled promptly upon a user's termination, or job role change.

Visitors must sign-in at the front desk of any company office upon arrival and escorted by an employee at all times. Visitors must wear a badge while on-site and return the badge when signing out at the front desk. Dates and times of all visitors as well as the name of the employee escorting them must be tracked for audit purposes.

Individuals permitted to access registry systems and HBI information must follow the HBI Identity & Access Management Standard. Details of our access controls are described in Part B of Question 30 response including; technical specifications of access management through Active Directory, our ticketing system, physical access controls to systems and environmental conditions at the datacenter.

### 3.5. COMMUNICATIONS & OPERATIONAL SECURITY

#### 3.5.1. MALICIOUS CODE

Controls shall be implemented to protect against malicious code including but not limited to:

- Identification of vulnerabilities and applicable remediation activities, such as patching, operating system & software upgrades and/or remediation of web application code vulnerabilities.

- File-integrity monitoring shall be used, maintained and updated appropriately.

- An Intrusion Detection Solution (IDS) must be implemented on all HBI systems, maintained & updated continuously.

- Anti-virus (AV) software must be installed on HBI classified web & application systems and systems that provide access to HBI systems. AV software and virus definitions are updated on a regular basis and logs are retained for no less than one year.

#### 3.5.2. THREAT ANALYSIS & VULNERABILITY MANAGEMENT

On a regular basis, IS personnel must review newly identified vulnerability advisories from trusted organizations such as the Center for Internet Security, Microsoft, SANS Institute, SecurityFocus, and the CERT at Carnegie-Mellon University. Exposure to such vulnerabilities must be evaluated in a timely manner and appropriate measures taken to communicate

vulnerabilities to the system owners, and remediate as required by the Vulnerability Management Standard. Internal and external network vulnerability scans, application & network layer penetration testing must be performed by qualified internal resource or an external third party at least quarterly or upon any significant network change. Web application vulnerability scanning is to be performed on a continual basis for our primary web properties applicable to their release cycles.

### 3.5.3. CHANGE CONTROL

Changes to HBI systems including operating system upgrades, computing hardware, networks and applications must follow the Change Control Standard and procedures described in Security Policy question 30b.

### 3.5.4. BACKUP & RESTORATION

Data critical to our operations shall be backed up according to our Backup and Restoration Standard. Specifics regarding Backup and Restoration requirements for registry systems are included in questions 37 & 38.

### 3.6. NETWORK CONTROLS

- Appropriate controls must be established for ensuring the network is operated consistently and as planned over its entire lifecycle.
- Network systems must be synchronized with an agreed upon time source to ensure that all logs correctly reflect the same accurate time.
- Networked services will be managed in a manner that ensures connected users or services do not compromise the security of the other applications or services as required in the HBI Network Configuration Standard. Additional details are included in Question 32: Architecture response.

### 3.7. DISASTER RECOVERY & BUSINESS CONTINUITY

The SVP of IT has responsibility for the management of disaster recovery and business continuity. Redundancy and fault-tolerance shall be built into systems whenever possible to minimize outages caused by hardware failures. Risk assessments shall be completed to identify events that may cause an interruption and the probability that an event may occur. Details regarding our registry continuity plan are included in our Question 39 response.

### 3.8 SOFTWARE DEVELOPMENT LIFECYCLE

Advance planning and preparation is required to ensure new or modified systems have adequate security, capacity and resources to meet present and future requirements. Criteria for new information systems or upgrades must be established and acceptance testing carried out to ensure that the system performs as expected. Registry systems must follow the HBI Software Development Lifecycle (SDLC) Standard.

### 3.9. SECURITY MONITORING

Audit logs that record user activities, system errors or faults, exceptions and security events shall be produced and retained according to legal, regulatory, and compliance requirements. Log files must be protected from unauthorized access or manipulation. IS is responsible for monitoring activity and access to HBI systems through regular log reviews.

### 3.10. INVESTIGATION & INCIDENT MANAGEMENT RESPONSE

Potential security incidents must be immediately reported to the IS Team, EVP of IT, the Legal Department and/or the Incident Response. The Incident Response Team (IRT) is required to investigate: any real or suspected event that could impact the security of our network or computer systems; impose significant legal liabilities or financial loss, loss of proprietary data/trade secret, and/or harm to our goodwill. The Director of IS is responsible for the organization and maintenance of the IRT that provides accelerated problem notification, damage

control, investigation and incident response services in the event of security incidents. Investigation and response processes follow the requirements of the Investigation and Incident Management Standard and supporting Incident Response Procedure (see Question 30b for details).

### 3.11. LEGAL & REGULATORY COMPLIANCE

All relevant legal, regulatory and contractual requirements are defined, documented and maintained within the IS Policy. Critical records are protected from loss, destruction and falsification, in accordance with legal, contractual and business requirements as described in our Document Retention Policy. Compliance programs implemented that are applicable to Registry Services include:

- Sarbanes Oxley (SOX): All employees managing and accessing SOX systems and/or data are required to follow SOX compliance controls.
- Data Privacy and Disclosure of Personally Identifiable Information (PII): data protection and privacy shall be ensured as required by legal and regulatory requirements, which may include state breach and disclosure laws, US and EU Safe Harbor compliance directives.

Other compliance programs implemented but not applicable to Registry systems include the Payment Card Industry (PCI) Data Security Standard (DSS), Office of Foreign Assets Control (OFAC) requirements, Copyright Infringement & DMCA.

### 4.0. SECURITY ASSESSMENTS

Our IS team conducts frequent security assessments to analyze threats, vulnerabilities and risks associated with our systems and data. Additionally, we contract with several third parties to conduct independent security posture assessments as described below. Details of these assessments are provided in our Security Policy B response.

#### 4.1. THIRD PARTY SECURITY ASSESSMENTS

We outsource the following third party security assessments (scope, vendor, frequency and remediation requirements of any issues found are detailed in our Security Policy B response); Web Application Security Vulnerability testing, quarterly PCI ASV scans, Sarbanes-Oxley (SOX) control design and operating effectiveness testing and Network and System Security Analysis.

#### 4.2. INTERNAL SECURITY ASSESSMENTS

The IS team conducts routine and continual internal testing (scope, frequency, and remediation requirements of any issues found are detailed in our Security Policy B response) including; web application security vulnerability testing, external and internal vulnerability scanning, system and network infrastructure penetration testing, access control appropriateness reviews, wireless access point discovery, network security device configuration analysis and an annual comprehensive enterprise risk analysis.

### 5.0. EXECUTIVE OVERSIGHT & CONTINUOUS IMPROVEMENT

In addition to the responsibility for Information Security residing within the IS team and SVP of IT, risk treatment decisions are also the responsibility of the executive of the business unit responsible for the risk. Any risk with potential to impact the business financially or legally in a material way is overseen by the Incident Response Management team and/or the Audit Committee. See Figure 2 in Attachment A. The Incident Response Management Team or Audit Committee will provide assistance with management action plans and remediation.

#### 5.1. GOVERNANCE RISK & COMPLIANCE

We have deployed RSA's Archer Enterprise Governance Risk and Compliance (eGRC) Tool to provide an independent benchmarking of risk, compliance and security metrics, assist with executive risk reporting and reduce risk treatment decision making time, enforcing continuous improvement. The eGRC provides automated reporting of registry systems compliance with the security program as a whole, SOX Compliance, and our Vulnerability Management Standard. The

eGRC dashboard continuously monitors risks and threats (through automated feeds from our vulnerability testing tools and third party data feeds such as Microsoft, CERT, WhiteHat, etc.) that are actionable. See Attachment A for more details on the GRC solutions deployed.

#### 6.0. SECURITY COMMITMENTS TO REGISTRANTS

We operate all registry systems in a highly secured environment with appropriate controls for protecting HBI data and ensuring all systems remain confidential, have integrity, and are highly available. Registrants can assume that:

1. We safeguard the confidentiality, integrity and availability of registrant data through access control and change management:
  - Access to data is restricted to personnel based on job role and requires 2 factors of authentication.
  - All system changes follow SOX-compliant controls and adequate testing is performed to ensure production pushes are stable and secure.
2. The network and systems are deployed in high availability with a redundant hot datacenter to ensure maximum availability.
3. Systems are continually assessed for threats and vulnerabilities and remediated as required by the Vulnerability Management Standard to ensure protection from external malicious acts.
  - We conduct continual testing for web code security vulnerabilities (cross-site scripting, SQL Injection, etc.) during the development cycle and in production.
4. All potential security incidents are investigated and remediated as required by our Incident Investigation & Response Standard, any resulting problems are managed to prevent any recurrence throughout the registry.

We believe the security measures detailed in this application are commensurate with the nature of the TLD string being applied for. In addition to the system/ infrastructure security policies and measures described in our response to this Q30, we also provide additional safety and security measures for this string.

These additional measures, which are not required by the applicant guidebook are:

1. Periodic audit of Whois data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

#### 7.0 RESPONSIBILITY OF INFORMATION SECURITY

See Question B Response Section 10.

© Internet Corporation For Assigned Names and Numbers.

# EXHIBIT 19



International Chamber of Commerce

*The world business organization*

International Centre for Expertise - Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to Contact Information Redacted*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** *This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).*

### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

ICC International Centre for ADR □ Centre international d'ADR de la CCI  
Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

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## Identification of the Parties and their Representatives

### Objector

Name	Fédération Internationale de Ski (FIS)
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

### Objector's Representatives

Name	Mrs. Sarah Lewis
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Mr. Marcel Looze
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

### Objector's Contact Address

Name	Starting Dot S.A.S
Contact person	Mr. Godefroy Jordan
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

### Applicant

Name	Wild Lake LLC
Contact	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted o

### Other Relevant Entities

Name	Donuts, Inc. (ultimate parent company of Applicant)
Contact Person 1	Mr. Paul Stahura <small>Contact Information Redacted</small>
Contact Person 1	Mr. Jon Nevett <small>Contact Information Redacted</small>
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

### Disputed gTLD

#### Disputed gTLD Domain Name

Name	SKI (Application ID 1-1636-27531)
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### Objection

**What is the ground for the Objection (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)**

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

## **Objector's Standing to object**

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The International Ski Federation (FIS) has standing to object to the application for this .SKI TLD because it is the global leading established international representative institution of the Ski community and because the Ski community is impacted by this .SKI TLD application.

The Ski Community is highly organized on local, national and international levels. It is clearly delineated by way of its organizational structures, its values and specialized equipment and resorts.

### **1. Level of global recognition of the institution**

The institution objecting to the new gTLD application “.SKI” by Wild Lake, LLC, ultimately owned by Donuts Inc. (application ID 1-1636-27531) (the “Objected Application”) is the FIS (Fédération Internationale de Ski, or International Ski Federation) (the “Objector”).

FIS is an institution declared for public utility in Switzerland.

FIS ([www.fis-ski.com](http://www.fis-ski.com)) is the International Federation grouping together 115 National Associations (the “National Associations”), from each continent:

- Africa            16 National Associations
- Americas        27        “
- Asia              23        “
- Europe          47        “
- Oceania         2         “

FIS is recognized by the International Olympic Committee (IOC) as one of seven Winter Olympic International Federations comprising the programme of the Winter Olympic Games. As such, FIS is mentioned on a number of occasions in the IOC Charter (Appendix 1), the IOC Rules and Responsibilities (Appendix 2) and the IOC Family (Appendix 3).

FIS is one of 35 International Sports Federations responsible for Olympic sports (Appendix 1, pages 82, 83 and 84) and is responsible for all Olympic matters and activities related to ski sport. The mission and role of “IF”s (International Sports Federations), such as FIS, within the Olympic Movement are described in Section 26 of the Olympic Charter (see Appendix 1).

In addition, FIS is the supreme authority worldwide in relation to ski sport, as stated in Article 2 of its 2012 Statutes (FIS 2012 Statutes attached in Appendix 4): “The FIS is the supreme authority in all matters concerning the sport of skiing”.

### **2. Length of time the institution has been in existence and proof of identity**

The FIS has existed for nearly a century. It was created in 1924 during the first Winter Olympic Games in Chamonix, France by 14 countries, as the successor of the first International Ski Commission founded in 1910 in Oslo, Norway. Since 1924, it has grown its membership to its current 115 National Associations.

A history of the formation, regulatory evolution, impact on ski sports, and growth of FIS, is attached as Appendix 5 (11 pages) and is also available on the FIS web site at: <http://www.fis-ski.com/uk/insidefis/history/fishistory.html>

### **3. Mechanisms for participation in activities, membership, and leadership**

FIS manages all ski sport and snowboarding at the Winter Olympic Games, but also organizes and hosts sport competitions as part of its core role of promoting ski sport. It organizes, per Article 3.5 of its Statutes, World Championships, World and Continental Cups, which total around 7,000 international competitions globally per year involving the nine ski disciplines of Cross-Country Skiing, Ski-jumping, Nordic Combined, Alpine skiing, Freestyle Skiing, Snowboard, Speed Skiing, Grass Skiing and Telemark. Furthermore, FIS has an active program with National Associations and other stakeholders entitled “Bring Children to the Snow” designed to encourage youngsters to participate in snow activities.

FIS is the top level of a multi-layer and multi-stakeholder membership-based organization promoting the global development of ski sport. It has clear and precise rules for membership (in its Statutes, Appendix 4 - Sections 6 to 11), including procedures for member exclusion. National Association members carry out duties as outlined in Article 8 of the Statutes (see Appendix 4).

National Associations in turn arrange activities and obtain membership fees for competitive skiers, in some cases leading to registering them with FIS to participate in international competitions. Additionally, many National Associations also have membership programs for leisure skiers of their nations.

The leadership principles of FIS are regulated by Articles 12 to 43 of the FIS Statutes (Appendix 4). The purpose of the leadership of FIS is the promotion of ski sport throughout the world.

The elected leaders of the FIS form the FIS Council, currently composed of:

- 1 President, Gian Franco Kasper (Switzerland)
- 4 Vice Presidents from Korea, Slovenia, Norway and the United States;
- 12 Members from 12 different countries;
- 1 Secretary General.

Further information on each Council Member is available on the FIS website at:  
<http://www.fis-ski.com/uk/insidefis/fis-council.html>

### **4. Institutional purpose related to the benefit of the associated community**

The purpose and objectives of FIS are defined in its statutes (Appendix 4) and include, among others:

- promoting the sport of skiing and its development, and developing skiing as a recreational and leisure sport (Articles 3.1, 3.9 and 3.11)
- establishing rules for all ski competitions approved by FIS (Article 3.6),
- organizing international, continental and Olympic ski competitions (Article 2.2 and 3.5),
- through such competitions, promoting and being the guardian of the core values of sport (Article 3.4), and strict respect of rules (Article 3.6) including the rules of the World Anti-Doping Agency (Article 3.8).

## **5. Performance of regular activities that benefit the associated community**

As described above, FIS organizes over 7,000 international ski competitions globally per year. These competitions benefit the ski community, as they actively involve the local community, large numbers of officials and volunteers, highlight the quality of ski resorts and the organization of ski competitions, create and promote a positive image of ski competitors and champions, and thereby promote ski sport by attracting viewers (both present at the competitions and at a distance via television, Internet, mobile devices, radio) and encouraging them to ski.

FIS works closely with the ski manufacturers to promote technical innovation for the benefit of both competitive and leisure skiers.

In addition, and in accordance with Section 3.3 of the FIS Statutes, FIS supports its members (National Associations) financially each year via contributions, both on a regular and on an exceptional basis. In 2009, FIS redistributed 24.6 million Swiss Francs (20 million Euros) to National Associations (pages 60 and 152 of Appendix 6: Minutes of FIS Congress 2009).

On 21 January 2013, the second World Snow Day, initiated by the FIS, took place to make the public aware of the pleasures that can be enjoyed through activities in the snow, and the importance of protecting this special part of nature. A total of 435 events in 39 countries were organized and coordinated through the FIS. More detailed information can be found at [www.world-snow-day.com](http://www.world-snow-day.com).

## **6. Level of formal boundaries around the community**

The formal boundaries of the community are at several levels:

1. At the FIS level, the community is formally limited to its members (National Associations) currently totalling 115 nations.
2. At the National Association level, the community is made up of its members, which include, depending on the country, local and regional ski clubs, ski schools, and individual members (competitive and leisure).
3. Beyond such formal boundaries, the community has one main physical boundary, namely specialized ski equipment: the ski (or skis, or snowboard), boots and clothing. In addition, skiing is generally performed in specialized resorts, equipped with ski lifts and marked trails and/or paths for cross-country skiing.

Levels 1 and 2 have as formal boundary a membership to an association. It must be underlined that most leisure skiers are not registered with the National Association of their country, but nevertheless consider themselves part of the broad skiing community.

Level 3 is a physical boundary, which is highly visible and requires choice and deliberate action. Without the use of equipment (owned, rented or borrowed) and access to alpine ski slopes or cross-country courses, it is not possible to be a skier.

Beyond ski competition, FIS covers all aspects of the community and is involved in the practice and regulation of recreational skiing through a Committee for Recreational Skiing. The '10 FIS Rules of Conduct of Skiers and Snowboarders', approved by the 2002 FIS

Congress (attached as Appendix 16) are adopted by hundreds of ski resorts all over the world to define and encourage safe behavior on the slopes.

## **Factual and Legal Grounds to the Objection**

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### **1. The SKI community is a clearly delineated community with global public recognition**

The ski sport community is immediately recognized by the use of specialized equipment: ski(s), snowboard, boots and clothing. Without this equipment, there is no skiing and one cannot be deemed as participating in ski sport.

The level of global public recognition of the word SKI can be identified by the use of the word SKI, or a word very similar in spelling or in phonetics, in different languages.

To quantify this, the number of “skier visits” (defined as days skied at a ski resort) in 2011 was estimated at 400 million (2011 Ski Global Market Survey; attached as Appendix 7 – page 10). The top 16 countries in terms of skier visits represent 83% of the total. Within these 16 countries, the word SKI is recognized within 12 countries in their local languages as the sport of skiing, either as the direct word, in spelling and in phonetics (English and French); in spelling only (Swedish, Norwegian); in phonetics only, (Japanese, Korean); or are very similar in spelling and phonetics (German – schi; Italian – sci; and Spanish – esquí ).

These 12 countries, on their own, represent 79% of the global skier visits (Appendix 8). The ski community is therefore clearly recognized by the single word SKI by at least 79% of the relevant global ski-related population.

### **2. Formal boundaries around the SKI community**

The most formal boundary around the community is on a first level, membership to FIS by the 115 member National Associations, on a second level, membership to a National Association (all the way down to a local ski club) by a skier. 11 National Associations alone account for 3 million individual members, as detailed in Appendix 9.

The fourth level of formal boundary is the act of purchasing a ski pass for the purpose of skiing (either a lift pass for alpine skiing or an access pass for cross-country skiing), the third level of formal boundary being the act of purchasing, renting or even borrowing ski equipment.

### **3. SKI community exists for more than a century as a global organization**

Historians of the FIS date skiing back to the year 5,000 BC (oldest skis found in Russia near Lake Sindor). FIS was founded in 1924 as the successor of the International Ski Commission founded in 1910 in Oslo, Norway by 22 delegates from 10 countries.

#### **4. SKI community global distribution**

The ski community is present on all 5 continents, both in terms of the 115 National Associations and in terms of ski resorts. There are ski resorts in Australia, Chile, China, South Africa, and New Zealand as well as in the established ski nations. A global distribution of the 400 million annual ski visits is detailed for the Top 34 nations in Appendix 7, pages 16 and 17.

#### **5. SKI, a community made up of millions of individuals**

The ski community starts at the top with one global federation, FIS, composed of 115 National Associations, themselves composed of more than 3 million individual members.

An estimated 110 million individuals annually practice ski sport (source: Global ski market survey 2011, key figures table covering the 34 main ski nations, pages 11 to 19, attached as Appendix 7).

#### **6. SKI community opposition to the application ID 1-1636-27531 is substantial**

FIS objection against the Objected Application is endorsed by FIS 115 member National Associations and supported by the following leading international organizations related to all sectors of ski sport (see official letters in Appendix 10):

- The International Olympic Committee (IOC)
- The World Anti Doping Agency (WADA)
- The International Ski Instructor Association (ISIA)
- The Ski Racing Suppliers' association (SRS)
- The World Federation of the Sporting Goods Industry (WFSGI)
- The National Ski Areas Association (NSAA), the trade association of the ski resorts of the United States.

The portion of the community expressing opposition to the Objected Application through its representative organizations is not just significant, but overwhelming.

#### **7. Costs incurred by FIS in expressing opposition**

Costs incurred by objector in expressing opposition include:

- Involvement by FIS marketing and legal staff in following the new gTLD process;
- Information and participation of senior management of FIS;
- Discussions with IOC, National Associations, resorts, ski instructors and associations of equipment manufacturers in order to determine a common position;
- Discovering and defining detrimental actions caused by the Objected Application;
- Filing this objection, with related coordination, legal and documentation expenses.

## **8. Strong association between SKI community invoked and the Objected Application gTLD string**

The Objected Application states, in response to Question 18a of the application, its focus as follows:

“The .SKI TLD will be appealing to the millions of people and organizations who are involved with or who simply enjoy the many variations of skiing, including alpine, snowboard, cross-country, telemark, as well as water, and sand skiing.”

FIS, and its related ski community, covers all aspects of skiing, as stated in the Objected Application, with the exception of waterskiing and sand skiing. Although there is an international association for waterskiing ([www.iwsf.com](http://www.iwsf.com)) and it is a sport recognized by the International Olympic Committee, waterskiing is not part of the Olympic Program. Waterskiing was a demonstration sport at the 1972 Munich Olympics, and is seeking to become part of the Olympic Program in the future. Internet research shows no estimate of the global number of water skiers. Concerning sand skiing, there is no international structure governing this sport.

## **10. Strong association by the public**

As noted above: “These 12 countries, on their own, represent 79% of the global skier visits (Appendix 8). The ski community is therefore clearly recognized by the single word SKI by at least 79% of the relevant global ski-related population.”

The public is also associated to the ski community through the TV broadcasting of the major ski competitions. With the FIS Alpine Ski World Cup standing out as one of the most popular winter sports series worldwide, extensive television coverage has reached 2.9 billion cumulative viewers for the alpine skiing competitions (based on IFM evaluation 2011/12, see Appendix 17).

## **11. Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the Ski community**

The full publicly available portion of the Objected Application is attached as Appendix 18.

Donuts, the ultimate parent company of Applicant, has now communicated publicly three times that it will only abide by an ‘open internet’, meaning a fully unregulated internet where cyber-squatting and auctioned-off domain names to the highest bidder are the rules:

- In its Launch Press Release on June 5, 2012 (Appendix 12);
- In its response in January 2013 to the Government Advisory Committee (GAC) Early Warning (EW) on its .RUGBY application (UK GAC EW) (Appendix 13);
- In its response in January 2013 to the GAC EW on its .BASKETBALL application (Greece GAC EW) (Appendix 14).

On March 6, 2013, ICANN published the Public Interest Commitment (the ‘PIC’) filed by Applicant on the Objected Application (Appendix 19). Nonetheless, the commitments made in the PIC are fully insufficient for the adequate protection of the ski community.

Indeed:

- 1) The legitimate ski assets very often are not trade marks, nor are they protected by national laws for priority registration of their names under gTLDs. Such legitimate ski assets include:
  - a. Ski resorts and mountains (over 5,000)
  - b. Names of FIS competitions, especially future competitions
  - c. Names of ski athletes (over 30,000 see Appendix 20) and ski instructors (over 100,000)
- 2) These commitments give no protection against terms in clear contradiction with the core values of ski and sports (doping, illicit gambling, racism...)
- 3) Some jurisdictions, where an abusive registrant could base its abusive registrations, have literally no regulations of any type concerning domain name registrations.

All these public statements from the Applicant clearly demonstrate that the Objected Application has been developed without ski community-specific registry policies and that the Applicant is an unaccountable sport TLD operator.

## **12. Dependence of the SKI community and FIS on the Domain Name System (DNS) for its core activities**

Internet is already playing a very strong, and ever increasing, role within the ski community by offering content relating to:

- Competitions organized by FIS are published on its web site [www.fis-ski.com](http://www.fis-ski.com) and on the web sites of national ski associations;
- FIS World Cup events organized for the 9 disciplines have specific web sites with live scoring, full event results, Twitter and Athlete Blog feeds and real-time news. The FIS Alpine Ski World Cup web site [www.fisalpine.com](http://www.fisalpine.com) attracted 443,519 unique visitors during the 2011/2012 season, up from 150,000 just two seasons earlier.
- The discipline specific websites of Cross Country, Ski Jumping, Snowboard and Freestyle skiing attracted the following unique visitors in the 2011/2012 season:  
[www.fiscrosscountry.com](http://www.fiscrosscountry.com) 541.003  
[www.fisskijumping.com](http://www.fisskijumping.com) 960.194  
[www.fissnowboard.com](http://www.fissnowboard.com) 53.345  
[www.fisfreestyle.com](http://www.fisfreestyle.com) 54.127
- "Alexa", the leading provider of free, global web metrics, shows that [fis-ski.com](http://www.fis-ski.com) has a high impact of search queries and is highly ranked on the global traffic rank. (see <http://www.alexa.com/siteinfo/fis-ski.com#>)
- National ski teams have developed their own web sites for promotion, information and education, and champions are increasingly following in these footsteps;
- Ski resorts have long established a presence on the Internet in order to promote their resorts (for instance with live web camera feeds showing snow and weather conditions), the pistes and courses, future events and overall facilities, as well as to facilitate finding accommodation within their resort from a variety of options (hotels, apartment rentals, etc.);
- Skiers use the Internet to search and compare resorts from a price and interest perspective, and to discover new resorts.
- Ski fans upload relevant content to share with other fans.
- Recreational skiers can purchase their ski passes online, buy or rent specialized ski equipment, find relevant accommodation and travel information.

### **13. Material detriment created by the application ID 1-1636-27531**

FIS, since its inception in 1924, has developed core principles and activities (as described above) that are key factors in communicating with all categories of skiers and potential skiers, from young newcomers to enthusiastic skiers of all ages.

The possible delegation of the Objected Application would have many and severe detrimental effects not only to FIS, but also to many key participants of the ski community. Indeed, the Objected Application will allow many web sites, based on words and activities that are in fundamental contradiction with and in opposition to the core principles and values of the FIS, ski sport and the ski community at large, to benefit from, deteriorate and/or abuse the reputation of skiing and ski sport and the positive image projected by the FIS.

Particular activities of specific harm and damage, all of which could be exercised under the Objected Application, include the following detriments.

#### **13.1. Detriments to the ski community image and values**

##### 13.1.1. Disruption of Efforts against Racism and Bullying

The topic of racism is particularly sensitive to both the perception of official sanction and the power of intentional or unintentional innuendo (as may easily result from content or the mere juxtaposition of otherwise acceptable words). All Sport governing bodies exercise great care in making sure that racist language and bullying remain absent from official communication. The Objected Application SKI TLD being developed without sport-specific registry policies and oversight, it is likely that racist content or innuendo would appear with a false aura of official language. Moreover, the governing and organizing bodies of skiing would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access.

##### 13.1.2. Disruption of Efforts against Illegal or Undesirable Betting

Gambling and one of its potential side effects, namely the incentive for match-fixing, has a strong impact on the image of the sports industry. As a .SKI TLD or any given sport-specific TLD confers an aura of official sanction, it is necessary that content-related and domain-name-related policies minimize the danger of illegal/undesirable content or innuendo from the start, and allow swift action if problems are found. That can only be done if the TLD registry is directly accountable to the sports community responsible for implementing its core values. In the opposite case, prudent policies and enforcement are hampered not only by an unaccountable TLD operators' self-interest of maximizing the number of registrations and minimizing administrative controls, but also by a lack of legal instruments. The UDRP (acronym for Uniform Dispute Resolution Policy) and URS (acronym for Uniform Rapid Suspension) procedures determined by the ICANN community are not equipped to deal with issues related to betting, nor are the measures that the Applicant portrays to implement in the future to protect the legitimate registrants.

## **13.2. Detriments to FIS core activities**

### 13.2.1. Disruption of media coverage rights and commercial activities

FIS World Cup series 2012/13 in Alpine Skiing comprises 79 races (male and female) organized from October 2012 to March 2013 in 30 resorts across 13 different countries in North America and Europe. FIS member National Associations individually manage the broadcast rights of the events each of them organize, with the support of media agencies such as Infront Sports & Media. Media experts and FIS estimate the total annual revenue of the broadcast, digital and sponsoring rights for FIS Alpine Ski World Cup to reach €100m, and additional damage would be felt by the other FIS disciplines (see Appendix 21).

The Objected Application's Applicant is both unable and unwilling to ensure that second-level domains related to FIS member National Associations and to FIS Alpine Ski World Cup events, and especially the "city + year" marks associated with each event, will be protected.

The cybersquatting of the main events' official names and/or the registrations of names that are very close to that created by the organizers, for example 'www.2014courchevel.com', in order to drive traffic to the site run by the cyber-squatters at the expense of the legitimate websites, will have a negative impact on the total value of the broadcast, digital and sponsoring rights for the World Cups in all FIS disciplines.

A 1% drop of the broadcast, digital and sponsoring rights for FIS Alpine Ski World Cup alone would total 10 million Euros over the 10-year delegation of the Objected Application.

### 13.2.2. Disruption of Anti-Doping Efforts

Communication is key for anti-doping efforts. Indeed, a lack of vigilance can create situations where doping practices are perceived as trivial or harmless. In other words, strong and clear communication within the community to deter an athlete to use doping products has a key role to play. The unaccountable Applicant will neither be willing nor able to monitor its name space with respect to doping related activity. For this reason, a ski-specific TLD in the hands of an unaccountable operator is certain to encumber community efforts against doping.

FIS' annual anti-doping budget, currently at over 1 million Euros per year, may hugely increase to face the flow of doping-related websites using the Objected Application TLD and thereby significantly impact the available resources for FIS to carry out its anti-doping activities.

### 13.2.3. Image loss through misappropriated famous names

The Objected Application's Applicant is both unable and unwilling to ensure that second-level domains reflecting famous names are assigned to the club, federation, association, event or athlete best known under that name. Dispute resolution policies based on trademark right alone are insufficient. Members of the National Associations and FIS as well as the community at large face a loss of image and prestige if inappropriate parties control key names. Many such parties are experts in the taking over of domain names and developing subterfuges preventing reassignment, thus causing further costs to legitimate stakeholders.

Moreover, the measures that the Applicant pretends to implement in the future to protect the legitimate registrants are fully insufficient to protect FIS and its member National Associations, as it would not include:

- The name FIS and the names (and short forms) of its 115 members, as those short forms (like 'FFS' for 'Fédération Française de Ski') are not registered trademarks;
- Names of World Cup and World Championship competitions, and related resorts, organized by FIS (7,000 annually), as the majority of those events are related to geographic names.

The cybersquatting of 30% of FIS, member National Associations and their affiliates set of 1,000 legitimate names would cost an estimated total of half a million Euros to the legitimate right holders in dispute resolution efforts and legal advisor fees (the average full cost of a UDRP arbitration procedure is around 1,500 Euros).

In addition, this detriment valuation does not include the loss of legitimate media and Internet traffic to cyber-squatted web sites of competitions and athletes and resorts.

Finally, the Objected Application pays no attention to protecting legitimate name owners of the ski community beyond applying Specification 5 of the Registry Operator contract, i.e. an estimated 2,000 words covering only country and territory names in no more than 6 languages.

### **13.3. Detriments to the ski community commercial activities**

#### 13.3.1. Brand-jacking and cybersquatting

The ski community, especially its celebrities, its athletes, its event locations and its local community brands are particularly exposed to the practice of brand-jacking. It is the practice of attempting to illegitimately use the brand identity, either for profit or in order to damage the reputation of the brand.

The Objected Application would allow for interference via impersonation (of FIS, National Associations, champions, geographical names, ski resorts, renowned athletes) and give undue advantage to domain name registrants who are not part of the ski community and who could derive a benefit from its positive image. The potential victim brand may be other than a registered trademark, a very frequent situation in the sport community as events and athletes do not generally register a trademark, and as place and geographic names cannot generally be a registered trademark name in their own jurisdiction. These include:

- Legitimate (but not necessarily legal) owners of ski-related geographies and names, including names of famous and common mountains, ski resorts, ski trails and slopes;
- Names of past, present and up-and-coming ski champions;
- Names of past, present and up-and-coming ski events and Championships.

The juxtaposition of a brand-like name and the word "ski" necessarily creates a degree of specificity. Unless the assignment of domain names is controlled, ski-specific brand-jacking will be generalized and impossible to eradicate.

In particular, the 6,000 resorts and the ski equipment industry represent a population of 500,000 businesses globally. The average rate of small and medium size businesses with a website is 50%, which means that 250,000 ski-related businesses have set up a website to promote their services and products. The annual cybersquatting of 0.5% of the domain names of those businesses would total dispute resolution costs of approximately 20 million Euros over the 10-year delegation of the Objected Application at an average dispute resolution cost of 1,500€.

### 13.3.2. Disruption of the recreational ski economy

Concrete and economic damage to the ski community by the Objected Application derives from the damage to the reputation of ski sport and its community, and to the many legitimate owners of the ski community who will not be given priority registration of their name.

The proliferation of detrimental activities on the web as a consequence of the weak protection policies proposed by the Applicant, in direct visual link with the ski community via web sites ending in .SKI (for instance, www.doping.ski or www.porn.ski), will significantly damage the image and reputation of the ski community, with related concrete and economic damages in terms of a decrease in ski activity and in skier visits.

A slight decrease of 0.10% in ski activity by recreational skiers at the current level of 400 million ski-days sold would generate a loss of 400 million Euros globally over the 10-year delegation of the Objected Application (Exhibit 7 – Global Ski Market Survey 2011).

The reasons why such a drop in recreational skiing may occur include:

- A strong decrease in the quality and family-friendly reputation and image of the sport of ski related to doping, illegal ski betting, racism and bullying domain names ending in .SKI.
- A loss of legitimate traffic to illegitimate resort sites via traffic jacking, with a related deterioration in the image of the ski community.
- A loss of trust in ski-related content, as consumers will not be able to easily recognize legitimate from illegitimate web sites.

The following analysis is an opinion based on the translation of the material detriments described below into financial cost.

**Table 1. Estimated cost of detriments caused by Objected Application**

<b>Item</b>	<b>Victims</b>	<b>Estimate of negative externalities, aggregate over 10 years, in Euros</b>
Significant increase of anti-doping efforts by FIS	FIS	Significant
Decrease of TV, digital and sponsoring rights of FIS Alpine Ski World Cup	FIS member National Associations, events organizers, resorts	10 million
Image loss through misappropriated famous names	FIS, FIS member National Associations, resorts	0.5 million
Cybersquatting and typo squatting lost revenue and legal costs	Brands, organizing bodies, athletes, businesses, resorts...	20 million
Disruption of the recreational ski economy	Ski-related businesses resorts, e-commerce...	400 million

#### **14. Level of certainty that alleged detrimental outcomes would occur**

Based on the fully open, unrestricted (except for Specification 5) nature of the Objected Application, as well as current proof of impersonation, it is all but certain that these detrimental outcomes will occur. It goes without saying that economic damage is an incomplete perspective, as many affected values cannot be measured in terms of money.

As an example of the extent of current cyber-squatting of even the most active members of the ski community, of the top 48 ski resorts world-wide in terms of day visits, cyber-squatters occupy 15 web sites with confusing names relative to the official resort web site, if not the name of the resort itself, either in .COM or in .CC (country). A list is attached as Appendix 15.

## **Remedies Requested**

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Full withdrawal of the Objected Application.

## **Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

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A copy of this Objection is transmitted to the Applicant(s) and to ICANN on March 13, 2013

## **Filing Fee (Article 1 Appendix III to the Rules and Article 8(c) of the Procedure)**

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As required, Euros 5 000 were paid on March 6, 2013.

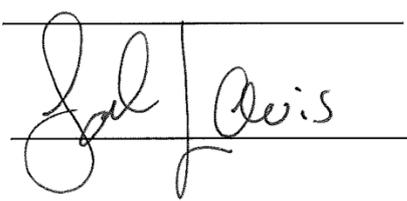
Evidence of the payment is attached for information.

## **Description of the Annexes filed with the Objection (Article 8(b) of the Procedure)**

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- 1 IOC Charter
- 2 IOC Rules and Responsibilities
- 3 Olympic Movement
- 4 FIS Statutes 2012
- 5 History of FIS
- 6 Minutes of 2009 FIS Congress
- 7 Global Ski Market Survey 2011
- 8 Ski in various languages
- 9 Number of Individual Members of 11 National Associations
- 10 List of the 115 National Associations which are members of FIS
- 11 List of supporters to FIS objection
- 12 Donuts Launch Press Release – June 5, 2012
- 13 Donuts response to GAC Early Warning on its .RUGBY application
- 14 Donuts response to GAC Early Warning on its .BASKETBALL application
- 15 Top 48 ski resorts and cyber-squatted names
- 16 10 FIS Rules for Conduct of Skiers and Snowboarders
- 17 IFM Sports FIS Sports Season 2011/12 broadcasting performance
- 18 Publicly-available portion of Objected Application
- 19 Wild Lake LLC Public Interest Commitment
- 20 Total Number of Active Registered FIS Licensed Athletes (2012)
- 21 Snow Sports Competitions organized by FIS, 2012/13

Name, Title : Mrs. Sarah Lewis, General Secretary

Date: 11.3.2013  
  
Signature: \_\_\_\_\_

# EXHIBIT 20



International Chamber of Commerce

*The world business organization*

International Centre for Expertise Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### RESPONSE FORM TO BE COMPLETED BY THE APPLICANT

- Applicant responding to several Objections or Objections based on separate grounds must file separate Responses
- Response Form must be filed in English and submitted by email to Contact Information Redacted
- The substantive part is limited to 5000 words or 20 pages, whichever is less

**Disclaimer:** This form is the template to be used by Applicants who wish to file a Response. Applicants must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

**Annex A** defines capitalized terms and abbreviations in addition to or in lieu of the foregoing.

ICC International Centre for ADR Centre international d’ADR de la CCI  
Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

### Identification of the Parties and their Representatives

#### Applicant

Name	Wild Lake, LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

#### Objector

Name	Fédération Internationale de Ski (FIS)
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Copy the information provided by the Objector.*

#### Applicant's Representative(s)

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtlddisputes.com">http://www.newgtlddisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative (for example external counsel or in-house counsel).*

**Applicant's Contact Address**

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtlddisputes.com">http://www.newgtlddisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Applicant. The Contact Address can be the Applicant's address, the Applicant's Representative's address or any other address used for correspondence in these proceedings.*

**Other Related Entities**

Name	Mrs. Sarah Lewis, Mr. Marcel Looze
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Mr. Godefroy Jordan (Starting Dot S.A.S.)
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional other related entity.*

## Disputed gTLD

**gTLD Applicant has applied to and Objector objects to [.example]**

Name	<.ski> – Application ID 1-1636-27531 (Case Ref. EXP/421/ICANN/38)
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### Objection

**The Objector filed its Objection on the following Ground (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)**

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

*Copy the information provided by the Objector.*

**Point-by-Point Response to the claims made by the Objector (Article 3.3.3 of the Guidebook and Article 11 of the Procedure)**

*(Provide an answer for each point raised by the Objector.)*

**A.**

### INTRODUCTION

ICANN adopted its new gTLD program to increase choice and competition in domain names. AGB Preamble, §1.1.2.3; AGB Module 2 Atchmt at A-1. Sharing and seeking to accomplish these goals, Donuts has applied for the instant and other TLDs, to offer domains on subjects that otherwise may not have their own forums. See Nevett Dec. ¶¶4-6 (**Annex B**).

Objector attempts to use the objection process to contravene the objectives of the new gTLD program and reserve for itself the <.ski> TLD for the narrow purposes of the co-applicant on behalf of which it acts. The open <.ski> registry offered by Donuts creates avenues of communication more expansive than the narrow use to which Objector would put that TLD. Such generic TLDs bring competition to registries, which have not experienced it in a world that has known little more than <.com>. The string as applied for by Donuts provides a vehicle to those who wish to make dictionary and other permissible uses of a <.ski> domain. It represents one of a growing number of niche offerings in an expanding internet “shopping mall,” giving users the choice of a specialty experience as an alternative to the sprawling “department store” environment of such incumbent registries as <.com>. See Nevett Dec. ¶¶6, 8 (**Annex B**).

The Objection threatens these important benefits by closing an entire segment of the domain-name space to the many generic uses of a common word's multiple meanings. Objector claims for its principal a cyber-monopoly over a word that does not describe a clearly delineated community. However, "[t]he ultimate goal of the community-objection process is to prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding." <http://www.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>.

As a threshold matter, Objector lacks standing to object. ICANN does not reserve community objections for mere industry segments or competing applicants. They also must represent a bone fide community.

The Objection also falls well short on the merits. ICANN has made clear that:

There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.

<http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>. More specifically, ICANN demands that community objectors prove *all of four* substantive elements. AGB §3.5.4 at 3-25.

Objector does not carry that burden. It cannot do so with respect to an everyday word that Applicant offers for generic Internet use. Objector does not represent a clearly delineated community able to co-opt that term for its own restrictive purposes. Nor does it show that such a community has substantial opposition to, or a strong association with, Applicant's proposed string.

Finally, and most significantly, Objector demonstrates no material detriment to its purported community. Objector's supposition of improper activity does not constitute proof that it will occur. Moreover, Applicant has established protective mechanisms that exceed ICANN's requirements. Those procedures – not this Objection – provide the proper means to address issues that have not yet arisen. In fact, the Applicant proposes to operate the TLD in a fashion more beneficial to those interested in <.ski> than the Objector.

By gearing solutions to threats as they happen instead of implementing overprotective barriers to entry, Applicant maximizes access to and free expression within the domain. Lacking any experience as a registry, Objector's speculation that it could do better has no basis in reality or under Guidebook standards.

Applicant has the same free speech rights as the general public to conduct its affairs using ordinary words from the English language. To hold otherwise would negate such rights, impede the growth of and competition on the Internet, and set dangerous precedent that takes choice away from the many and places control in the hands of a few.

## **B.**

### **OBJECTOR LACKS STANDING**

#### **1. *Threshold Considerations***

The standing evaluation begins with two preliminary matters. The first relates to whether Objector's organization constitutes a "community" as ICANN contemplated it. The second involves whether it can make proper use of the community objection process to the extent it acts on behalf of competing applicant claiming community status.

Regarding the first point, ICANN envisioned a “community” as a locality, a group of individuals sharing specific characteristics or interests, or entities that provide a common service. See, e.g., AGB §4.2.3 at 4-11. It did not intend for private parties purportedly representing an entire industry to claim community status. *Id.*

Second, Objector operates as a proxy for a competing applicant, Starting Dot S.A.S, which also applied as a community.<sup>1</sup> As such, *that applicant* will undergo a Community Priority Evaluation (CPE), a different and independently dispositive remedy whereby a group of designated ICANN experts will examine its professed community status. AGB §4.2.2. If that uniquely qualified body so finds, the application “will ... prevail” over all non-community applicants for the same string. *Id.*

That structure leaves objections *only* for those actual *communities that do not apply for the TLD* in their own right. Objector abuses the process by taking a “free shot” at eliminating its principal’s competitor, seeking such a ruling by a single dispute resolution professional on specified factors that the Guidebook leaves for a group of ICANN-selected evaluators to determine. The Panel should not countenance such subversive behaviour.

## **2. Guidebook Elements**

Beyond the foregoing, Objector must prove it has standing as (i) “an established institution” with (ii) “an ongoing relationship with a clearly delineated community.” AGB §3.2.2.4. Its showing does not suffice.

Objector claims “established institution” status entirely by unsworn statements in its Objection. Beyond that, it simply refers to its self-promotional website and 2012 “statutes” that do not evidence independent historical existence. It describes itself as “the supreme authority worldwide in relation to ski sport,” but offers no actual evidence of the “global recognition” required to establish standing.

Further, be “clearly delineated,” the “community named by the objector must be ... strongly associated with the applied-for gTLD string.” AGB §3.2.2.4 at 3-7. In other words, the word “ski” must readily bring Objector’s organization to mind. Merely stating that proposition reveals its folly.

So, too, does application of ICANN’s test for an “ongoing relationship” with a “clearly delineated community.” The standard requires proof of: (a) mechanisms for participation in its activities, membership and leadership; (b) institutional purpose related to the benefit of the community with which it claims association; (c) regular activities to benefit that community; or (d) formal boundaries defining the community. AGB §3.2.2.4 at 3-8.

While Objector describes its organization and its governance and membership in general terms, it presents no evidence whatsoever on key factors. The only information it offers concerning its activities consists of unsworn statements in the Objection and reference to its self-serving statutes and website. See, e.g., Objn at 5, Appx 4. Such sweeping pronouncements with no evidentiary support do not demonstrate an institutional purpose or activities to benefit its putative community.

Objector labels that group the “ski community.” Objn at 7. Yet, it fails to identify what comprises it or what “boundaries” surround it, and instead simply describes the boundaries of its own structure. See, e.g., Objn at 6-7, Appx 16.

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<sup>1</sup> A true and complete copy of Starting Dot’s competing application appears in **Annex C**. The instant Objection was filed by Godefroy Jordan <godefroy@startingdot.com> by email dated March 13, 2013, a true copy of which appears in **Annex D**. Sections 6(a) and (b) of Starting Dot’s application identify Mr. Jordan as its president. **Annex C at 2**.

Not only does Objector fail to demonstrate the composition of the “ski community;” one wonders if it even could. The “ski community” no doubt consists of many parties such as spectators, enthusiasts, consumers, retailers, journalists, commentators, historians and others, and involves other activities such as water, sand and jet skiing, to name a few. While these other types of skiing do not come within Objector’s purview, they certainly have their own interests in “ski” topics that have nothing to do with Objector’s sphere.

The applicant on whose behalf Objector acts likewise limits the “community” to snow skiing. Applic. §20(a) (**Annex C at 13-14**). In the same section of its application, Respondent’s competitor describes that “community” as follows:

The ski community is made up of two types of groups:

- Professionals and companies that are active in the ski industry;
- Individuals who practice or/and have a real interest for the sport of skiing in its broadest sense.

Companies in the ski industry range from small businesses to big corporations, active, in particular, in the following business segments:

- Travel industry (including travel agencies, transportation);
- Ski resorts;
- Hotel business;
- Catering;
- Ski equipment industry (including, manufacturing and retail);
- Sporting events (e.g. competitions);
- Ski schools;
- Press/Media.

Professionals involved in the ski industry range from ski instructors to Ski Industry PR Professionals (SIPP). *There are indeed many different professions that can be practiced in the ski industry.*

*Furthermore, the ski community is made up of and lives off millions of ski enthusiasts, passionate about the sport of skiing.*

*Id.* (emphases added). Such loose affiliations and broad scope defy “clear delineation.”

Thus, Objector either lacks any significant relationship with a substantial portion of the community it claims to represent, or that “community” is too broad, diverse and wide-ranging in interests to be “clearly delineated.” Objector certainly does not prove otherwise, as it has the burden to do. Nor has it submitted any evidence, such as a survey, demonstrating the requisite “strong association” between the ski “industry” and the word “ski” that makes up the string. As such, it lacks the necessary standing to bring its Objection.

FIS does not object to an application for <.FIS>, but rather for <.ski>. Objector would have an easier time defining a clearly delineated “FIS” community, but such a narrowly targeted “community” could not permissibly control the use of a generic dictionary term. Such a scheme would be contrary to the open nature of the Internet.

The Panel should dismiss the Objection on standing alone. It need never consider the substance of the Objection. Nevertheless, we reveal its absence of merit below.

### C.

#### **THE OBJECTION SHOULD BE REJECTED**

A valid community objection requires “substantial opposition from a significant portion of the community to which the string may be targeted.” AGB §3.5.4. This gives Objector the

burden of proving: (i) a clearly delineated community; (ii) substantial opposition to the application by the community; (iii) a strong association between that community and the subject string; and (iv) a “likelihood” that the Application will cause “*material detriment* to the *rights or legitimate interests* of a *significant portion* of the community to which the *string* may be ... targeted.” *Id.* at 3-22 (emphases added). Since the general presumption is in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD, there is a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the Applicant. <http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>. “The objector *must meet all four tests* ... for the objection to prevail;” failure on any *one* compels denial. AGB §3.5.4 (emphasis added). Objector meets none.

### **1. Objector Fails to Invoke a Clearly Delineated Community.**

Applicant has already shown above that Objector does not represent a “clearly delineated” community. However, Objector necessarily must overcome a more stringent test on the merits than it need do for standing. ICANN would have no reason to make “clearly delineated” a substantive element of the objection if it meant nothing more than the criterion for standing. Rules “should be interpreted so as not to render one part inoperative.” *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). See also *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). To meet the substantive test, therefore, Objector must show that the string itself describes a clearly delineated community.

By itself, the word “ski” invokes several different activities. Dictionary.com ascribes 4 different meanings to the word – 2 as a noun, 2 as a verb – including: (i) “one of a pair of long, slender runners made of wood, plastic, or metal used in gliding over snow;” (ii) “water ski,” which in turn means “a ski on which to water-ski, designed to plane over water: it is shorter and broader than the skis used on snow;” (iii) to travel on skis, as for sport; and (iv) to use skis on; travel on skis over.” See **Annex E**. See also **Annex F**.

Objector’s focus on its own activities does not take into account the other dictionary meanings of the term *not* associated with the “community” it invokes. Indeed, skiing includes these additional activities as well as others not as well developed. Searching “sand skiing” on Google yields a variety of results, including the American National Parks Services page on sand boarding, skiing and sledding. See **Annex G**. A Yelp search for “water skiing” in Lake Tahoe, California returns results for a dozen business offering services related to the sport. See, e.g., **Annex H**. The many diverse meanings of the broad term “ski” make it impossible for Objector to show that the term describes a “clearly delineated community.”

The separate elements enumerated in the objection standard do not assist. Objector does not, because it cannot, show that the public recognizes “ski” as a “community” because the definition is too broad. One does not see snow-skiers and water skiers meeting at the same association meetings. Most clearly, the term is incapable of denoting “formal boundaries” that indicate who makes up the “community.” And, because “ski” does not describe a “community,” Objector cannot establish the duration of such community’s existence, its global distribution, or the number of its members. AGB at 3-22, 23.

Objector has failed to make the requisite showings for its ski “community.” Rather, Objector associates the prescribed factors with its own organization, as if it alone made up the entire “community.” It does not, of course, as its own admissions prove. Failing to satisfy its heavy burden to prove a clearly delineated “ski” community, the Objection must be denied.

**2. Objector Demonstrates No Substantial Opposition to the Application Within the “Community” It Claims to Represent.**

Objector falls short of satisfying this element, which requires proof of: (a) the number of expressions of opposition to the Application relative to the asserted community’s composition; (b) the representative nature of those expressing opposition; (c) the stature or weight of sources of opposition; (d) the distribution or diversity of opposition within the invoked community; (e) Objector’s historical defense of the alleged community in other contexts; and (f) costs incurred by Objector in expressing opposition. AGB §3.5.4 at 3-23. Objector proves no “substantial” opposition to the Application to satisfy its burden.

This aspect of the Objection relies almost entirely on its Appendix 11, which consists of substantively identical form letters professing “opposition” from executives of six groups affiliated with Objector. The letters reflect no independent thought showing genuine opposition by each such member itself. Nor do they add up to a meaningful number of expressions of opposition within the larger ski “community” that Objector claims to represent (and certainly not in relation to whatever “community” could possibly be described simply by the word “ski”).

Objector offers no proof that such cookie-cutter “oppositions” fairly represent the views of a “ski” community, even as defined by Objector. It provides no evidence regarding the stature of those ostensibly voicing opposition, or of the distribution or diversity of such opposition. And, Objector makes no showing of any historical “defense” it has mounted for the “community” it invokes.<sup>2</sup>

Objector attempts to augment its showing with unsworn evidence in the form of a purported “global ski market survey 2011.” Yet even a cursory inspection of the exhibit reveals its lack of credibility for its ambiguous, spotty and otherwise self-admitted unreliable supporting data. See Objn at 8, Appx 7 at 10 (“data collection about the industry is not always very well organised”), 71 (“often figures published are only partially correct”).

Objector does not sustain its burden of proving “substantial” opposition within the “ski” community. First, the “ski” community can’t be defined and then, for this element, Objector has not demonstrated that substantial opposition exists to Applicant’s proposed operation of the TLD. Its failure to establish this essential element requires rejection of the Objection. AGB §3.5.4 at 3-25.

**3. Objector Demonstrates No “Strong Association” Between the “Community” Invoked and the Applied-For String.**

Objector bears the burden of proving a “strong association” between the applied-for string and the so-called community it invokes. It may do so by showing (a) statements made in the Application, (b) other public statements by Applicant, and (c) public associations between the string and the objecting “community.” AGB §3.5.4 at 3-24.

The Objector cannot do this. Take, for example, the Application’s stated purpose of the TLD:

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<sup>2</sup> As to the “cost” element of “substantial opposition,” Objector provides only a statement unsubstantiated by evidence, specificity or even an estimate. Objector fails to state any costs material to its Objection, referring instead to tasks related to filing its own application, learning about the new gTLD process, communicating with “affiliates” and allocating resources incidental to preparing and submitting its own application.

The .SKI TLD will be appealing to the millions of people and organizations who are involved with or who simply enjoy the many variations of skiing, including snow, cross-country, telemark, water, and sand skiing. Participation in these recreational activities is extensive and includes professionals, individuals, families, tour operators, resorts, coaches, tournaments, equipment manufacturers, retailers, boat manufacturers, ski associations, and many others.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8-9). The purpose of the TLD is open and the string itself is not tied to a specific community. That is the whole point of the generically worded TLD. If the Objector were attacking <.snowski>, it could more readily show a tie between it and some “community,” but not to the broader, dictionary meaning of the word making up the string itself.

Indeed, the concept of “targeting,” which lies at the heart of this facet of the Objection, runs directly *contrary* to Applicant’s stated purpose for this TLD and the philosophy behind the operation of registries generally by Applicant and its family of companies:

Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN’s objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8-9). Thus, Applicant expressly does not “target” the string toward *any* particular community, let alone that which Objector claims to represent.

Nor does Objector’s submitted evidence support a “strong association” by the *public* between the string and the posited community. Objector again stands on two unsworn and unsubstantiated documents. Objn at 9, Appxs 8, 17. These do nothing to prove a “strong” association between the narrow interests Objector claims to represent and the generic string. This should come as no surprise, given the multiple meanings of the term apart from the interests for which Objector lobbies.

**4. Objector Has Not Shown That Granting the Application Likely Would Cause Material Detriment to the “Community” Invoked by Objector.**

One establishes “material detriment” by proving elements that include: (a) the nature and extent of potential damage to the invoked “community” or its reputation from Applicant’s operation of the string; (b) evidence that Applicant does not intend to act consistent with the interests of the invoked community; (c) interference with the core activities of the invoked community by Applicant’s operation of the string; (d) extent the invoked community depends on the DNS for core activities; and (e) the level of certainty that detrimental outcomes will occur. AGB §3.5.4 at 3-24. The fear and speculation put forth in the Objection does not supply proof of these elements sufficient to satisfy Objector’s burden.

*a. Objector shows no “likely” harm to the “community” or its reputation from Applicant’s operation of the subject string.*

Objector does not prove that Applicant’s <.ski> gTLD poses a *likelihood* of damage to the purported “community” or its “reputation.” Rather, it focuses on protecting the community application of a competitor. Objector complains of such adverse consequences to the

“community” as racism and bullying, undesirable betting, disrupted media coverage, doping, misappropriated famous names, and brand-jacking. With the exception of one unsworn and self-serving document which it seemingly prepared itself, Objector offers no evidence that Applicant’s proposed string would create any *greater* or *different* harm to the “community than it appears to experience under the existing regime of <.com> and other generics. As such, Objector does not prove that an open <.ski> gTLD itself would *cause* any such harm, since, by Objector’s own admission, the issues of which it warns already exist.

To heighten protection for intellectual property interests and against fraudulent activity, the Application goes beyond the extensive safeguards mandated by ICANN for new TLDs by incorporating new and robust mechanisms. See Application, Q18A. This set of protections far exceeds the already powerful ones proscribed by the Applicant Guidebook. It is beyond cavil that Applicant intends to use these measures to curb abuse while preserving consumer choice and TLD competition. Moreover, due to its size and experience in operating domains, Applicant will be much better equipped to address any issues of misconduct. In fact, Applicant has committed to employing a compliance staff whose function will be to address such issues. Nevett Dec. ¶11 (**Annex B**).

*b. Applicant intends to act in the equal interest of all who may register <.ski> names, including those in Objector’s claimed community.*

Objector similarly provides no evidence supporting the second element – namely, that Applicant “does not intend to act in accordance with the interests of the community or of users more widely,” including that Applicant “has not proposed or does not intend to institute effective security protection for user interests.” AGB §3.5.4 at 3-24. Applicant has expressed its affirmative intent to act in the best interests of and to protect *all* users, and to “make this TLD a place for Internet users that is far safer than existing TLDs.” Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). It will do so with the 14 protections that ICANN demands for new gTLDs (but never required for existing gTLDs), and will go beyond that by implementing eight additional measures, including those to address the exact types of concerns raised by Objector. *Id.* Hence, Objector’s lament that Applicant’s proposal lacks sufficient means to combat misconduct simply has no basis in fact. As shown, the actual facts demonstrate the contrary.

While Objector states its conclusory belief that the Application offers inadequate protections, it fails to show how any of the mechanisms proposed by Applicant fall short. Nor does it elaborate on what tools, in its view, a <.ski> domain should employ. Instead, it suggests that not operating the TLD as a community “will significantly damage the image and reputation of the ski community, with related concrete and economic damages in terms of a decrease in ski activity and in ski visits.” Objn at 14.

Applicant vehemently disagrees.

First, ICANN does not require an applicant to run a gTLD as a community. Virtually any generic word could attract some self-proclaimed community to oppose it, as here. That a TLD could function for the benefit of a community does not replace the obligation of Objector to prove detriment and the other three substantive objection elements. Its own belief that the competing applicant on behalf of which it acts could do a “better job” explicitly does not suffice to show detriment. AGB §3.5.4 at 3-24. ICANN already has provided the proper remedy in that instance – namely, to submit a community application, as the party on behalf of which Objector acts has done.

Second, imposing registration restrictions as Objector urges here would hinder free speech, competition and innovation in the namespace. As the Application states:

[A]ttempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate

registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). ICANN supports the same objectives. Indeed, they lie at the heart of the entire new gTLD program. See, e.g., AGB Preamble, §1.1.2.3; Module 2, Attmt at A-1.

The Objection would have the Panel gut these principles in deference to the self-interest of Objector and its theoretical or narrow community. This would lead the namespace down a dangerous path. Applicant's content-neutral approach strikes the proper balance that promotes free speech and the growth of cyber media, while protecting users more thoroughly than both the current landscape and ICANN's new gTLD enhancements do. Objector does not and cannot show that Applicant will act against the legitimate interests of the invoked "community." Its Objection cannot prevail.

*c. Objector fails to show how Applicant's operation of the string would interfere with the core activities of the alleged community.*

Because it cannot do so, Objector fails to show how Applicant's operation of the TLD would interfere with the community's core activities. With *no* evidence whatsoever, Objector forecasts that its annual anti-doping budget "may hugely increase to face the flow of doping-related websites" on the TLD. Objn at 12. It uses data from an unsworn and self-serving document it seemingly prepared itself to project a threat to its media coverage from cybersquatting. Yet, if snow-skiing websites were banned from registering names in <.com>, would doping incidents dramatically drop? There is no evidence that Applicant's proposed string would cause the potential interference that Objector concocts. Quite the opposite, Applicant's new safeguards are likely to reduce the types and amount of bad behavior seen in large registries now.

Objector also fears the loss to speculators of domain names corresponding to non-trademark identifiers such as clubs, federations, events and athletes. What Objector fears is a reasonable consequence rather than a detriment. A group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection on as against any new gTLD. Doing so would make affiliation with Objector tantamount to trademark protection on the TLD while also limiting legitimate use by all registrants. Applicant believes the policy regulating the TLD must promote rather than stifle growth, free speech, legitimate activity and consumer choice. Nevett Dec. ¶8, 10 (**Annex B**).

Though Objector's policies and regulations have their place in regulating professional ski activities, a connection to or oversight by it is irrelevant and unnecessary to administering the TLD. On the contrary, the TLD's administration is best left to an entity like Applicant, which has the experience and capability to launch, expand and operate the TLD in a secure manner while appropriately protecting Internet users and rights-holders from potential fraud and abuse. While safeguarding against fraud and abuse, Applicants' policies acknowledge that over-regulating registrant eligibility unnecessarily restricts users by preventing a substantial segment of legitimate registrants from participating in a space to which they are legitimately connected. Applicants' domain policies, stated in its Application with clarity and in depth, diminishes the risk of abuse while promoting legitimate registrations and safeguarding the reputation of the TLD.

*d. Objector makes no showing on the remaining elements of detriment.*

Objector does not depend on the domain name system for its core activities. For this factor to be meaningful, any core activity referenced by an Objector must "depend" on the DNS. The Panel should scrutinize the cited activities and compare their relationship to the

overarching business or operational model of the Objector. Objector does virtually nothing online other than promote its own activities on its web sites.

While Objector may be “all but certain that these detrimental outcomes will occur,” it offers *no* evidence of its conviction. Objn at 15. As discussed herein, the Objection fails to support any of its forecasts for detriment with any evidence at all aside from unsworn and unreliable exhibits, perhaps even self-servingly drafted by Objector itself.

Applicant has every right to the gTLD at issue. ICANN has so provided, and Objector fails in every respect to meet its burden to divest Applicant of that right. The Objection cannot succeed. Applicant therefore respectfully urges the Panel to overrule it and to direct Objector to pay the costs reasonably incurred by Applicant in opposing the Objection.

---

**Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Response is/was transmitted to the Objector on: \_\_\_\_\_ [insert date]  
by \_\_\_\_\_ [specify means of communication, for example e-mail] to the following  
address: \_\_\_\_\_

A copy of this Response is/was transmitted to ICANN on: \_\_\_\_\_ [insert date]  
by \_\_\_\_\_ [specify means of communication, for example e-mail] to the following  
address: \_\_\_\_\_

**Filing Fee (Article 1 Appendix III to the Rules and Article 11(f) of the Procedure)**

As required, Euros 5 000 were paid to ICC on \_\_\_5/15/13\_\_\_\_\_ [insert date].

Evidence of the payment is attached for information.

**Description of the Annexes filed with the Response (Article 11(e) of the Procedure)**

*List and Provide description of any annex filed.*

Respectfully submitted,

THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes

By: \_\_\_\_\_/jmg/\_\_\_\_\_  
John M. Genga  
Contact Information Redacted

By: \_\_\_\_\_/dcm/\_\_\_\_\_  
Don C. Moody  
Contact Information Redacted

Attorneys for Applicant/Respondent  
WILD LAKE, LLC

# EXHIBIT 21



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/421/ICANN/38**

**FÉDÉRATION INTERNATIONALE DE SKI (SWITZERLAND) vs/  
WILD LAKE LLC (USA)**

---

STARTING DOT S.A.S

Mr. Godefroy Jordan

Contact Information Redacted

*By email:* Contact Information Redacted

THE IP & TECHNOLOGY LEGAL GROUP, P.C.

Mr. John M. Genga and Mr. Don C. Moody

Contact Information Redacted

*By email:* Contact Information Redacted  
*and* Contact Information Redacted

19 June 2013

Dear Sirs,

Please be advised, that pursuant to Article 13 of the Procedure and Article 9(5)(d) of the Rules, the Centre has appointed as Expert in this matter:

Mr. Jonathan Peter Taylor

Contact Information Redacted

Tel: Contact Information Redacted

Email: Contact Information Redacted

The Expert is the sole member of the Panel in accordance with Article 13 of the Procedure.

**Chairman of the Standing Committee of the Centre**

The Chairman of the Standing Committee appointed the Expert on 12 June 2013, pursuant to Article 3(3) of Appendix I to the Rules.

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

Please note that the Panel will only be fully constituted upon receipt of the parties' full payment of the Costs.

### **Expert's Availability and Independence**

We enclose the Expert's ICC *curriculum vitae*, as well as his Declaration of Acceptance and Statement of Independence.

Please be advised that the Expert has declared that he is available and able to serve as Expert in this matter.

### **Expert's Fees and Expenses**

Pursuant to Article 3 of the Appendix III to the Rules, ICC has fixed the Expert's hourly rate at € 450. Further, any reasonable expenses of the Expert shall be reimbursed.

### **Deposit for Costs**

#### **1. Costs**

According to Article 14(3) of the Rules, ICC currently estimates the total Costs for this matter at **€ 58 600**, subject to later readjustments.

The Costs cover the estimated fees and expenses of the Expert, as well as ICC's administrative costs incurred and still to be incurred.

In the course of the proceeding, the Centre may have to readjust the estimated Costs.

Further, and pursuant to Article 14(5) of the Rules, upon termination of the proceeding the Centre shall settle the total Costs of the proceeding and shall, as the case may be, reimburse the party or parties for any excess payment or bill the parties for any balance required.

#### **2. Advance Payment**

The Costs have to be fully paid by each party pursuant to Article 14(b) of the Procedure.

Accordingly, the Costs should be paid in the following manner:

- Objector: € **53 600** (€ 58 600 – € 5 000 already paid)
- Applicant: € **53 600** (€ 58 600 – € 5 000 already paid)

In accordance with Article 14(b) of the Procedure, the payment has to be made **within 10 days of the receipt of this letter**. The evidence of such payment has to be submitted to the Centre within the same time limit.

Therefore, we invite the parties to proceed with the payment of the Costs pursuant to the following instructions:

.../...

Beneficiary (*Account holder*): International Chamber of Commerce  
Contact Information Redacted

Bank of Beneficiary: UBS SA  
Contact Information Redacted

IBAN: Contact Information Redacted

Swift Code/BIC: Contact Information Redacted

Please include the **case reference, the party's name, the disputed string and the application ID** on your payment to help ensure that it is accurately credited.

Please note also that the parties should bear any banking charges associated with the payment.

We draw your attention to the fact that if the Objector fails to make the advance payment of Costs, its Objection shall be dismissed and no fees that the Objector has paid shall be refunded (Article 14(d)(i) of the Procedure).

Further, we draw your attention to the fact that if the Applicant fails to make the advance payment of Costs, the Objection will be deemed to have been sustained and no fees that the Applicant has paid shall be refunded (Article 14(d)(ii) of the Procedure).

Finally, please note that upon termination of the proceeding, ICC shall refund to the prevailing party, as determined by the Panel, its advance payment of Costs (Article 14(e) of the Procedure). However, please note that the Filing Fee is not refundable.

### **Transfer of the File**

Please be advised that the Costs must be fully paid by each party before this proceeding can continue. Once full payments have been received, the Centre will transfer the file to the Expert and invite him to proceed with this matter.

Accordingly, the Expert and the parties should **not** make contact until the Centre has transferred the file to the Expert.

Should you have any further questions, please do not hesitate to contact us.

Yours faithfully,



Špela Košak  
Deputy Manager  
ICC International Centre for Expertise

Enclosures (*for parties only*):

- Expert's ICC *curriculum vitae*
- Expert's Declaration of Acceptance and Statement of Independence

*c.c. (with enclosures):*

- Mr. Daniel Schindler
- Mr. Jon Nevett

*By email:* Contact Information Redacted  
*By email:* Contact Information Redacted

*c.c. (without enclosures):*

- Mr. Jonathan Peter Taylor

*By email:* Contact Information Redacted

# EXHIBIT 22



International Chamber of Commerce

*The world business organization*

International Centre for Expertise Centre international d'expertise

Case N°: EXP/421/ICANN/38

**ICC EXPERT  
DECLARATION OF ACCEPTANCE AND AVAILABILITY,  
STATEMENT OF IMPARTIALITY AND INDEPENDENCE**

Family Name(s): TAYLOR Given Name(s): JONATHAN

*Please tick all relevant boxes.*

**1. ACCEPTANCE**

- I **agree** to serve as expert under and in accordance with ICANN's gTLD Applicant Guidebook, including the New gTLD Dispute Resolution Procedure ("**Procedure**"), the Rules for Expertise of the ICC ("**Rules**") including Appendix III to the ICC Rules and supplemented by the ICC Practice Note on the Administration of Cases. I confirm that I am familiar with these rules and documents. I accept that my fees and expenses will be fixed exclusively by the ICC International Centre for Expertise ("**Centre**") (Article 3 Appendix III to the ICC Rules).

**NON-ACCEPTANCE**

- I **decline** to serve as expert in this case.  
*(If you tick here, simply date and sign the form without completing any other sections.)*

**2. AVAILABILITY**

- I **confirm**, on the basis of the information presently available to me, that I can devote the time necessary to conduct this proceeding diligently, efficiently and in accordance with the time limits provided in the Procedure, subject to any extensions granted by the Centre pursuant to Article 21(a) of the Procedure.

...

ICC International Centre for ADR Centre international d'ADR de la CCI

Contact Information Redacted

**3. INDEPENDENCE AND IMPARTIALITY**

(Tick one box and provide details below and/or, if necessary, on a separate sheet.)

In deciding which box to tick, you should take into account, having regard to Article 11(1) of the Rules and Article 13(c) of the Procedure, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

**Nothing to disclose:** I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

**Acceptance with disclosure:** I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

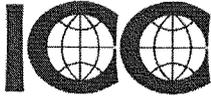
Neither my firm nor I has ever acted for either party.  
However, I do know Sarah Lewis of FIS. I met her in 2007, when I advised a working party convened by the World Anti-Doping Agency to consider revisions to the International Standard for Testing, and she was a member of the working party. I have seen her at anti-doping seminars from time to time since then. \*

Date: 07.06.13 Signature: Josiah Tan

\* I do not consider this affects my independence or impartiality but note it in the interests of full disclosure.

The information requested in this form will be considered by the ICC International Centre for Expertise solely for the purpose of your appointment. The information will remain confidential and will be stored in a case management database system. It may be disclosed solely to the parties and their counsel in the case referenced above for the purposes of that proceeding. According to Article 32 and, in particular, Article 40 of the French law "Informatique et Libertés" of 6 January 1978, you may access this information and ask for rectification by writing to the Centre.

# EXHIBIT 23



**International Chamber of Commerce**

*The world business organization*

International Centre for Expertise Centre international d'expertise

### **CURRICULUM VITAE (CO)**

*For the confidential use of the International Chamber of Commerce and communication to the parties. To be completed in English.*

Mr.

Ms.

Family Name(s):

TAYLOR

Given Name(s):

JONATHAN PETER

Date of birth:

Contact Information Redacted

Nationality(ies):

Contact Information Redacted

Personal Address:

Contact Information Redacted

Telephone: Contact Information Redacted

Mobile: Contact Information Redacted

E-Mail: Contact Information Redacted

Fax:

Business Address (*Including company or firm name where applicable*):

BIRD & BIRD LLP

Contact Information Redacted

Telephone: Contact Information Redacted

Fax: Contact Information Redacted Mobile: Contact Information Redacted

E-Mail:

Contact Information Redacted

Website:

www.twobirds.com

*Please indicate which address you wish to be used for any correspondence:*

Personal

Business

*Please indicate which email you wish to be used for all notifications and communications:*

Personal

Business

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

*For the confidential use of ICC and communication to the parties. To be completed in English.*

Academic degrees / Qualifications:

BA (1<sup>st</sup> Class Hons.) in Jurisprudence, University of Oxford, 1989

LLM, University of Virginia, 1990

Qualified to practise at the New York Bar, 1991, practised there until 1997.

Qualified to practise as a solicitor in England and Wales, 1996, and have practised there ever since 1997.

Training and qualifications in the field of dispute resolution (e.g. training as an arbitrator, accreditation as a mediator etc.)

Chairman of the Anti-Doping Tribunal of the International Baseball Federation.

Member of Sport Resolution UK's Panel of Arbitrators.

Current professional activity(ies) and position(s):

Partner and Joint Head of the International Sports Group, Bird & Bird LLP, London

Member, Ethics Committee, British Horseracing Authority

Member, WADA Working Group on legal matters

Other professional experience (including activities and positions) relevant for the present procedure:

Director of Studies in Sports Law, King's College, London, 2000-2007.

Joint editor, Lewis & Taylor, 'Sport: Law & Practice' (Bloomsbury 3<sup>rd</sup> Edn, due 2013)

Additional information (Use separate sheet if necessary):

Please see CV attached.

.../...

For the confidential use of ICC and communication to the parties. To be completed in English.

Languages:

I hereby confirm that I am fully able to conduct expertise proceedings in English without the assistance of an interpreter or translator and that I am capable of drafting an expert determination in English.

Additionally, please mark all languages in which you consider yourself able to conduct expertise proceedings and read and understand documents without the assistance of an interpreter or translator:

- |                                  |                                     |                                      |                                 |
|----------------------------------|-------------------------------------|--------------------------------------|---------------------------------|
| <input type="checkbox"/> French  | <input type="checkbox"/> German     | <input type="checkbox"/> Italian     | <input type="checkbox"/> Arabic |
| <input type="checkbox"/> Spanish | <input type="checkbox"/> Portuguese | <input type="checkbox"/> Russian     | <input type="checkbox"/> Polish |
| <input type="checkbox"/> Chinese | <input type="checkbox"/> Japanese   | <input type="checkbox"/> Other _____ |                                 |

Please indicate other languages of which you have good knowledge:

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# EXHIBIT 24



International Chamber of Commerce

*The world business organization*

International Centre for Expertise ☐ Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

<i>Fédération Internationale de Ski (FIS),</i>	ICC Case No. EXP/421/ICANN/38
(Objector)	
-v-	In re Community Objection to: <.SKI>
<i>Wild Lake, LLC,</i>	Application ID 1-1636-27531
(Applicant/Respondent)	

### Applicant’s Objection to Panel Appointment of Jonathan Peter Taylor

Wild Lake, LLC (“Applicant”) respectfully objects to the appointment of Jonathan Peter Taylor as a Panelist in this matter, in response to his disclosure that he personally knows and has specifically worked with someone within Objector’s organization. Applicant understands that the Centre will consider this objection with input from the Panel, including Mr. Taylor, and from the Objector.

Applicant has considered and appreciates Mr. Taylor’s disclosure. It does not doubt his best intentions when he states that he does not expect that his professional familiarity with Sarah Lewis of FIS would affect his independence and impartiality. However, Applicant respectfully submits that the connection between the two impacts the *appearance* of impartiality, regrettably making disqualification of Mr. Taylor appropriate.<sup>1</sup>

“Every expert must be independent of the parties involved in the expertise proceedings ....” Rules, Arts. 7-3, 11-1. To that end, the Centre requires potential Panelists to disclose “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.*” *Id.* Art. 7-4. Mr. Taylor has scrupulously adhered to this disclosure obligation.

The disclosure has called at least the *appearance* of Mr. Taylor’s independence into question in the eyes of Applicant. He specifically advised a working group of which Ms.

<sup>1</sup> Applicant has no quarrel with Mr. Taylor personally. Indeed, he has been appointed to a community objection panel in a case involving another subsidiary of Donuts (Applicant’s ultimate parent), and Donuts has stated that it has no objection to his appointment in that matter, ICC EXP/486/ICANN/103.

[ICC International Centre for ADR ☐ Centre international d’ADR de la CCI](#)

Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

Lewis was an active participant at the World Anti-Doping Agency. Objector has identified Ms. Lewis as one of its representatives in this proceeding, and has specifically expressed concern that a <.SKI> registry operated by Applicant could create a doping risk for the sport. While Applicant believes the argument fallacious, Objector – through Ms. Lewis, the representative with whom Mr. Taylor has had a professional relationship – nevertheless has raised it, and Mr. Taylor has a specific connection to Objector’s representative in this matter regarding that very issue. Applicant has serious concerns regarding potential preconceptions Mr. Taylor may have on that subject based on the work he has done in the area, as well as contact he has maintained in that very same context with Ms. Lewis, who appears before the Panel on Objector’s express behalf.

These proceedings represent a new dispute resolution method that the domain name industry, its regulators and others closely scrutinize. Applicant therefore respectfully suggests that Mr. Taylor be replaced to preserve the appearance of complete impartiality for all concerned.

The principle of maintaining the appearance of impartiality and independence at all times lies at the heart of the Rules and the ethical precepts of many judicial, arbitral and professional legal bodies. For example, the Guide to Judicial Conduct of the United Kingdom Supreme Court, based on principles of judicial conduct endorsed by the United Nations Human Rights Commission in 2003 and published in 2007, state several overarching “values” regarding judicial conduct, including:

- (i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence ....
- (ii) Impartiality is essential to the proper discharge of the judicial office.
- ...
- (iv) Propriety, and the *appearance* of propriety, are *essential* to the performance of all of the activities of the judge.

[http://www.supremecourt.gov.uk/docs/guide\\_to\\_judicial\\_conduct.pdf](http://www.supremecourt.gov.uk/docs/guide_to_judicial_conduct.pdf) (emphases added), complete copy attached hereto as **Annex 1**.

American courts uphold similar judicial values, reflected in an official Code of Conduct for United States Judges published by the Judicial Conference of the United States, created by the legislature to administer all U.S. Federal Courts. Its Canon 2 provides:

A JUDGE SHOULD AVOID IMPROPRIETY AND THE *APPEARANCE OF IMPROPRIETY* IN ALL ACTIVITIES

*Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary.

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (emphases added), complete copy attached hereto as **Annex 2**. The American Bar Association, the leading legal association in the U.S., also has published a Model Code of Judicial Conduct that expresses the principle similarly:

Canon 1 – A judge shall uphold and promote the independence, integrity, and *impartiality* of the judiciary, and shall *avoid impropriety and the appearance of impropriety*.

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011\\_mcjc\\_table\\_of\\_contents.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_table_of_contents.authcheckdam.pdf) (emphases added), complete copy of Canons attached hereto as **Annex 3**.

Alternative dispute resolution providers similarly espouse avoiding the appearance of impropriety among their neutrals. The American Arbitration Association and its International Centre for Dispute Resolution, another DRSP in ICANN's new gTLD program, has published a Code of Ethics for Arbitrators. It provides that "an arbitrator should avoid impropriety or the appearance of impropriety," Canon III, and counsels withdrawal in the event of a "relationship likely to affect impartiality *or which might create an appearance of partiality*," Canon II §G. [http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG\\_003867&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased) (emphasis added), complete copy attached hereto as **Annex 4**.

This tribunal likewise requires independence and impartiality of its experts. Rules, Arts. 7-3, 7-4, 11-1. It further provides:

If any party objects that the expert does not ... fulfill[ ] the expert's functions in accordance with these Rules [e.g., independence and impartiality] ..., the Centre may replace the expert after having considered the observations of the expert and the other party or parties.

Rules, Art. 11-4. Mr. Taylor has presented his observations, as has Applicant here. Applicant believes that anyone who has provided legal advice to someone within an organization that later appears before him in an adversary proceeding – and which raises issues that relate specifically to matters covered by the prior professional relationship – would have difficulty putting that history aside when rendering a decision that could affect that organization.

For such reasons, consistent with prevailing ethical rules, Applicant respectfully objects to the appointment of Jonathan Taylor as a Panelist in this matter. To maintain the appearance of expert impartiality and independence in, and protect the perceived integrity of, these closely-watched proceedings, the Centre should honor this objection and, regrettably, appoint a replacement Panelist.

---

**Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Response is/was transmitted to the Objector on: June 26, 2013  
by email to the following addresses: Contact Information Redacted

A copy of this Response is/was transmitted to ICANN on June 26, 2013 by e-mail to the following addresses: [DRfiling@icann.org](mailto:DRfiling@icann.org)

**Description of the Annexes filed with the Response (Article 11(e) of the Procedure)**

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*List and Provide description of any annex filed.*

**Annex 1** – U.K. Supreme Court Guide to Judicial Conduct

**Annex 2** – Code of Conduct for United States Judges

**Annex 3** – American Bar Association Model Code of Judicial Conduct

**Annex 4** – AAA-ICDR Code of Ethics for Arbitrators

DATED: June 30, 2013

Respectfully submitted,

THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes

By: \_\_\_\_\_/jmg/\_\_\_\_\_  
John M. Genga  
Contact Information Redacted

By: \_\_\_\_\_/dcm/\_\_\_\_\_  
Don C. Moody  
Contact Information Redacted

Attorneys for Applicant/Respondent  
WILD LAKE, LLC

# Annex 1

[U.K. Supreme Court Guide to Judicial Conduct]

# **United Kingdom Supreme Court**



## **Guide to Judicial Conduct (2009)**

## **CONTENTS**

**Foreword**

**1 Introduction**

**2 Judicial Independence**

**3 Impartiality**

**4 Integrity**

**5 Propriety**

**6 Competence and Diligence**

**FOREWORD BY THE RT HON LORD PHILLIPS PRESIDENT OF THE UK  
SUPREME COURT**

Every court should have a Code of Judicial Conduct that sets out the standards of ethical conduct to be expected of the Court. Such a Code serves a number of purposes. It provides guidance to the members of the Court. It informs those who use the Court of the standards that they can reasonably expect of its judges. It explains to members of the public how judges behave and should help to secure their respect and support for the judiciary. This Guide has been prepared by and for the Justices of the Supreme Court and has the approval and support of each of us.

# GUIDE TO JUDICIAL CONDUCT

## 1 INTRODUCTION

**1.1** The President, Deputy President and Justices of the United Kingdom Supreme Court (collectively referred to hereafter as ‘the Justices’) have decided to adopt this Guide to their judicial conduct. Such guides have become commonplace in recent years.<sup>1</sup> The Justices have drawn upon the principles contained in a revised version of the Guide for Judges in England and Wales which was published in March 2008.

**1.2** That Guide refers to the *Bangalore Principles of Judicial Conduct*, endorsed by the United Nations Human Rights Commission in 2003 and published with a commentary in 2007. The intention of the *Principles* is to establish standards of ethical conduct for judges, to provide guidance for individual judges and the judiciary in regulating judicial conduct, and also to assist members of the executive and legislature, lawyers and the public, better to understand and support the judiciary. The principles are stated as six “values”:

- (i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
- (ii) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.
- (iii) Integrity is essential to the proper discharge of the judicial office.
- (iv) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge.
- (v) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

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<sup>1</sup> Eg Canadian Judicial Council, *Ethical Principles for Judges* (1998), Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2002). See the seminal study by Mr Justice Thomas, a judge of the Supreme Court of Queensland, *Judicial Ethics in Australia* (2<sup>nd</sup> edn, 1997).

(vi) Competence and diligence are prerequisites to the due performance of judicial office.

1.3 The Justices believe that those principles are already well understood by the judiciary, executive and legislature in the United Kingdom. The specific guidance given below, much of which might be thought to go without saying, follows the same pattern. There is considerable overlap between the principles.

1.4 The primary responsibility for deciding whether a particular activity or course of conduct is appropriate rests with the individual Justice. The interests of justice must always be the overriding factor. There is also a range of reasonably held opinions on some points. In cases of doubt, a Justice should seek the advice of the President or Deputy President of the Court.

## **2 INDEPENDENCE**

2.1 The judiciary of the United Kingdom have been independent of the government since at least the early 18<sup>th</sup> century. The Supreme Court of the United Kingdom was established in order to achieve the physical separation of the country's highest court from the House of Lords and thus to clarify the Justices' independence both of government and of Parliament. Judicial independence is a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. The Justices will take care that their conduct, official or private, does not undermine their institutional or individual independence or the public appearance of independence.

2.2 The Justices have all sworn the judicial oath, which states:

“I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will.”

In taking that oath, each Justice has acknowledged that he or she is primarily accountable to the law which he or she must administer. This involves putting aside private interests and preferences and being alert to attempts to influence decisions or curry favour.

2.3 The Justices may consult with their colleagues when points of difficulty arise on matters of conduct. But they are solely responsible for the decisions that they take in the performance of their judicial duties.

2.4 The Justices must be immune to the effects of publicity, whether favourable or unfavourable. But that does not mean ignoring the profound effect which their decisions are likely to have, not only on the parties before the Court, but also upon the wider public whose concerns may well be forcibly

expressed in the media.

- 2.5** The Justices accept their responsibility to promote public understanding of their work and of their decisions. But they will show appropriate caution and restraint when explaining or commenting publicly upon their decisions in individual cases.
- 2.6** If a Justice is misquoted or misrepresented in the media, the matter will be handled by the Court's communications officer in consultation with the Justice. See also "*The Media: a Guide for Judges*", first published by the Lord Chancellor's Department in July 2000.

### **3 IMPARTIALITY**

- 3.1** Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.
- 3.2** Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.
- 3.3** Each Justice will refrain from any kind of party political activity and from attendance at political gatherings or political fundraising events, or contributing to a political party, in such a way as to give the appearance of belonging to a particular political party. They will also refrain from taking part in public demonstrations which might diminish their authority as a judge or create a perception of bias in subsequent cases. They will bear in mind that political activity by a close member of a Justice's family might raise concern in a particular case about the judge's own impartiality and detachment from the political process.
- 3.4** However, the Justices recognise that it is important for members of the Court to deliver lectures and speeches, to take part in conferences and seminars, to write and to teach and generally to contribute to debate on matters of public interest in the law, the administration of justice, and the judiciary. Their aim is to enhance professional and public understanding of the issues and of the role of the Court.
- 3.5** In making such contributions, the Justices will take care to avoid associating themselves with a particular organisation, group or cause in such a way as to give rise to a perception of partiality towards that

organisation (including a set of chambers or firm of solicitors), group or cause.

- 3.6** In their personal relations with individual members of the legal profession, especially those who practise regularly in the Supreme Court, the Justices will avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

***Bias and the appearance of bias***

- 3.7** The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify a Justice from taking part in a particular case is the subject of United Kingdom and Strasbourg jurisprudence which will guide the Justices in specific situations. Recent UK cases include *Porter v Magill* [2002] 2 AC 357, *Locobail (UK) Ltd v Bayfield Properties Ltd* [2002] QB 451, *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700 and *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416.

- 3.8** Circumstances will vary infinitely and guidelines can do no more than seek to assist the individual Justice in the judgment to be made, which involves, by virtue of the authorities, considering the perception the fair-minded and informed observer would have. What follows are merely signposts to some of the questions which may arise.

- 3.9** A Justice will not sit in a case where:

- (i) he or she has a close family relationship with a party or with the spouse or domestic partner of a partner;
- (ii) his or her spouse or domestic partner was a judge in a court below;
- (iii) he or she has a close family relationship with an advocate appearing before the Supreme Court.

- 3.10** Sufficient reasons for not sitting on a case include:

- (i) personal friendship with, or personal animosity towards, a party; friendship is to be distinguished from acquaintance, which may or may not be a sufficient reason depending upon its nature and extent;
- (ii) current or recent business association with a party; this includes the Justice's own solicitor, accountant, doctor, dentist or other professional adviser; it does not normally include the Justice's insurance company, bank or a local authority to which he or she pays council tax.

- 3.11** Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend upon the circumstances, include:
- (i) friendship or past professional association with counsel or solicitors acting for a party;
  - (ii) the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which that relative is involved in or affected by the result in the case;
  - (iii) past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was.
- 3.12** A Justice will not sit in a case in which he or she or, to his or her knowledge, a member of his or her family has any significant financial interest in the outcome of the case. 'Family' for this purpose means spouse, domestic partner or other person in a close personal relationship with the Justice; son, son-in-law, daughter, daughter-in-law; and anyone else who is a companion or employee living in the Justice's household. It is for the Justice to inform himself or herself about his or her personal financial and fiduciary interests and to take reasonable steps to be informed about the interests of members of his or her family.
- 3.13** A significant financial interest could arise, not from an interest in the outcome of the particular case, but where the decision on the point of law might have an impact upon the Justice's own financial interests. The Justice will have regard to the nature and extent of his or her interest and the effect of the decision on others with whom he or she has a relationship, actual or foreseeable.
- 3.14** Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court. This risk will seldom, if ever, arise from what a judge has said in other cases, or from previous findings against a party in other litigation.
- 3.15** If circumstances which may give rise to a suggestion of bias, or the appearance of bias, are present, they should be disclosed to the parties well before the hearing, if possible. Otherwise the parties may be placed in a difficult position when deciding whether or not to proceed. Sometimes, however, advance notification may not be possible.
- 3.16** Disclosure should be to all parties and, unless the issue has been resolved before the hearing, discussion should be in open court. Even where the parties consent to the Justice sitting, the Justice should refuse himself or

herself if, on balance, he or she considers that this is the proper course. Conversely, there are likely to be cases in which the Justice has thought it appropriate to bring the circumstances to the attention of the parties but, having considered any submissions, is entitled to and may rightly decide to proceed notwithstanding the lack of consent.

## **4 INTEGRITY**

- 4.1** As a general proposition, the Justices are entitled to exercise the rights and freedoms available to all citizens. There is a public interest in their participating, insofar as their office permits, in the life and affairs of the community. The Justices also have private and family lives which are entitled to the same respect as those of other people.
- 4.2** However, the Justices accept that the nature of their office exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience. They are conscious that it is a privilege to serve the community in this capacity. They will try to avoid situations which might reasonably lower respect for their judicial office, or cast doubt upon their impartiality as judges, or expose them to charges of hypocrisy. They will try to conduct themselves in a way which is consistent with the dignity of their office.
- 4.3** In Court, the Justices will seek to be courteous, patient, tolerant and punctual and to respect the dignity of all. They will strive to ensure that no one in Court is exposed to any display of bias or prejudice on grounds such as race, colour, sex, religion, national origin, disability, age, marital status, sexual orientation, social and economic status and other like causes. Care will be taken that arrangements made for and during a hearing do not put people with a disability at a disadvantage.
- 4.4** No Justice, or member of a Justice's family, will ask for or accept any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the Justice in connection with his or her judicial duties.

## **5 PROPRIETY**

- 5.1** The Justices will avoid impropriety and the appearance of impropriety in all of their activities. They will not exploit the prestige of their office to obtain personal favours or benefits.
- 5.2** A Justice may not practise law while in full time office: see Courts and Legal Services Act 1990, s 75 and Schedule 11. Nor may a Justice allow

the use of his or her residence by a member of the legal profession to receive clients or other members of the legal profession.

**5.3** The Justices will not use or lend the prestige of their office to advance their own private interests, or those of a member of their family or of anyone else, nor will they convey or permit others to convey the impression that anyone is in a special position improperly to influence the Justice in the performance of his or her duties.

**5.4** Confidential information acquired by a Justice in his or her judicial capacity will not be used or disclosed by the Justice for any purpose not related to his or her judicial duties.

### ***Outside activities***

**5.5** Justices may form or join associations of judges or participate in other organisations representing the interests of judges.

**5.6** Justices may appear at a public hearing before a Parliamentary committee or official body concerned with matters relating to the law, the legal system, the administration of justice or related matters.

**5.7** Justices may serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge.

**5.8** Justices may engage in other academic, voluntary, charitable or religious activities which do not detract from the dignity of their office or otherwise interfere with the performance of their judicial duties.

**5.9** Subject to those constraints, Justices may properly be involved in the management of educational, voluntary, charitable or religious organisations. Care should be taken in allowing their name to be associated with an appeal for funds, even for a charitable organisation, lest it be seen as inappropriate use of judicial prestige in support of the organisation or creating a sense of obligation in donors.

**5.10** Justices who hold high office in universities and similar institutions will bear in mind the need to limit their involvement in contentious situations. Moreover, in considering whether to accept office and what role to play, consideration should be given to the trend of some such bodies to be more entrepreneurial and to resemble a business. The greater the move in that direction, the less appropriate judicial participation may be.

### ***Commercial activities***

**5.11** The requirements of a Justice's office and terms of service place severe restraints upon the permissible scope of his or her involvement with any

commercial enterprise. Some guidance is given in the cases referred to earlier.

- 5.12** The management of family assets and the estates of deceased close family members, whether as executor or trustee, is unobjectionable, and may be acceptable for other relatives or friends if the administration is not complex, time consuming or contentious. However, the risks, including the risk of litigation, associated with the office of trustee, even of a family trust, should not be overlooked and the factors involved need to be weighed carefully before office is accepted.
- 5.13** A full-time Justice will not receive any remuneration other than a judicial salary except for fees and royalties earned as an author or editor but may of course receive money from investments or property.

### ***Gifts and hospitality***

- 5.14** Caution should be exercised when considering whether to accept any gift or hospitality. Justices will be wary of accepting any gift or hospitality which might appear to relate in some way to their judicial office and might be construed as an attempt to attract judicial goodwill or favour.
- 5.15** The acceptance of a gift or hospitality of modest value, as a token of appreciation, may be unobjectionable, depending on the circumstances. For example a Justice who makes a speech or participates in some public or private function should feel free to accept a small token of appreciation; this may include a contribution to charity.
- 5.16** By way of further example, the acceptance of invitations to lunches and dinners by legal and other professional and public bodies or officials, where attendance can be reasonably seen as the performance of a public or professional duty, carrying no degree of obligation, is entirely acceptable.
- 5.17** There is a long-standing tradition of association between bench and the bar and the solicitors' profession. This occurs both on formal occasions, such as dinners, and less formal ones. However, Justices will be cautious when invited to take part in what may be legitimate marketing or promotional activities, for example by barristers' chambers or solicitors' firms, or professional associations, where the object of judicial participation may be perceived to be the impressing of clients or potential clients. They will also take care not to associate with individual members of the profession who are engaged in current or pending cases before the Court in such a way as to give any appearance of partiality.

### ***References and social activities***

- 5.18** Justices may give references for professional competence or character for people who are well known to them. A person should not be deprived of a

reference because the person best able to give it is a Justice. Giving character evidence in court or otherwise is not excluded, particularly where it may seem unfair to deprive the person concerned of the benefit of such evidence, but this should be undertaken only exceptionally. Consultation with the President or Deputy President of the Court is advisable before taking a decision to give evidence.

- 5.19** Justices will assess social and other activities in the light of their duty to maintain the dignity of their office and not to permit associations which may affect adversely their ability to discharge their duties.

## **6 COMPETENCE AND DILIGENCE**

- 6.1** As Lord Bingham of Cornhill stated in his 1993 lecture to the Society of Public Teachers of Law, entitled *Judicial Ethics*:

“It is a judge’s professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence.”

Plainly this requires the judge to take reasonable steps to maintain and enhance the judge’s knowledge and skills necessary for the proper performance of judicial duties, to devote the judge’s professional activity to judicial duties and not to engage in conduct incompatible with the diligent discharge of such duties.

- 6.2** Beyond stating those general propositions, it is not seen as the function of this guide to consider judicial duties and practice with respect, for example, to judgment writing and participation in judicial education. These topics are better dealt with, insofar as they are not prescribed in the rules of the Supreme Court, in Practice Directions or in case law, by guidance from the President or Deputy President of the Court, and in discussion amongst the Justices.

## Annex 2

[Code of Conduct for United States Judges]

# Guide to Judiciary Policy

Vol 2: Ethics and Judicial Conduct  
Pt A: Codes of Conduct

## Ch 2: Code of Conduct for United States Judges

### Introduction

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office

Canon 5: A Judge Should Refrain from Political Activity

### Compliance with the Code of Conduct

### Applicable Date of Compliance

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### Introduction

The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." **See:** [JCUS-APR 73](#), pp. 9-11. Since then, the Judicial Conference has made the following changes to the Code:

- March 1987: deleted the word "Judicial" from the name of the Code;
- September 1992: adopted substantial revisions to the Code;
- March 1996: revised part C of the Compliance section, immediately following the Code;
- September 1996: revised Canons 3C(3)(a) and 5C(4);
- September 1999: revised Canon 3C(1)(c);
- September 2000: clarified the Compliance section;
- March 2009: adopted substantial revisions to the Code.

*Last substantive revision (Transmittal GR-2) June 30, 2009  
Last revised (minor technical changes) June 2, 2011*

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the “Compliance” section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct  
c/o General Counsel  
Administrative Office of the United States Courts  
Contact Information Redacted

Procedural questions may be addressed to:

Office of the General Counsel  
Administrative Office of the United States Courts  
Contact Information Redacted

## **CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

### **COMMENTARY**

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code.

Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

## **CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES**

- A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.
- C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

### COMMENTARY

**Canon 2A.** An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to

serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

**Canon 2B.** Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

**Canon 2C.** Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See *New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse

membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

### **CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY**

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

#### **A. *Adjudicative Responsibilities.***

- (1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

- (3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.
- (4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:
  - (a) initiate, permit, or consider ex parte communications as authorized by law;
  - (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;
  - (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or
  - (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's

official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

B. *Administrative Responsibilities.*

- (1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.
- (2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.
- (3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.
- (4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.
- (5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

C. *Disqualification.*

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
  - (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;
  - (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in

controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

- (i) ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;
  - (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;
  - (iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
  - (iv) ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;
- (d) “proceeding” includes pretrial, trial, appellate review, or other stages of litigation.
- (4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge’s spouse or minor child) divests the interest that provides the grounds for disqualification.
- D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

## COMMENTARY

**Canon 3A(3).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

**Canon 3A(4).** The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

**Canon 3A(5).** In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

**Canon 3A(6).** The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

**Canon 3B(3).** A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

**Canon 3B(5).** Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by

drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

**Canon 3C.** Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

**Canon 3C(1)(c).** In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

**Canon 3C(1)(d)(ii).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

#### **CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE**

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

##### **A. *Law-related Activities.***

- (1) *Speaking, Writing, and Teaching.* A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- (2) *Consultation.* A judge may consult with or appear at a public hearing before an executive or legislative body or official:

- (a) on matters concerning the law, the legal system, or the administration of justice;
    - (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or
    - (c) when the judge is acting pro se in a matter involving the judge or the judge's interest.
  - (3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.
  - (4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.
  - (5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.
- B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:
- (1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.
  - (2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.
- C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge

may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

- (1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.
- (2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.
- (3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.
- (4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.
- (5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of

a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

- (1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- (2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

- F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.
- G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.
- H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:
- (1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
  - (2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.
  - (3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

## COMMENTARY

**Canon 4.** Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

**Canon 4A.** Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

**Canon 4A(4).** This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

**Canon 4A(5).** A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

**Canon 4B.** The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

**Canon 4C.** A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

**Canon 4D(1), (2), and (3).** Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

**Canon 4D(5).** The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

**Canon 4E.** Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

**Canon 4F.** The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

**Canon 4H.** A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and

implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

## **CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY**

- A. *General Prohibitions.* A judge should not:
- (1) act as a leader or hold any office in a political organization;
  - (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
  - (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
- B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.
- C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

### **COMMENTARY**

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

### **Compliance with the Code of Conduct**

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge

A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

- (1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);
- (2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. Judge Pro Tempore

A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

- (1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.
- (2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. Retired Judge

A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

### **Applicable Date of Compliance**

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

## Annex 3

[American Bar Association Model Code of Judicial Conduct]

# ABA MODEL CODE OF JUDICIAL CONDUCT<sup>1</sup>

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## Annex 4

[AAA-ICDR Code of Ethics for Arbitrators]

## **The Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004**

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

### *Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone,

to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

*Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

**CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.**

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

- I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

**CANON II: AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

- (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
- (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- (3) the nature and extent of any prior knowledge they may have of the dispute; and
- (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

### CANON III: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests

for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

- (4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
- (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
- (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

#### CANON IV: AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

**CANON V: AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

**CANON VI: AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.**

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

**CANON VII: AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.**

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

#### CANON VIII: AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

#### *Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

#### CANON IX: ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

(1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;

(2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and

(3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

#### CANON X: EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

##### *A. Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

(1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and

(2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

##### *B. Obligations under Canon II*

(1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and

(2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

##### *C. Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
  - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
  - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
  - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

*G. Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

*H. Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

*I. Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

# EXHIBIT 25



International Chamber of Commerce

*The world business organization*

International Centre for Expertise - Centre international d'expertise

## **NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE**

*Fédération Internationale de Ski (FIS),*

(Objector)

-v-

*Wild Lake, LLC,*

(Applicant/Respondent)

ICC Case No. EXP/421/ICANN/38

In re Community Objection to:

<.SKI>

Application ID 1-1636-27531

### **Objector’s response to Applicant’s objection to Panel Appointment of Mr. Jonathan Peter Taylor**

The Applicant has surprisingly objected to the appointment of Mr. Jonathan Peter Taylor as a Panelist following his disclosure that he has been part of a working group in which FIS was also involved.

We have reviewed Mr. Jonathan Peter Taylor’s credentials and cannot find any reason for the Respondent to raise justifiable doubt as to Mr. Jonathan Peter Taylor’s impartiality or independence.

Respondent’s request questions the ability of Mr. Jonathan Peter Taylor to remain independent simply because Mr. Jonathan Peter Taylor has disclosed that he has met Mrs. Sarah Lewis of FIS in the past. Neither his firm, nor he has ever acted for any party in the past. That Mr. Jonathan Peter Taylor knows Mrs. Sarah Lewis from a working group is irrelevant, and in any event does not present any indication of an absence of impartiality in this proceeding.

Mr. Jonathan Peter Taylor has never been in direct contact with FIS as legal counsel, advisor or suchlike. He was merely mandated by the World Anti-Doping Agency (WADA) working group for the International Standards for Testing. Mr. Jonathan Peter Taylor was editing these Rules on behalf of WADA. FIS was simply asked to be a

part of the working group established for the version that was concluded in November 2009 (approved at the World Anti-Doping Conference in Madrid). In the early stages of the work Mrs. Sarah Lewis has participated with Ms. Sarah Fussek, who had only recently joined FIS in spring 2008 handling the anti-doping administration as part of her work. Mrs. Sarah Lewis only attended two meetings, one at the WADA Headquarters in Montreal and one in London, Ms. Sarah Fussek handled further work as FIS anti-Doping Coordinator.

FIS has not been part of the working group for the updated edition of the International Standards for Testing (if there is such a working group), which will be approved at the World Anti-Doping Conference in November 2013.

Mr. Jonathan Peter Taylor has clearly indicated that it will not affect his independence and impartiality.

It is clear that Mr. Jonathan Peter Taylor will decide the objection proceeding based upon the strict set of criteria set forth by ICANN.

It is unfortunate that the Respondent has challenged the independence and impartiality of the panelist in the hopes to find a panelist that may actually be biased toward its own cause. We hope that the ICC rejects this request and allows the proceedings to take their course. We look forward to the Panel's decision on this issue at its earliest convenience.

It should be noted that the current situation is not listed by the International Bar Association in its Guidelines on Conflicts of Interest in International Arbitration. Red list and Orange lists do not apply to such situation.

The simple fact to have been part of a working group years ago cannot be interpreted as a potential conflict of interest, otherwise Arbitrators would be condemned to be hermits!

For such reasons, consistent with prevailing ethical rules, Objector respectfully advises that the ICC reaffirms the Expert assigned, M. Jonathan Taylor as a Panelist in this matter.

Regarding to the condition of communication by Applicant, we invite the Center of Expertise to notice that this communication relative to the Applicant's objection to Panel Appointment of Mr. Jonathan Peter Taylor was received on July 1, 2013, at 2:02am and not, as written in the document from the applicant, page 3, on June 26, 2013.

**Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Response is/was transmitted to the Applicant on: July 1, 2013 by email to the following addresses: Contact Information Redacted

A copy of this Response is/was transmitted to ICANN on July 1, 2013 by e-mail to the following addresses: DRfiling@icann.org

Respectfully submitted,

DATED: July 1, 2013

Respectfully submitted,

STARTING DOT S.A.S.

By: \_\_\_\_/gj/\_\_\_\_\_ Godefroy JORDAN

Contact Information Redacted

*Attorney for Objector Fédération Internationale de Ski (FIS)*

# EXHIBIT 26



International Chamber of Commerce

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**EXP/421/ICANN/38**

FÉDÉRATION INTERNATIONALE DE SKI (SWITZERLAND) vs/  
WILD LAKE LLC (USA)

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STARTING DOT S.A.S  
Mr. Godefroy Jordan  
Contact Information Redacted

*By email:* Contact Information Redacted

THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
Mr. John M. Genga and Mr. Don C. Moody  
Contact Information Redacted

*By email:* Contact Information Redacted  
*and*

Mr. Jonathan Peter Taylor  
Bird & Bird LLP  
Contact Information Redacted

*Email:* Contact Information Redacted

12 July 2013

Dear Sirs,

The Centre acknowledges receipt of Mr. John M. Genga emails dated 1 and 4 July 2013, sent on behalf of the Applicant, copies of which were directly sent to the Objector and copies of which are attached for the Expert's information.

Further, the Centre acknowledges receipt of Mr. Godefroy Jordan email dated 1 July 2013, sent on behalf of the Objector, a copy of which was directly sent to the Applicant and a copy of which is attached for the Expert's information.

**Correspondence**

In this regard we remind the parties to always send copies of all correspondence in this matter to each other as well as to the Expert.

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

**Payment of Costs**

The Centre acknowledges receipt of the Applicant's payment of the Costs, received by the Centre on 28 June 2013, and of the Objector's payment of the Costs, received by the Centre on 25 June 2013.

**Request for Replacement**

We take note of the Applicant's comments on the appointed Expert, Mr. Taylor.

We understand that the Applicant's comments constitute a request for replacement of the Expert pursuant to Article 11 of the Rules.

Further, we note that Objector has already submitted its comments on Applicant's request for a replacement of the Expert.

Accordingly, we invite the Expert to submit his comments, if any, on the Applicant's request for replacement of the Expert to the Centre **on or before 16 July 2013**.

Further, we invite the parties to submit any further comments, if any, to the Centre **on or before 16 July 2013**.

After receipt of the comments, the Centre shall take a decision as to whether it shall replace the Expert in this matter.

After the Centre has taken its decision on the request for replacement, the Centre shall, as the case may be, confirm the constitution of the Expert Panel or take the next steps in the replacement procedure.

Should you have any further questions, please do not hesitate to contact us.

Yours faithfully,



Špela Košak  
Deputy Manager  
ICC International Centre for Expertise

Enclosures (*for the Expert only*):

- Applicant's emails dated 1 and 4 July 2013
- Objector's email dated 1 July 2013

*c.c. (with enclosures):*

- Mr. Daniel Schindler
- Mr. Jon Nevett

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

# EXHIBIT 27

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**From:** Jonathan Taylor Contact Information Redacted  
**Sent:** Tuesday, July 16, 2013 12:52 AM  
**To:** Contact Information Redacted  
**Cc:** Contact Information Redacted  
**Subject:** RE: ICC EXP/421/ICANN/38 [B&B-M.FID6966607]

Dear all,

My understanding is that the Applicant is not suggesting actual bias on my part. I am grateful for that and can confirm it would be my clear intention and commitment to decide the matter based on the merits alone.

However, the Applicant is concerned that there is an 'appearance of bias' that necessitates my replacement as Expert in this matter. It is for others to decide whether this is a proper ground for objection under the applicable rules and, if so, what is the proper test to determine if appearance of bias exists. (For what it is worth, the test under English law would be whether the facts would lead a fair-minded and informed observer to conclude that there was a real possibility that I would be pre-disposed or prejudiced in favour of the Objector and/or against the Applicant for reasons unconnected with the merits of the case). For my part, I would only say that I do not think it unreasonable for the Applicant to raise this concern and I am not offended in any way by its doing so.

I obviously could not rule on any such objection myself. I can only comment on the relevant facts, as to which I can confirm that the Objector is correct in saying that (a) neither my firm nor I has ever acted for either party in the past; (b) I have never been engaged by or acted for FIS 'as legal counsel, advisor or suchlike'; (c) I was instructed by WADA to work on the revision of the International Standard for Testing in the period 2007-2009; (d) WADA also convened a working party (which had 8 members in total, as I recall, including Sarah Lewis) of representatives of stakeholders to provide their input into proposed revisions to the Standard, and I attended the meetings of that working party; (e) no register was taken of attendance at meetings so I cannot specifically confirm that Ms Lewis attended only two meetings of the working party, but I recall that she did not attend all of the meetings and that her assistant Ms Fussek took on some of the role on her behalf at some point; and (f) while I am currently working on a further revision of the International Standard for Testing for WADA, neither Sarah Lewis nor anyone else from the FIS is involved in that process.

I hope this is of assistance.

**Jonathan Taylor**

**Partner**  
**Joint Head, International Sports Group**  
**Bird & Bird**  
Contact Information Redacted

Contact Information Redacted

[twobirds.com](http://twobirds.com)



---

**From:** KOSAK Spela Contact Information Redacted **On Behalf Of** EXPERTISE  
**Sent:** 12 July 2013 15:45  
**To:** Contact Information Redacted  
**Cc:** Contact Information Redacted  
**Subject:** ICC EXP/421/ICANN/38

Dear Sirs,

Please find attached our letter of today and its enclosures.

Faithfully yours,

Špela Košak

ICC International Centre for Expertise

Contact Information Redacted

Contact Information Redacted



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Veuillez contacter le Centre par téléphone au **Contact Information Redacted**  
. Vous ne devez ni conserver le message, ni en révéler le contenu.*

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We may monitor email content for the purposes of ensuring compliance with law and our policies, as well as details of correspondents to supplement our relationships database.

# EXHIBIT 28



International Chamber of Commerce

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**EXP/421/ICANN/38**

FÉDÉRATION INTERNATIONALE DE SKI (SWITZERLAND) vs/  
WILD LAKE LLC (USA)

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STARTING DOT S.A.S  
Mr. Godefroy Jordan  
Contact Information Redacted

*By email:* Contact Information Redacted

THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
Mr. John M. Genga and Mr. Don C. Moody  
Contact Information Redacted

*By email:* Contact Information Redacted  
*and*

25 July 2013

Dear Sirs,

The Centre acknowledges receipt of the Expert's, Mr. Taylor, email dated 16 July 2013, a copy of which was directly sent to the Parties.

**Request for Replacement of the Expert**

With reference to the Centre's letter dated 12 July 2013, we note that the Applicant has submitted a request for replacement of the Expert pursuant to Article 11(4) of the Rules.

We inform you that on 25 July 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise has decided to reject the request for replacement of the Expert, pursuant to Article 3(4)(A) of Appendix I to the Rules.

Accordingly, Mr. Jonathan Taylor will continue to act as Expert in this matter.

Therefore, the Centre will now proceed with this matter and shall transfer the file to the Expert shortly.

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

Should you have any further questions, please do not hesitate to contact us.

Yours faithfully,



Hannah Tümpel  
Manager  
ICC International Centre for Expertise

*c.c.:*

- Mr. Daniel Schindler
- Mr. Jon Nevett
- Mr. Jonathan Peter Taylor

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

*By email:* Contact Information Redacted

# EXHIBIT 29

**Objector's Supplemental Filing before the:  
International Centre for Expertise of the ICC**

**ICC Case Ref.: EXP/421/ICANN/38**

**Applicant:** Wild Lake, LLC

**Objector:** Fédération Internationale de Ski (FIS)

**Application ID:** 1-1636-27531

**String:** .SKI

**I. Introduction and Grounds for Submission**

This supplemental filing is being submitted to the International Chamber of Commerce ("ICC") by the FIS (The Objector) with respect to the above-referenced proceeding, solely for the purpose of responding to certain factual and legal inaccuracies set forth in the response recently submitted by Wild Lake, LLC (The Applicant).

The Applicant Guidebook has not provided any guidelines regarding the possibility or the prohibition to submit supplemental filing under this procedure. In such a situation, similar procedure like the Uniform Dispute Resolution Procedure in use for more than 10 years may provide a guidance. The UDRP rules, in paragraph §10(b), impose on the Panel the responsibility to *"ensure that the Parties are treated with equality and that each Party is given a fair opportunity to present its case"*. The Panel which accepts a response from one party generally allows the other party the opportunity to file supplemental submissions (*Auto-C, LLC v. MustNeed.com, WIPO Case No. D2004-0025 <autochlor.com>*; *Fratelli Carli S.p.A v. Linda Nrcross, WIPO Case No. D2006-0988 <carli.org>*; *Metro Sportswear Limited v. Vertical Axis Inc. and Canadagoose.com c/o Whois Identity Shield, WIPO Case No. D2008-0754 <canadagoose.com>*).

Article 4 (e) of the Attachment to Module 3, New gTLD Dispute Resolution Procedure provides identical guidelines to the Panel: *"In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position."*

As the Objector has put forward some inaccurate elements that need to be considered, that is the reason why the Applicant has to submit a supplemental observations following the response of the Objector to the Community Objection for the gTLD SKI according to Applicant Guidebook §3.5.1.

The Applicant has overtly misinterpreted the definition of a community and the criteria to take into account as set in the Applicant Guidebook in an attempt to confuse the Panel.

In application of article 4 (e) of the Attachment to Module 3, New gTLD Dispute Resolution Procedure the Objector respectfully requests the Panel to take into account this supplemental observations.

## II. Factual and Legal Inaccuracies in Applicant's Response

First, the Applicant claims and asserts facts that are not present in the Applicant Guidebook by hazardous deductions. For example, the Applicant asserts that Community Objections may only be filed by "*communities that do not apply for the TLD*". This assertion is not part of the criteria set by ICANN in the Applicant Guidebook related to the standing of an Objector. Applying for a TLD or supporting an existing Application which serves the interest of a community does not prevent the same community to defend its rights and interests against any other application the community consider as detrimental to its interests.

Second, the Applicant quotes "*the community named by the objector must be ... strongly associated with applied-for gTLD string*" and concludes that *the word "ski" must readily bring Objector's organization to mind*. This assertion is based on a false statement and truncated text from the Applicant Guidebook. The Applicant Guidebook in Module 3.5.4 establishes four tests for an objection to be successful:

- *The community invoked by the objector is a clearly delineated community; and*
- *Community opposition to the application is substantial; and*
- *There is a strong association between the community invoked and the applied-for gTLD string; and*
- *The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.*

None of these tests or the fact that the community must be strongly associated with the applied-for gTLD allows the Applicant to impose additional rules and establish a direct link between the public and the Objector. The fact to consider is the association made by the public between the Ski Community represented by the Objector and the string SKI, which is quite obvious.

As far as that goes, the Applicant's response is entirely based on false or misleading interpretations. The most blatant misinterpretation is related to the definition of a community as set by the ICANN. The concept of community has been defined as early as 2007 in the preparatory work of the Generic Names Support Organization (GNSO) and published in its Final Report (See Annex 2). This concept is referred to by the Applicant Guidebook in the Module 3.2.1, "Grounds for Objection".

The GNSO states that "*community 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*" (See Annex 2, Implementation Guidelines P, c).

The Applicant Guidebook then establishes the framework for a community to protect its interests and rights. The Community Objection framework is detailed in Modules 3.2 of the Applicant Guidebook. The Objector must prove inter alia "*The community invoked by the objector is a clearly delineated community*" and "*There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*".

These prerequisites do not require:

- The community invoked to embrace in its entirety any person or entity that has an interest in the word SKI;
- The Objector to be representative of any person or entity that has an interest in the word SKI;
- The opposition to be a global opposition from any stakeholder that has an interest in the word SKI.

The question of the delineation of the community is therefore the key issue in determining the merits of the Objection. If the Applicant may question the delineation of the community the Objector represents, it is not within its powers to define the community itself or who would be able to represent the community.

The Applicant attempts to define a ski community with any professional or individual using the term ski, putting on the same level different types of skiing activities. The only use of the term ski cannot be a ground to define a community as so well established by ICANN and would even distort the concept of community established by ICANN.

The single term of ski in its primary meaning always refer to a “narrow strip of wood, plastic, metal or combination thereof worn underfoot to glide over snow” (See Annex 4). Even the definition cited by the Applicant in its response confirms this. Secondary meanings of the word ski, always associated with another specific term, may refer to other activities or meanings.

The FIS has put boundaries around its community by defining and organizing membership and activities. These boundaries fully meet the requirements of a delineated community as set by ICANN.

Furthermore, with hundreds of ski federations, millions of skiers with a license and partnership with United Nations agencies like the International Olympic Committee (IOC), the representativeness of the FIS cannot be contested. The sole fact that the FIS engages in such Community Opposition shows the opposition of its members to the SKI application from Wild Lake, LLC, making it a very substantial opposition.

Consequently, the FIS clearly represents a delineated community and has proven a substantial opposition of the community to the Wild Lake, LLC SKI application.

#### **IV. Annexes**

- Annex 1: Applicant Guidebook, Module 3
- Annex 2: ICANN Generic Names Supporting Organisation - Final Report -Introduction of New Generic Top-Level Domains
- Annex 3: Ski definition on Wikipedia

#### **V. Conclusion**

The Applicant has not shown that the Objector’s arguments were not based and failed to mention important new facts publicly available that support the Objection. The Application SKI # 1-1636-27531 should therefore be rejected.

Respectfully submitted,



Signature:

Name: Mr. Godefroy Jordan

Date: June 27, 2013

# ANNEX 1



# gTLD Applicant Guidebook

(v. 2012-06-04)

## Module 3

4 June 2012

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# Module 3

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## Objection Procedures

This module describes two types of mechanisms that may affect an application:

- I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.
- II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

### 3.1 GAC Advice on New gTLDs

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ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

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

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns

raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
- III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

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

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

## 3.2 *Public Objection and Dispute Resolution Process*

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The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

### 3.2.1 *Grounds for Objection*

---

A formal objection may be filed on any one of the following four grounds:

**String Confusion Objection** – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.

**Legal Rights Objection** – The applied-for gTLD string infringes the existing legal rights of the objector.

**Limited Public Interest Objection** – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

**Community Objection** – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these objection grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see

<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

### 3.2.2 *Standing to Object*

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing.
Legal rights	Rightholders
Limited public interest	No limitations on who may file – however, subject to a “quick look” designed for early conclusion of frivolous and/or abusive objections
Community	Established institution associated with a clearly delineated community

#### 3.2.2.1 *String Confusion Objection*

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation. That is, an applicant does not have standing to object to another application with which it is already in a contention set as a result of the Initial Evaluation.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible

outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.

### 3.2.2.2 *Legal Rights Objection*

A rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming (which may include either registered or unregistered trademarks) are infringed by the applied-for gTLD must be included in the filing.

An intergovernmental organization (IGO) is eligible to file a legal rights objection if it meets the criteria for registration of a .INT domain name<sup>1</sup>:

- a) An international treaty between or among national governments must have established the organization; and
- b) The organization that is established must be widely considered to have independent international legal personality and must be the subject of and governed by international law.

The specialized agencies of the UN and the organizations having observer status at the UN General Assembly are also recognized as meeting the criteria.

### 3.2.2.3 *Limited Public Interest Objection*

Anyone may file a Limited Public Interest Objection. Due to the inclusive standing base, however, objectors are subject to a "quick look" procedure designed to identify and eliminate frivolous and/or abusive objections. An objection found to be manifestly unfounded and/or an abuse of the right to object may be dismissed at any time.

A Limited Public Interest objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as the grounds for such an objection (see subsection 3.5.3).

A Limited Public Interest objection that is manifestly unfounded may also be an abuse of the right to object. An objection may be framed to fall within one of the

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<sup>1</sup> See also <http://www.iana.org/domains/int/policy/>.

accepted categories for Limited Public Interest objections, but other facts may clearly show that the objection is abusive. For example, multiple objections filed by the same or related parties against a single applicant may constitute harassment of the applicant, rather than a legitimate defense of legal norms that are recognized under general principles of international law. An objection that attacks the applicant, rather than the applied-for string, could be an abuse of the right to object.<sup>2</sup>

The quick look is the Panel's first task, after its appointment by the DRSP and is a review on the merits of the objection. The dismissal of an objection that is manifestly unfounded and/or an abuse of the right to object would be an Expert Determination, rendered in accordance with Article 21 of the New gTLD Dispute Resolution Procedure.

In the case where the quick look review does lead to the dismissal of the objection, the proceedings that normally follow the initial submissions (including payment of the full advance on costs) will not take place, and it is currently contemplated that the filing fee paid by the applicant would be refunded, pursuant to Procedure Article 14(e).

#### 3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

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<sup>2</sup> The jurisprudence of the European Court of Human Rights offers specific examples of how the term "manifestly ill-founded" has been interpreted in disputes relating to human rights. Article 35(3) of the European Convention on Human Rights provides: "The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." The ECHR renders reasoned decisions on admissibility, pursuant to Article 35 of the Convention. (Its decisions are published on the Court's website <http://www.echr.coe.int>.) In some cases, the Court briefly states the facts and the law and then announces its decision, without discussion or analysis. E.g., Decision as to the Admissibility of Application No. 34328/96 by Egbert Peree against the Netherlands (1998). In other cases, the Court reviews the facts and the relevant legal rules in detail, providing an analysis to support its conclusion on the admissibility of an application. Examples of such decisions regarding applications alleging violations of Article 10 of the Convention (freedom of expression) include: *Décision sur la recevabilité de la requête no 65831/01 présentée par Roger Garaudy contre la France* (2003); *Décision sur la recevabilité de la requête no 65297/01 présentée par Eduardo Fernando Alves Costa contre le Portugal* (2004).

The jurisprudence of the European Court of Human Rights also provides examples of the abuse of the right of application being sanctioned, in accordance with ECHR Article 35(3). See, for example, *Décision partielle sur la recevabilité de la requête no 61164/00 présentée par Gérard Duringer et autres contre la France et de la requête no 18589/02 contre la France* (2003).

***It is an established institution*** – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

***It has an ongoing relationship with a clearly delineated community*** – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

### ***3.2.3 Dispute Resolution Service Providers***

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To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.

- The International Centre for Dispute Resolution has agreed to administer disputes brought pursuant to string confusion objections.
- The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed to administer disputes brought pursuant to legal rights objections.

- The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program. The selection process began with a public call for expressions of interest<sup>3</sup> followed by dialogue with those candidates who responded. The call for expressions of interest specified several criteria for providers, including established services, subject matter expertise, global capacity, and operational capabilities. An important aspect of the selection process was the ability to recruit panelists who will engender the respect of the parties to the dispute.

### *3.2.4 Options in the Event of Objection*

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Applicants whose applications are the subject of an objection have the following options:

The applicant can work to reach a settlement with the objector, resulting in withdrawal of the objection or the application;

The applicant can file a response to the objection and enter the dispute resolution process (refer to Section 3.2); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

### *3.2.5 Independent Objector*

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A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.

In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community.

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<sup>3</sup> See <http://www.icann.org/en/announcements/announcement-21dec07.htm>.

Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.

**Mandate and Scope** - The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed. The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections (see subsection 3.1.2).

The IO may file a Limited Public Interest objection against an application even if a Community objection has been filed, and vice versa.

The IO may file an objection against an application, notwithstanding the fact that a String Confusion objection or a Legal Rights objection was filed.

Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground.

The IO may consider public comment when making an independent assessment whether an objection is warranted. The IO will have access to application comments received during the comment period.

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

**Selection** – The IO will be selected by ICANN, through an open and transparent process, and retained as an independent consultant. The Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant.

Although recommendations for IO candidates from the community are welcomed, the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence.

The IO's (renewable) tenure is limited to the time necessary to carry out his/her duties in connection with a single round of gTLD applications.

**Budget and Funding** – The IO's budget would comprise two principal elements: (a) salaries and operating expenses, and (b) dispute resolution procedure costs – both of which should be funded from the proceeds of new gTLD applications.

As an objector in dispute resolution proceedings, the IO is required to pay filing and administrative fees, as well as advance payment of costs, just as all other objectors are required to do. Those payments will be refunded by the DRSP in cases where the IO is the prevailing party.

In addition, the IO will incur various expenses in presenting objections before DRSP panels that will not be refunded, regardless of the outcome. These expenses include the fees and expenses of outside counsel (if retained) and the costs of legal research or factual investigations.

### 3.3 *Filing Procedures*

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The information included in this section provides a summary of procedures for filing:

- Objections; and
- Responses to objections.

For a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure ("Procedure") included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail.

Note that the rules and procedures of each DRSP specific to each objection ground must also be followed. See <http://newgtlds.icann.org/en/program-status/objection-dispute-resolution>.

#### 3.3.1 *Objection Filing Procedures*

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The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. Should an applicant wish to file a formal objection to another gTLD application, it would follow these same procedures.

- All objections must be filed electronically with the appropriate DRSP by the posted deadline date.

Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. An objector wishing to object to several applications must file a separate objection and pay the accompanying filing fees for each application that is the subject of an objection. If an objector wishes to object to an application on more than one ground, the objector must file separate objections and pay the accompanying filing fees for each objection ground.

Each objection filed by an objector must include:

- The name and contact information of the objector.
- A statement of the objector's basis for standing; that is, why the objector believes it meets the standing requirements to object.
- A description of the basis for the objection, including:
  - A statement giving the specific ground upon which the objection is being filed.
  - A detailed explanation of the validity of the objection and why it should be upheld.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

An objector must provide copies of all submissions to the DRSP associated with the objection proceedings to the applicant.

The DRSP will publish, and regularly update a list on its website identifying all objections as they are filed. ICANN will post on its website a notice of all objections filed once the objection filing period has closed.

### ***3.3.2 Objection Filing Fees***

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At the time an objection is filed, the objector is required to pay a filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will

dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

Funding from ICANN for objection filing fees, as well as for advance payment of costs (see subsection 3.4.7 below) is available to the At-Large Advisory Committee (ALAC). Funding for ALAC objection filing and dispute resolution fees is contingent on publication by ALAC of its approved process for considering and making objections. At a minimum, the process for objecting to a gTLD application will require: bottom-up development of potential objections, discussion and approval of objections at the Regional At-Large Organization (RALO) level, and a process for consideration and approval of the objection by the At-Large Advisory Committee.

Funding from ICANN for objection filing fees, as well as for advance payment of costs, is available to individual national governments in the amount of USD 50,000 with the guarantee that a minimum of one objection per government will be fully funded by ICANN where requested. ICANN will develop a procedure for application and disbursement of funds.

Funding available from ICANN is to cover costs payable to the dispute resolution service provider and made directly to the dispute resolution service provider; it does not cover other costs such as fees for legal advice.

### **3.3.3 Response Filing Procedures**

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Upon notification that ICANN has published the list of all objections filed (refer to subsection 3.3.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, an applicant responding to several objections must file a separate response and pay the accompanying filing fee to respond to each objection.
- Responses must be filed electronically.

Each response filed by an applicant must include:

- The name and contact information of the applicant.

- A point-by-point response to the claims made by the objector.
- Any copies of documents that it considers to be a basis for the response.

Responses are limited to 5000 words or 20 pages, whichever is less, excluding attachments.

Each applicant must provide copies of all submissions to the DRSP associated with the objection proceedings to the objector.

### *3.3.4 Response Filing Fees*

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At the time an applicant files its response, it is required to pay a filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded, which will result in the objector prevailing.

## *3.4 Objection Processing Overview*

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The information below provides an overview of the process by which DRSPs administer dispute proceedings that have been initiated. For comprehensive information, please refer to the New gTLD Dispute Resolution Procedure (included as an attachment to this module).

### *3.4.1 Administrative Review*

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Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's right to submit a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for filing an objection.

### *3.4.2 Consolidation of Objections*

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Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. The DRSP shall endeavor to decide upon

consolidation prior to issuing its notice to applicants that the response should be filed and, where appropriate, shall inform the parties of the consolidation in that notice.

An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

ICANN continues to strongly encourage all of the DRSPs to consolidate matters whenever practicable.

### 3.4.3 *Mediation*

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The parties to a dispute resolution proceeding are encouraged—but not required—to participate in mediation aimed at settling the dispute. Each DRSP has experts who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel constituted to issue an expert determination in the related dispute.

There are no automatic extensions of time associated with the conduct of negotiations or mediation. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. Absent exceptional circumstances, the parties must limit their requests for extension to 30 calendar days.

The parties are free to negotiate without mediation at any time, or to engage a mutually acceptable mediator of their own accord.

### **3.4.4 Selection of Expert Panels**

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A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.

There will be one expert in proceedings involving a string confusion objection.

There will be one expert, or, if all parties agree, three experts with relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection.

There will be three experts recognized as eminent jurists of international reputation, with expertise in relevant fields as appropriate, in proceedings involving a Limited Public Interest objection.

There will be one expert in proceedings involving a community objection.

Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

### **3.4.5 Adjudication**

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The panel may decide whether the parties shall submit any written statements in addition to the filed objection and response, and may specify time limits for such submissions.

In order to achieve the goal of resolving disputes rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the panel may require a party to produce additional evidence.

Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances.

### **3.4.6 Expert Determination**

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The DRSPs' final expert determinations will be in writing and will include:

- A summary of the dispute and findings;

- An identification of the prevailing party; and
- The reasoning upon which the expert determination is based.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.

### **3.4.7 Dispute Resolution Costs**

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Before acceptance of objections, each DRSP will publish a schedule of costs or statement of how costs will be calculated for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while Limited Public Interest and community objection proceedings will involve hourly rates charged by the panelists.

Within ten (10) calendar days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant. Each party must make its advance payment within ten (10) calendar days of receiving the DRSP's request for payment and submit to the DRSP evidence of such payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DRSP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its expert determination, the DRSP will refund the advance payment of costs to the prevailing party.

### ***3.5 Dispute Resolution Principles (Standards)***

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Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

#### ***3.5.1 String Confusion Objection***

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A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

#### ***3.5.2 Legal Rights Objection***

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In interpreting and giving meaning to GNSO Recommendation 3 (“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law”), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s registered or unregistered trademark or service mark (“mark”) or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector’s mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector’s mark or IGO name or acronym.

In the case where the objection is based on trademark rights, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to the objector's existing mark.
2. Whether the objector's acquisition and use of rights in the mark has been bona fide.
3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of the objector, of the applicant or of a third party.
4. Applicant's intent in applying for the gTLD, including whether the applicant, at the time of application for the gTLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.
5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by the applicant is consistent with such acquisition or use.
7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide.
8. Whether the applicant's intended use of the gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

In the case where a legal rights objection has been filed by an IGO, the panel will consider the following non-exclusive factors:

1. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound or meaning, to the name or acronym of the objecting IGO;
2. Historical coexistence of the IGO and the applicant's use of a similar name or acronym. Factors considered may include:
  - a. Level of global recognition of both entities;
  - b. Length of time the entities have been in existence;
  - c. Public historical evidence of their existence, which may include whether the objecting IGO has communicated its name or abbreviation under Article 6<sup>ter</sup> of the Paris Convention for the Protection of Industrial Property.
3. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise of the objecting IGO's name or acronym;
4. Whether and to what extent the applicant has been commonly known by the sign corresponding to the applied-for gTLD, and if so, whether any purported or likely use of the gTLD by the applicant is consistent therewith and bona fide; and
5. Whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objecting IGO's name or acronym as to the source, sponsorship, affiliation, or endorsement of the TLD.

### ***3.5.3 Limited Public Interest Objection***

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An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.

Examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

Note that these are included to serve as examples, rather than an exhaustive list. It should be noted that these instruments vary in their ratification status. Additionally, states may limit the scope of certain provisions through reservations and declarations indicating how they will interpret and apply certain provisions. National laws not based on principles of international law are not a valid ground for a Limited Public Interest objection.

Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of

discrimination that violate generally accepted legal norms recognized under principles of international law;

- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

#### 3.5.4 *Community Objection*

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The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.

**Community** – The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;

- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

**Substantial Opposition** – The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

**Targeting** – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be

balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

**Detriment** – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

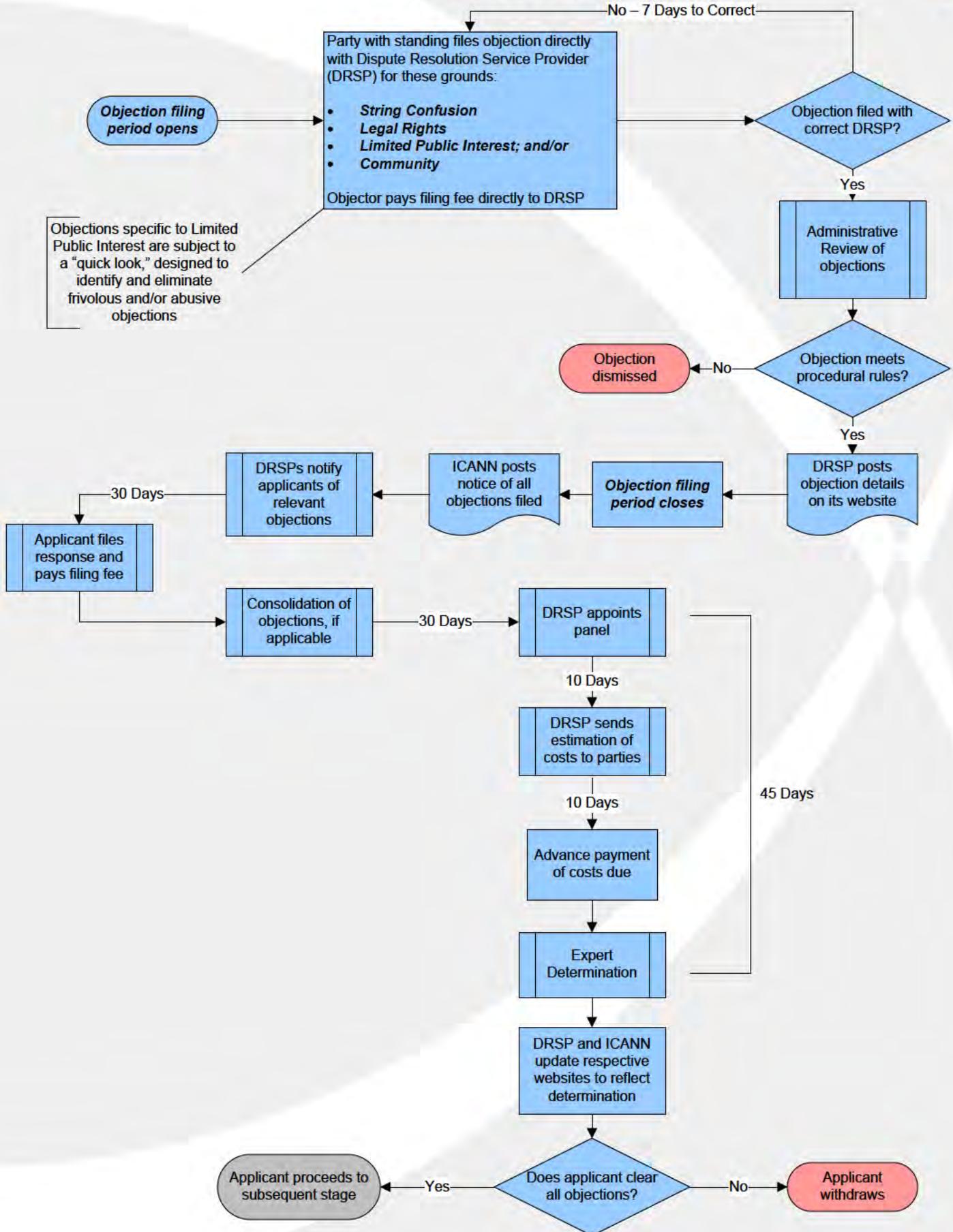
Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

# DRAFT - New gTLD Program – Objection and Dispute Resolution



## ANNEX 2

**Generic Names Supporting Organization**[Home](#)[About](#)[Council Activities](#)[Group Activities](#)[Library](#)[News](#)[Basics](#)[Home](#) » [gns0.icann](#) » [issues](#) » [new-gtlds](#) » **ABSTRACT****Final Report - Introduction of New Generic Top-Level Domains**

Last Updated: 4 September 2009

Date 8 August 2007

ICANN Generic Names Supporting Organisation

Final Report

Introduction of New Generic Top-Level Domains

8 August 2007

Part A Final Report

Introduction of New Generic Top-Level Domains

[ABSTRACT](#)[BACKGROUND](#)[SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES](#)[TERM OF REFERENCE ONE -- WHETHER TO INTRODUCE NEW TOP-LEVEL DOMAINS](#)[TERM OF REFERENCE -- SELECTION CRITERIA](#)[TERM OF REFERENCE THREE -- ALLOCATION METHODS](#)[TERM OF REFERENCE FOUR -- CONTRACTUAL CONDITIONS](#)[NEXT STEPS](#)[Annex A – NCUC Minority Statement: Recommendation 6](#)[Annex B – Nominating Committee Appointee Avri Doria: Individual Comments](#)[Annex C – NCUC Minority Statement: Recommendation 20 and Implementation Guidelines F, H & P](#)[REFERENCE MATERIAL -- GLOSSARY](#)**FINAL REPORT PART B****ABSTRACT**

This is the Generic Names Supporting Organization's Final Report on the Introduction of New Top-Level Domains. The Report is in two parts. Part A contains the substantive discussion of the Principles, Policy Recommendations and Implementation Guidelines and Part B contains a range of supplementary materials that have been used by the Committee during the course of the Policy Development Process.

The GNSO Committee on New Top-Level Domains consisted of all GNSO Council members. All meetings were open to a wide range of interested stakeholders and observers. A set of participation data is found in Part B.

Many of the terms found here have specific meaning within the context of ICANN and new top-level domains discussion. A full glossary of terms is available in the Reference Material section at the end of Part A.

**BACKGROUND**

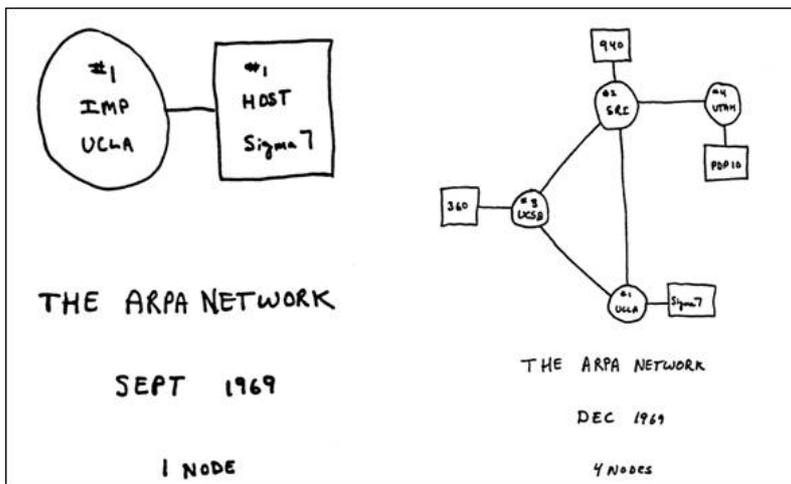
1. The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for the overall coordination of "the global Internet's system of unique identifiers" and ensuring the "stable and secure operation of the Internet's unique identifier systems. In particular, ICANN coordinates the "allocation and assignment of the three sets of unique identifiers for the Internet". These are "domain names"(forming a system called the DNS); Internet protocol (IP) addresses and autonomous system (AS) numbers and Protocol port and parameter numbers". ICANN is also responsible for the "operation and evolution of the DNS root name server system and policy development reasonably and appropriately related to these technical functions". These elements are all contained in ICANN's Mission and Core Values[1] in addition to provisions which enable policy development work that, once approved by the ICANN Board, become binding on the organization. The results of the policy development process found here relate to the introduction of new generic top-level domains.

2. This document is the *Final Report* of the Generic Names Supporting Organisation's (GNSO) Policy Development Process (PDP) that has been conducted using ICANN's Bylaws and policy development guidelines that relate to the work of the GNSO. This *Report* reflects a comprehensive examination of four Terms of Reference designed to establish a stable and ongoing process that facilitates the introduction of new top-level domains. The policy development process (PDP) is part of the Generic Names Supporting Organisation's (GNSO) mandate within the ICANN structure. However, close consultation with other ICANN Supporting Organisations and Advisory Committees has been an integral part of the process. The consultations and negotiations have also included a wide range of interested stakeholders from within and outside the ICANN community[2].

3. The *Final Report* is in two parts. This document is Part A and contains the full explanation of each of the Principles, Recommendations and Implementation Guidelines that the Committee has developed since December 2005[3]. Part B of the *Report* contains a wide range of supplementary materials which have been used in the policy development process including Constituency Impact Statements (CIS), a series of Working Group Reports on important sub-elements of the Committee's deliberations, a collection of external reference materials, and the procedural documentation of the policy development process[4].

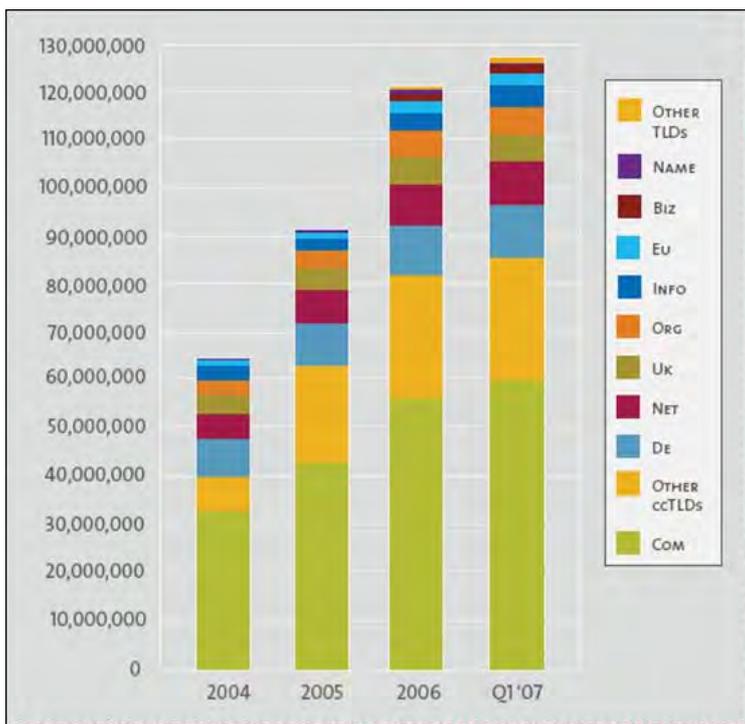
4. The finalisation of the policy for the introduction of new top-level domains is part of a long series of events that have dramatically changed the nature of the Internet. The 1969 ARPANET diagram shows the initial design of a network that is now global in its reach and an integral part of many lives and businesses. The policy recommendations found here illustrate the complexity of the Internet of 2007 and, as a package, propose a system to add new top-level domains in an orderly and transparent way. The ICANN Staff Implementation Team, consisting of policy, operational and legal staff members, has worked closely with the Committee on all aspects of the policy development

process[5]. The ICANN Board has received regular information and updates about the process and the substantive results of the Committee's work.



5. The majority of the early work on the introduction of new top-level domains is found in the IETF's Request for Comment series. RFC 1034[6] is a fundamental resource that explains key concepts of the naming system. Read in conjunction with RFC920[7], an historical picture emerges of how and why the domain name system hierarchy has been organised. Postel & Reynolds set out in their RFC920 introduction about the "General Purpose Domains" that "...While the initial domain name "ARPA" arises from the history of the development of this system and environment, in the future most of the top level names will be very general categories like "government", "education", or "commercial". The motivation is to provide an organization name that is free of undesirable semantics."

6. In 2007, the Internet is multi-dimensional and its development is driven by widespread access to inexpensive communications technologies in many parts of the world. In addition, global travel is now relatively inexpensive, efficient and readily available to a diverse range of travellers. As a consequence, citizens no longer automatically associate themselves with countries but with international communities of linguistic, cultural or professional interests independent of physical location. Many people now exercise multiple citizenship rights, speak many different languages and quite often live far from where they were born or educated. The 2007 OECD Factbook[8] provides comprehensive statistics about the impact of migration on OECD member countries. In essence, many populations are fluid and changing due in part to easing labour movement restrictions but also because technology enables workers to live in one place and work in another relatively easily. As a result, companies and organizations are now global and operate across many geographic borders and jurisdictions. The following illustration[9] shows how rapidly the number of domain names under registration has increased and one could expect that trend to continue with the introduction of new top-level domains.



7. A key driver of change has been the introduction of competition in the registration of domain names through ICANN Accredited Registrars[10]. In June 2007, there were more than 800 accredited registrars who register names for end users with ongoing downward pressure on the prices end-users pay for domain name registration.

8. ICANN's work on the introduction of new top-level domains has been underway since 1999. By mid-1999, Working Group C[11] had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.

9. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel[12].

10. The July 2007 zone file survey statistics from www.registrarstats.com[13] shows that there are slightly more than 96,000,000 top level domains registered across a selection of seven top-level domains including .com, .net and .info. Evidence from potential new applicants provides more impetus to implement a system that enables the ongoing introduction of new top level domains[14]. In addition, interest from Internet users who could use Internationalised Domain Names (IDNs) in a wide variety of scripts beyond ASCII is growing rapidly.

11. To arrive at the full set of policy recommendations which are found here, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the

policy development process[15], and which was augmented by a full set of GNSO Constituency Statements[16]. These are all found in Part B of the *Final Report* and should be read in conjunction with this document. In addition, the Committee received detailed responses from the Implementation Team about proposed policy recommendations and the implementation of the recommendations package as an on-line application process that could be used by a wide array of potential applicants.

12. The Committee reviewed and analysed a wide variety of materials including Working Group C's findings, the evaluation reports from the 2003 & 2004 round of sponsored top-level domains and a full range of other historic materials[17].

13. In the past, a number of different approaches to new top level domains have been considered including the formulation of a structured taxonomy[18] of names, for example, .auto, .books, .travel and .music. The Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable. It is expected that applicants will apply for targeted community strings such as travel for the travel industry and cat for the Catalan community as well as some generic strings. The Committee identified five key drivers for the introduction of new top-level domains.

- (i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated
- (ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds
- (iii) Expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.
- (iv) There is demand for additional top-level domains as a business opportunity. The GNSO Committee expects that this business opportunity will stimulate competition at the registry service level which is consistent with ICANN's Core Value 6.
- (v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.

14. The remainder of this Report is structured around the four *Terms of Reference*. This includes an explanation of the Principles that have guided the work taking into account the Governmental Advisory Committee's March 2007 *Public Policy Principles for New gTLDs*[19]; a comprehensive set of Recommendations which has majority Committee support and a set of Implementation Guidelines which has been discussed in great detail with the ICANN Staff Implementation Team. The Implementation Team has released two *ICANN Staff Discussion Points* documents (in November 2006 and June 2007). Version 2 provides detailed analysis of the proposed recommendations from an implementation standpoint and provides suggestions about the way in which the implementation plan may come together. The ICANN Board will make the final decision about the actual structure of the application and evaluation process.

15. In each of the sections below the Committee's recommendations are discussed in more detail with an explanation of the rationale for the decisions. The recommendations have been the subject of numerous public comment periods and intensive discussion across a range of stakeholders including ICANN's GNSO Constituencies, ICANN Supporting Organisations and Advisory Committees and members of the broader Internet-using public that is interested in ICANN's work[20]. In particular, detailed work has been conducted through the Internationalised Domain Names Working Group (DN-WG)[21], the Reserved Names Working Group (RN-WG)[22] and the Protecting the Rights of Others Working Group (PRO-WG) [23]. The Working Group Reports are found in full in Part B of the *Final Report* along with the March 2007 GAC Public Policy Principles for New Top-Level Domains, Constituency Impact Statements. A minority statement from the NCUC about Recommendations 6 & 20 are found Annexes for this document along with individual comments from Nominating Committee appointee Ms Avri Doria.

#### SUMMARY -- PRINCIPLES, RECOMMENDATIONS & IMPLEMENTATION GUIDELINES

1. This section sets out, in table form, the set of Principles, proposed Policy Recommendations and Guidelines that the Committee has derived through its work. The addition of new gTLDs will be done in accordance with ICANN's primary mission which is to ensure the security and stability of the DNS and, in particular, the Internet's root server system[24].

2. The Principles are a combination of GNSO Committee priorities, ICANN staff implementation principles developed in tandem with the Committee and the March 2007 GAC Public Policy Principles on New Top-Level Domains. The Principles are supported by all GNSO Constituencies.[25]

3. ICANN's Mission and Core Values were key reference points for the development of the Committee's Principles, Recommendations and Implementation Guidelines. These are referenced in the right-hand column of the tables below.

4. The Principles have support from all GNSO Constituencies.

	PRINCIPLES	MISSION & CORE VALUES
A	<b>New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.</b>	M1 & CV1 & 2, 4-10
B	Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.	M1-3 & CV 1, 4 & 6
C	The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.	M3 & CV 4-10
D	A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet.	M1-3 & CV 1
E	A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meet its obligations under the terms of ICANN's registry agreement.	M1-3 & CV 1
F	<b>A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.</b>	M1-3 & CV 1
G	<b>The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.</b>	

	RECOMMENDATIONS[26]	MISSION & CORE VALUES
1	<b>ICANN must implement a process that allows the introduction of new top-level domains.</b> <b>The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.</b> <b>All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.</b>	M1-3 & CV1-11
2	Strings must not be confusingly similar to an existing top-level domain or a Reserved Name.	M1-3 & C1-6-11

3	Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law.  Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).	CV3
4	Strings must not cause any technical instability.	M1-3 & CV 1
5	Strings must not be a Reserved Word[27].	M1-3 & CV 1 & 3
6*	<b>Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.</b>  <b>Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).</b>	<b>M3 &amp; CV 4</b>
7	<b>Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.</b>	<b>M1-3 &amp; CV1</b>
8	Applicants must be able to demonstrate their financial and organisational operational capability.	M1-3 & CV1
9	<b>There must be a clear and pre-published application process using objective and measurable criteria.</b>	<b>M3 &amp; CV6-9</b>
10	<b>There must be a base contract provided to applicants at the beginning of the application process.</b>	<b>CV7-9</b>
11	[Replaced with Recommendation 20 and Implementation Guideline P and inserted into Term of Reference 3 Allocation Methods section]	
12	<b>Dispute resolution and challenge processes must be established prior to the start of the process.</b>	<b>CV7-9</b>
13	Applications must initially be assessed in rounds until the scale of demand is clear.	CV7-9
14	The initial registry agreement term must be of a commercially reasonable length.	CV5-9
15	<b>There must be renewal expectancy.</b>	<b>CV5-9</b>
16	<b>Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.</b>	<b>CV5-9</b>
17	<b>A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.</b>	<b>M1 &amp; CV1</b>
18	If an applicant offers an IDN service, then ICANN's DN guidelines[28] must be followed.	M1 & CV1
19	Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.	M1 & CV1
20*	An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.	

\* The NCUC submitted Minority Statements on Recommendations 6 and 20. The remainder of the Recommendations have support from all GNSO Constituencies.

	IMPLEMENTATION GUIDELINES	MISSION & CORE VALUES
IG A	The application process will provide a pre-defined roadmap for applicants that encourages the submission of applications for new top-level domains.	CV 2, 5, 6, 8 & 9
IG B	Application fees will be designed to ensure that adequate resources exist to cover the total cost to administer the new gTLD process.  Application fees may differ for applicants.	CV 5, 6, 8 & 9
IG C	ICANN will provide frequent communications with applicants and the public including comment forums.	CV 9 & 10
IG D	A first come first served processing schedule within the application round will be implemented and will continue for an ongoing process, if necessary.  Applications will be time and date stamped on receipt.	CV 8-10
IG E	The application submission date will be at least four months after the issue of the Request for Proposal and ICANN will promote the opening of the application round.	CV 9 & 10
IG F*	<b>If there is contention for strings, applicants may[29]</b>  <b>i) resolve contention between them within a pre-established timeframe</b>  <b>ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and</b>  <b>iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.</b>	CV 7-10
IG H*	Where an applicant lays any claim that the TLD is intended to support a particular community such as a sponsored TLD, or any other TLD intended for a specified community, that claim will be taken on trust with the following exceptions:  (i) the claim relates to a string that is also subject to another application and the claim to support a community is being used to gain priority for the application; and  (ii) a formal objection process is initiated.	CV 7 - 10

	Under these exceptions, Staff Evaluators will devise criteria and procedures to investigate the claim. Under exception (ii), an expert panel will apply the process, guidelines, and definitions set forth in IG P.	
IG H	External dispute providers will give decisions on objections.	CV 10
IG I	An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process.	CV 10
IG J	The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing market place.	CV 4-10
IG K	ICANN should take a consistent approach to the establishment of registry fees.	CV 5
IG L	The use of personal data must be limited to the purpose for which it is collected.	CV 8
IG M	ICANN may establish a capacity building and support mechanism aiming at facilitating effective communication on important and technical Internet governance functions in a way that no longer requires all participants in the conversation to be able to read and write English[30].	CV 3 - 7
IG N	ICANN may put in place a fee reduction scheme for gTLD applicants from economies classified by the UN as least developed.	CV 3 - 7
IG O	ICANN may put in place systems that could provide information about the gTLD process in major languages other than English, for example, in the six working languages of the United Nations.	CV 8 -10
IG P*	<p>The following process, definitions and guidelines refer to Recommendation 20.</p> <p><b>Process</b></p> <p>Opposition must be objection based.</p> <p>Determination will be made by a dispute resolution panel constituted for the purpose.</p> <p>The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).</p> <p><b>Guidelines</b></p> <p>The task of the panel is the determination of substantial opposition.</p> <p>a) <b>substantial</b> – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment</p> <p>b) <b>significant portion</b> – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.</p> <p>c) <b>community</b> – community 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.</p> <p>d) <b>explicitly targeting</b> – explicitly targeting means there is a description of the intended use of the TLD in the application.</p> <p>e) <b>implicitly targeting</b> – implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.</p> <p>f) <b>established institution</b> – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.</p> <p>Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.</p> <p>The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.</p> <p>g) <b>formal existence</b> – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.</p> <p>h) <b>detriment</b> – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.</p>	
IG Q	ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.	
IG R	Once formal objections or disputes are accepted for review there will be a cooling off period to allow parties to resolve the dispute or objection before review by the panel is initiated.	

\* The NCUC submitted Minority Statements on Implementation Guidelines F, H & P. The remainder of the Implementation Guidelines have support from all GNSO Constituencies.

1. This set of implementation guidelines is the result of detailed discussion, particularly with respect to the two *ICANN Staff Discussion Points*[31] documents that were prepared to facilitate consultation with the GNSO Committee about the implementation impacts of the proposed policy Recommendations. The Implementation Guidelines will be used to inform the final Implementation Plan which is approved by the ICANN Board

2. The *Discussion Points* documents contain draft flowcharts which have been developed by the Implementation Team and which will be updated, based on the final vote of the GNSO Council and the direction of the ICANN Board. The *Discussion Points* documents have been used in the ongoing internal implementation discussions that have focused on ensuring that draft recommendations proposed by the Committee are implementable in an efficient and transparent manner[32]. The flowchart setting out the proposed Contention Evaluation Process is a more detailed component within the Application Evaluation Process and will be amended to take into account the inputs from Recommendation 20 and its related Implementation Guidelines.

3. This policy development process has been designed to produce a systemised and ongoing mechanism for applicants to propose new top-level domains. The Request for

Proposals (RFP) for the first round will include scheduling information for the subsequent rounds to occur within one year. After the first round of new applications, the application system will be evaluated by ICANN's TLDs Project Office to assess the effectiveness of the application system. Success metrics will be developed and any necessary adjustments made to the process for subsequent rounds.

4. The following sections set out in detail the explanation for the Committee's recommendations for each Term of Reference.

#### TERM OF REFERENCE ONE -- WHETHER TO INTRODUCE NEW TOP-LEVEL DOMAINS

##### 1. Recommendation 1 Discussion -- All GNSO Constituencies supported the introduction of new top-level domains.

2. The GNSO Committee was asked to address the question of whether to introduce new top-level domains. The Committee recommends that ICANN should implement a process that allows the introduction of new top level domains and that work should proceed to develop policies that will enable the introduction of new generic top-level domains, taking into account the recommendations found in the latter sections of the *Report* concerning Selection Criteria (Term of Reference 2), Allocation Methods (Term of Reference 3) and Policies for Contractual Conditions (Term of Reference 4).
3. ICANN's work on the introduction of new top-level domains has been ongoing since 1999. The early work included the 2000 Working Group C Report[33] that also asked the question of "whether there should be new TLDs". By mid-1999, the Working Group had quickly reached consensus on two issues, namely that "...ICANN should add new gTLDs to the root. The second is that ICANN should begin the deployment of new gTLDs with an initial rollout of six to ten new gTLDs, followed by an evaluation period". This work was undertaken throughout 2000 and saw the introduction of, for example, .coop, .aero and .biz.
4. After an evaluation period, a further round of sponsored TLDs was introduced during 2003 and 2004 which included, amongst others, .mobi and .travel.
5. In addressing Term of Reference One, the Committee arrived at its recommendation by reviewing and analysing a wide variety of materials including Working Group C's findings; the evaluation reports from the 2003-2004 round of sponsored top-level domains and full range of other historic materials which are posted at <http://gns0.icann.org/issues/new-gtlds/>
6. In addition, the Committee considered the responses to a Call for Expert Papers issued at the beginning of the policy development process[34]. These papers augmented a full set of GNSO Constituency Statements[35] and a set of Constituency Impact Statements[36] that addressed specific elements of the Principles, Recommendations and Implementation Guidelines.
7. The Committee was asked, at its February 2007 Los Angeles meeting, to confirm its rationale for recommending that ICANN introduce new top-level domains. In summary, there are five threads which have emerged:
  - (i) It is consistent with the reasons articulated in 1999 when the first proof-of-concept round was initiated
  - (ii) There are no technical impediments to the introduction of new top-level domains as evidenced by the two previous rounds
  - (iii) It is hoped that expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the Internet. In addition, users will be able to use domain names in their language of choice.
  - (iv) In addition, the introduction of a new top-level domain application process has the potential to promote competition in the provision of registry services, and to add to consumer choice, market differentiation and geographic and service-provider diversity which is consistent with ICANN's Core Value 6.
  - (v) No compelling reason has been articulated to not proceed with accepting applications for new top-level domains.
8. Article X, Part 7, Section E of the GNSO's Policy Development Process requires the submission of "constituency impact statements" which reflect the potential implementation impact of policy recommendations. By 4 July 2007 all GNSO Constituencies had submitted Constituency Impact Statements (CIS) to the gTLD-council mailing list[37]. Each of those statements is referred to throughout the next sections[38] and are found in full in Part B of the *Report*. The NCUC submitted Minority Statements on Recommendations 6 & 20 and on Implementation Guidelines F, H & P. These statements are found in full here in Annex A & C, respectively, as they relate specifically to the finalised text of those two recommendations. GNSO Committee Chair and Nominating Committee appointee Ms Avri Doria also submitted individual comments on the recommendation package. Her comments are found in Annex B here.
9. All Constituencies support the introduction of new TLDs particularly if the application process is transparent and objective. For example, the ISPCP said that, "...the ISPCP is highly supportive of the principles defined in this section, especially with regards to the statement in [principle A] (A): New generic top-level domains must be introduced in an orderly, timely and predictable way. Network operators and ISPs must ensure their customers do not encounter problems in addressing their emails, and in their web searching and access activities, since this can cause customer dissatisfaction and overload help-desk complaints. Hence this principle is a vital component of any addition sequence to the gTLD namespace. The various criteria as defined in D, E and F, are also of great importance in contributing to minimise the risk of moving forward with any new gTLDs, and our constituency urges ICANN to ensure they are scrupulously observed during the applications evaluation process". The Business Constituency's (BC) CIS said that "...if the outcome is the best possible there will be a beneficial impact on business users from: a reduction in the competitive concentration in the Registry sector; increased choice of domain names; lower fees for registration and ownership; increased opportunities for innovative on-line business models." The Registrar Constituency (RC) agreed with this view stating that "...new gTLDs present an opportunity to Registrars in the form of additional products and associated services to offer to its customers. However, that opportunity comes with the costs if implementing the new gTLDs as well as the efforts required to do the appropriate business analysis to determine which of the new gTLDs are appropriate for its particular business model."
10. The Registry Constituency (RyC) said that "...Regarding increased competition, the RyC has consistently supported the introduction of new gTLDs because we believe that: there is a clear demand for new TLDs; competition creates more choices for potential registrants; introducing new TLDs with different purposes increases the public benefit; new gTLDs will result in creativity and differentiation in the domain name industry; the total market for all TLDs, new and old, will be expanded." In summary, the Committee recommended, "ICANN must implement a process that allows the introduction of new top-level domains. The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process". Given that this recommendation has support from all Constituencies, the following sections set out the other Terms of Reference recommendations.

#### TERM OF REFERENCE -- SELECTION CRITERIA

##### 1. Recommendation 2 Discussion -- Strings must not be confusingly similar to an existing top-level domain.

- i) This recommendation has support from all the GNSO Constituencies. Ms Doria accepted the recommendation with the concern expressed below[39].
- ii) The list of existing top-level domains is maintained by IANA and is listed in full on ICANN's website[40]. Naturally, as the application process enables the operation of new top-level domains this list will get much longer and the test more complex. The RyC, in its Impact Statement, said that "...This recommendation is especially important to the RyC. ... It is of prime concern for the RyC that the introduction of new gTLDs results in a ubiquitous experience for Internet users that minimizes user confusion. gTLD registries will be impacted operationally and financially if new gTLDs are introduced that create confusion with currently existing gTLD strings or with strings that are introduced in the future. There is a strong possibility of significant impact on gTLD registries if IDN versions of existing ASCII gTLDs are introduced by registries different than the ASCII gTLD registries. Not only could there be user confusion in both email and web applications, but dispute resolution processes could be greatly complicated." The ISPCP also stated that this recommendation was "especially important in the avoidance of any negative impact on network activities." The RC stated that "...Registrars would likely be hesitant to offer confusingly similar gTLDs due to customer demand and support concerns. On the other hand, applying the concept too broadly would inhibit gTLD applicants and ultimately limit choice to Registrars and their customers".

- iii) There are two other key concepts within this recommendation. The first is the issue of "confusingly similar" [41] and the second "likelihood of confusion". There is extensive experience within the Committee with respect to trademark law and the issues found below have been discussed at length, both within the Committee and amongst the Implementation Team.
- iv) The Committee used a wide variety of existing law[42], international treaty agreements and covenants to arrive at a common understanding that strings should not be confusingly similar either to existing top-level domains like .com and .net or to existing trademarks[43]. For example, the Committee considered the World Trade Organisation's TRIPS agreement, in particular Article 16 which discusses the rights which are conferred to a trademark owner [44]. In particular, the Committee agreed upon an expectation that strings must avoid increasing opportunities for entities or individuals, who operate in bad faith and who wish to defraud consumers. The Committee also considered the Universal Declaration of Human Rights[45] and the International Covenant on Civil and Political Rights which address the "freedom of expression" element of the Committee's deliberations.
- v) The Committee also benefited from the work of the Protecting the Rights of Others Working Group (PRO-WG). The PRO-WG presented its *Final Report*[46] to the Committee at the June 2007 San Juan meeting. The Committee agreed that the Working Group could develop some reference implementation guidelines on rights protection mechanisms that may inform potential new TLD applicants during the application process. A small ad-hoc group of interested volunteers are preparing those materials for consideration by the Council by mid-October 2007.
- vi) The Committee had access to a wide range of differing approaches to rights holder protection mechanisms including the United Kingdom, the USA, Jordan, Egypt and Australia[47].
- vii) In addition, the Committee referred to the 1883 *Paris Convention on the Protection of Industrial Property*[48]. It describes the notion of confusion and describes creating confusion as "to create confusion by any means whatever" {Article 10bis (3) (1) and, further, being "liable to mislead the public" {Article 10bis (3) (3)}. The treatment of confusingly similar is also contained in European Union law (currently covering twenty-seven countries) and is structured as follows. "...because of its identity with or similarity to...there exists a likelihood of confusion on the part of the public...; the likelihood of confusion includes the likelihood of association..." {Article 4 (1) (b) of the 1988 EU Trade Mark directive 89/104/EEC}. Article 8 (1) (b) of the 1993 European Union Trade Mark regulation 40/94 is also relevant.
- viii) In the United States, existing trade mark law requires applicants for trademark registration to state under penalty of perjury that "...to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person, to cause confusion, or to cause mistake, or to deceive..." which is contained in Section 1051 (3) (d) of the US Trademark Act 2005 (found at <http://www.bitlaw.com/source/15usc/1051.html>).[49]
- ix) In Australia, the Australian Trade Marks Act 1995 Section 10 says that "...For the purposes of this Act, a trade mark is taken to be deceptively similar to another trade mark if it so nearly resembles that other trade mark that it is likely to deceive or cause confusion" (found at [http://www.ipaustralia.gov.au/resources/legislation\\_index.shtml](http://www.ipaustralia.gov.au/resources/legislation_index.shtml))
- x) A number of different trademark offices provide guidance on how to interpret confusion. For example, the European Union Trade Mark Office provides guidance on how to interpret confusion. "...confusion may be visual, phonetic or conceptual. A mere aural similarity may create a likelihood of confusion. A mere visual similarity may create a likelihood of confusion. Confusion is based on the fact that the relevant public does not tend to analyse a word in detail but pays more attention to the distinctive and dominant components. Similarities are more significant than dissimilarities. The visual comparison is based on an analysis of the number and sequence of the letters, the number of words and the structure of the signs. Further particularities may be of relevance, such as the existence of special letters or accents that may be perceived as an indication of a specific language. For words, the visual comparison coincides with the phonetic comparison unless in the relevant language the word is not pronounced as it is written. It should be assumed that the relevant public is either unfamiliar with that foreign language, or even if it understands the meaning in that foreign language, will still tend to pronounce it in accordance with the phonetic rules of their native language. The length of a name may influence the effect of differences. The shorter a name, the more easily the public is able to perceive all its single elements. Thus, small differences may frequently lead in short words to a different overall impression. In contrast, the public is less aware of differences between long names. The overall phonetic impression is particularly influenced by the number and sequence of syllables." (found at <http://oami.europa.eu/en/mark/marque/direc.htm>).
- xi) An extract from the United Kingdom's Trade Mark Office's Examiner's Guidance Manual is useful in explaining further the Committee's approach to developing its Recommendation. "*For likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average consumer. Likelihood of association is not an alternative to likelihood of confusion, "but serves to define its scope". Mere association, in the sense that the later mark brings the earlier mark to mind is insufficient to find a likelihood of confusion, unless the average consumer, in bringing the earlier mark to mind, is led to expect the goods or services of both marks to be under the control of one single trade source. "The risk that the public might believe that the goods/services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion..."*" (found at <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>)
- xii) The Committee also looked in detail at the existing provisions of ICANN's Registrar Accreditation Agreement, particularly Section 3.7.7 9[50] which says that "...The Registered Name Holder shall represent that, to the best of the Registered Name Holder's knowledge and belief, neither the registration of the Registered Name nor the manner in which it is directly or indirectly used infringes the legal rights of any third party."
- xiii) The implications of the introduction of Internationalised Domain Names (IDNs) are, in the main, the same as for ASCII top-level domains. On 22 March 2007 the DN-WG released its *Outcomes Report*[51] that the Working Group presented to the GNSO Committee. The Working Group's exploration of DN-specific issues confirmed that the new TLD recommendations are valid for IDN TLDs. The full IDN WG Report is found in Part B of the *Report*.
- xiv) The technical testing for IDNs at the top-level is not yet completed although strong progress is being made. Given this and the other work that is taking place around the introduction of IDNs at the top-level, there are some critical factors that may impede the immediate acceptance of new DN TLD applications. The conditions under which those applications would be assessed would remain the same as for ASCII TLDs.
- xv) Detailed work continues on the preparation of an Implementation Plan that reflects both the Principles and the Recommendations. The proposed Implementation Plan deals with a comprehensive range of potentially controversial (for whatever reason) string applications which balances the need for reasonable protection of existing legal rights and the capacity to innovate with new uses for top level domains that may be attractive to a wide range of users[52].
- xvi) The draft Implementation Plan (included in the *Discussion Points* document), illustrates the flow of the application and evaluation process and includes a detailed dispute resolution and extended evaluation tracks designed to resolve objections to applicants or applications.
- xvii) There is tension between those on the Committee who are concerned about the protection of existing TLD strings and those concerned with the protection of trademark and other rights as compared to those who wish, as far as possible, to preserve freedom of expression and creativity. The *Implementation Plan* sets out a series of tests to apply the recommendation during the application evaluation process.
- 2. Recommendation 3 Discussion -- Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).**
- i. This recommendation has support from all GNSO Constituencies. Ms Doria supported the recommendation with concern expressed below[53].
- ii. This recommendation was discussed in detail in the lead up to the Committee's 7 June 2007 conference call and it was agreed that further work would be beneficial. That work was conducted through a series of teleconferences and email exchanges. The Committee decided to leave the recommendation text as it had been drafted and insert a new Principle G that reads "...The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."
- iii. Prior to this, the Committee engaged in comprehensive discussion about this recommendation and took advice from a number of experts within the group[54]. The original

text of the recommendation has been modified to recognise that an applicant would be bound by the laws of the country where they are located and an applicant may be bound by another country that has jurisdiction over them. In addition, the original formulation that included "freedom of speech" was modified to read the more generally applicable "freedom of expression".

- iv. Before reaching agreement on the final text, the IPC and the NCUC, in their respective Constituency Impact Statements (CIS), had differing views. The NCUC argued that "...there is no recognition that trade marks (and other legal rights have legal limits and *defenses*." The IPC says "agreed [to the recommendation], and, as stated before, appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the IP rights of others."

### 3. Recommendation 4 Discussion -- Strings must not cause any technical instability.

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. It was agreed by the Committee that the string should not cause any technical issues that threatened the stability and security of the Internet.
- iii. In its CIS, the ISPCP stated that "...this is especially important in the avoidance of any negative impact on network activities...The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organizational and operational capability of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The IPC also agreed that "technical and operational stability are imperative to any new gTLD introduction." The RC said "...This is important to Registrars in that unstable registry and/or zone operations would have a serious and costly impact on its operations and customer service and support."
- iv. The Security and Stability Advisory Committee (SSAC) has been involved in general discussions about new top level domains and will be consulted formally to confirm that the implementation of the recommendations will not cause any technical instability.
- v. A reserved word list, which includes strings which are reserved for technical reasons, has been recommended by the RN-WG. This table is found in the section below.

### 4. Recommendation 5 Discussion -- Strings must not be a Reserved Word.[55]

- i. This recommendation is supported by all GNSO Constituencies. Ms Doria supported the recommendation but expressed some concerns outlined in the footnote below.[56]
- ii. The RN WG developed a definition of "reserved word" in the context of new TLDs which said "...depending on the specific reserved name category as well as the type (ASCII or IDN), the reserved name requirements recommended may apply in any one or more of the following levels as indicated:
1. At the top level regarding gTLD string restrictions
  2. At the second-level as contractual conditions
  3. At the third-level as contractual conditions for any new gTLDs that offer domain name registrations at the third-level.
- iii. The notion of "reserved words" has a specific meaning within the ICANN context. Each of the existing ICANN registry contracts has provisions within it that govern the use of reserved words. Some of these recommendations will become part of the contractual conditions for new registry operators.
- iv. The Reserved Names Working Group (RN-WG) developed a series of recommendations across a broad spectrum of reserved words. The Working Group's *Final Report*[57] was reviewed and the recommendations updated by the Committee at ICANN's Puerto Rico meeting and, with respect to the recommendations relating to DNs, with IDN experts. The final recommendations are included in the following table.



	Reserved Name Category	Domain Name Level(s)	Recommendation
1	ICANN & IANA	All ASCII	The names listed as ICANN and IANA names will be reserved at all levels.
2	ICANN & IANA	Top level, IDN	Any names that appear in the IDN evaluation facility[58] which consist exclusively of translations of 'example' or 'test' that appear in the document at <a href="http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf">http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf</a> shall be reserved.
3	ICANN & IANA	2 <sup>nd</sup> & 3 <sup>rd</sup> levels, IDN	Any names that appear in the IDN evaluation facility which consist exclusively of translations of 'example' or 'test' that appear in the document at <a href="http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf">http://www.icann.org/topics/idn/idn-evaluation-plan-v2%209.pdf</a> shall be reserved.
4	Symbols	All	We recommend that the current practice be maintained, so that no symbols other than the '-' [hyphen] be considered for use, with further allowance for any equivalent marks that may explicitly be made available in future revisions of the IDNA protocol.
5	Single and Two Character IDNs	DNA-valid strings at all levels	Single and two-character U-labels on the top level and second level of a domain name should not be restricted in general. At the top level, requested strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be granted for allocation in the DNS with particular caution applied to U-labels in Latin script (see Recommendation 10 below). Single and two character labels at the second level and the third level if applicable should be available for registration, provided they are consistent with the IDN Guidelines.
6	Single Letters	Top Level	We recommend reservation of single letters at the top level based on technical questions raised. If sufficient research at a later date demonstrates that the technical issues and concerns are addressed, the topic of releasing reservation status can be reconsidered.
7	Single Letters and Digits	2 <sup>nd</sup> Level	In future gTLDs we recommend that single letters and single digits be available at the second (and third level if applicable).
8	Single and Two Digits	Top Level	A top-level label must not be a plausible component of an IPv4 or IPv6 address. (e.g., .3, 99, .123, .1035, .0xAF, .1578234)
9	Single Letter, Single Digit Combinations	Top Level	Applications may be considered for single letter, single digit combinations at the top level in accordance with the terms set forth in the new gTLD process.  Examples include .3F, A1, .u7.
10	Two Letters	Top Level	We recommend that the current practice of allowing two letter names at the top level, only for ccTLDs, remains at this time [59]  Examples include .AU, DE, .UK.
11	Any combination of Two Letters, Digits	2 <sup>nd</sup> Level	Registries may propose release provided that measures to avoid confusion with any corresponding country codes are implemented [60] Examples include ba.aero, ub.cat, 53.com, 3M.com, e8.org.
12	Tagged Names	Top Level ASCII	In the absence of standardization activity and appropriate IANA registration, all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved at the top-level.[61]
13	N/A	Top Level IDN	For each IDN gTLD proposed, applicant must provide both the "ASCII compatible encoding" ("A-label") and the "Unicode display form" ("U-label")[62] For example:  <ul style="list-style-type: none"> <li>• If the Chinese word for 'Beijing' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1q90i) and the U-label (北京).</li> <li>• If the Japanese word for 'Tokyo' is proposed as a new gTLD, the applicant would be required to provide the A-label (xn--1qs71d) and the U-label (東京).</li> </ul>
14	Tagged Names	2 <sup>nd</sup> Level ASCII	The current reservation requirement be reworded to say, " <i>In the absence of standardization activity and appropriate IANA registration</i> , all labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the second (2 <sup>nd</sup> ) level.[63] – added words in <i>italics</i> . (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
15	Tagged Names	3 <sup>rd</sup> Level ASCII	All labels with hyphens in both the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n") must be reserved in ASCII at the third (3 <sup>rd</sup> ) level) for gTLD registries that register names at the third level.[64] – added words in <i>italics</i> . (Note that names starting with "xn--" may only be used if the current ICANN IDN Guidelines are followed by a gTLD registry.)
16	NIC, WHOIS, WWW	Top ASCII	The following names must be reserved: nic, whois, www.
17	NIC, WHOIS, WWW	Top IDN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist.
18	NIC, WHOIS, WWW	Second and Third* ASCII	The following names must be reserved for use in connection with the operation of the registry for the Registry TLD: nic, whois, www Registry Operator may use them, but upon conclusion of Registry Operator's designation as operator of the registry for the Registry TLD, they shall be transferred as specified by ICANN. (*Third level only applies in cases where a registry offers registrations at the third level.)
19	NIC, WHOIS, WWW	Second and Third* DN	Do not try to translate nic, whois and www into Unicode versions for various scripts or to reserve any ACE versions of such translations or transliterations if they exist, except on a case by case basis as proposed by given registries. (*Third level only applies in cases where a registry offers

	Reserved Name Category	Domain Name Level(s)	Recommendation
			registrations at the third level.)
20	Geographic and geopolitical	Top Level ASCII and DN	<p>There should be no geographical reserved names (i.e., no exclusionary list, no presumptive right of registration, no separate administrative procedure, etc.). The proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge, therefore no additional protection mechanisms are needed. Potential applicants for a new TLD need to represent that the use of the proposed string is not in violation of the national laws in which the applicant is incorporated.</p> <p>However, new TLD applicants interested in applying for a TLD that incorporates a country, territory, or place name should be advised of the GAC Principles, and the advisory role vested to it under the ICANN Bylaws. Additionally, a summary overview of the obstacles encountered by previous applicants involving similar TLDs should be provided to allow an applicant to make an informed decision. Potential applicants should also be advised that the failure of the GAC, or an individual GAC member, to file a challenge during the TLD application process, does not constitute a waiver of the authority vested to the GAC under the ICANN Bylaws.</p> <p><i>Note New gTLD Recommendation 20</i></p>
21	Geographic and geopolitical	All Levels ASCII and DN	<p>The term 'geopolitical names' should be avoided until such time that a useful definition can be adopted. The basis for this recommendation is founded on the potential ambiguity regarding the definition of the term, and the lack of any specific definition of it in the WIPO Second Report on Domain Names or GAC recommendations.</p> <p><i>Note New gTLD Recommendation 20</i></p>
22	Geographic and geopolitical	Second Level & Third Level if applicable, ASCII & IDN	<p>The consensus view of the working group is given the lack of any established international law on the subject, conflicting legal opinions, and conflicting recommendations emerging from various governmental fora, the current geographical reservation provision contained in the sTLD contracts during the 2004 Round should be removed, and harmonized with the more recently executed .COM, .NET, .ORG, .BIZ and .INFO registry contracts. The only exception to this consensus recommendation is those registries incorporated/organized under countries that require additional protection for geographical identifiers. In this instance, the registry would have to incorporate appropriate mechanisms to comply with their national/local laws.</p> <p>For those registries incorporated/organized under the laws of those countries that have expressly supported the guidelines of the WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications as adopted by the WIPO General Assembly, it is strongly recommended (but not mandated) that these registries take appropriate action to promptly implement protections that are in line with these WIPO guidelines and are in accordance with the relevant national laws of the applicable Member State.</p> <p><i>Note New gTLD Recommendation 20</i></p>
23	gTLD Reserved Names	Second & Third Level ASCII and DN (when applicable)	<p>Absent justification for user confusion<sup>[65]</sup>, the recommendation is that gTLD strings should no longer be reserved from registration for new gTLDs at the second or when applicable at the third level. Applicants for new gTLDs should take into consideration possible abusive or confusing uses of existing gTLD strings at the second level of their corresponding gTLD, based on the nature of their gTLD, when developing the startup process for their gTLD.</p>
24	Controversial Names	All Levels, ASCII & DN	<p>There should not be a new reserved names category for Controversial Names.</p>
25	Controversial Names	Top Level, ASCII & DN	<p>There should be a list of disputed names created as a result of the dispute process to be created by the new gTLD process.</p> <p><i>Note New gTLD Recommendation 6</i></p>
26	Controversial Names	Top Level, ASCII & DN	<p>In the event of the initiation of a CN-DRP process, applications for that label will be placed in a HOLD status that would allow for the dispute to be further examined. If the dispute is dismissed or otherwise resolved favorably, the applications will reenter the processing queue. The period of time allowed for dispute should be finite and should be relegated to the CN-DRP process. The external dispute process should be defined to be objective, neutral, and transparent. The outcome of any dispute shall not result in the development of new categories of Reserved Names.<sup>[66]</sup></p> <p><i>Note New gTLD Recommendation 6</i></p>
27	Controversial Names	Top Level, ASCII & DN	<p>The new GTLD Controversial Names Dispute Resolution Panel should be established as a standing mechanism that is convened at the time a dispute is initiated. Preliminary elements of that process are provided in this report but further work is needed in this area.</p> <p><i>Note New gTLD Recommendation 6</i></p>
28	Controversial Names	Top Level, ASCII & DN	<p>Within the dispute process, disputes would be initiated by the ICANN Advisory Committees (e.g., ALAC or GAC) or supporting organizations (e.g., GNSO or ccNSO). As these organizations do not currently have formal processes for receiving, and deciding on such activities, these processes would need to be defined:</p> <ul style="list-style-type: none"> <li>o The Advisory Groups and the Supporting Organizations, using their own processes and consistent with their organizational structure, will need to define procedures for deciding on any requests for dispute initiation.</li> <li>o Any consensus or other formally supported position from an ICANN Advisory Committee or ICANN Supporting Organization must document the position of each member within that committee or organization (i.e., support, opposition, abstention) in compliance with both the spirit and letter of the ICANN bylaws regarding openness and transparency.</li> </ul>

	Reserved Name Category	Domain Name Level(s)	Recommendation
			<i>Note New gTLD Recommendation 6</i>
29	Controversial Names	Top Level, ASCII & DN	Further work is needed to develop predictable and transparent criteria that can be used by the Controversial Resolution Panel. These criteria must take into account the need to: <ul style="list-style-type: none"> <li>§ Protect freedom of expression</li> <li>§ Affirm the fundamental human rights, in the dignity and worth of the human person and the equal rights of men and women</li> <li>§ Take into account sensitivities regarding terms with cultural and religious significance.</li> </ul> <i>Note New gTLD Recommendation 6</i>
30	Controversial Names	Top Level, ASCII & DN	In any dispute resolution process, or sequence of issue resolution processes, the Controversial name category should be the last category considered. <p><i>Note New gTLD Recommendation 6</i></p>

v. With respect to geographic terms, the NCUC's CIS stated that "...We oppose any attempts to create lists of reserved names. Even examples are to be avoided as they can only become prescriptive. We are concerned that geographic names should not be fenced off from the commons of language and rather should be free for the use of all...Moreover, the proposed recommendation does not make allowance for the duplication of geographic names outside the ccTLDs – where the real issues arise and the means of resolving competing use and fair and nominative use."

vi. The GAC's Public Policy Principle 2.2 states that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities."

vii. The Implementation Team has developed some suggestions about how this recommendation may be implemented. Those suggestions and the process flow were incorporated into the Version 2 of the ICANN Staff *Discussion Points* document for consideration by the Committee.

**5. Recommendation 6 Discussion -- Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.**

**Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention of the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).**

- i. This Recommendation is supported by all GNSO Constituencies except the NCUC. The NCUC has submitted a Minority Statement which is found in full in Annex A. The NCUC's earlier Constituency Impact Statement is found, along with all the GNSO Constituency Impact Statements, in Part B of this report. Ms Doria has submitted individual comments[67]. The Committee has discussed this recommendation in great detail and has attempted to address the experiences of the 2003-2004 sTLD round and the complex issues surrounding the .xxx application. The Committee has also recognised the GAC's Public Policy Principles, most notably Principle 2.1 a) and b) which refer to both freedom of expression and terms with significance in a variety of contexts. In addition, the Committee recognises the tension respecting freedom of expression and being sensitive to the legitimate concerns others have about offensive terms. The NCUC's earlier CIS says "...we oppose any string criteria based on morality and public order".
- ii. Other Constituencies did not address this recommendation in their CISs. The Implementation Team has tried to balance these views by establishing an Implementation Plan that recognises the practical effect of opening a new top-level domain application system that will attract applications that some members of the community do not agree with. Whilst ICANN does have a technical co-ordination remit, it must also put in place a system of handling objections to strings or to applicants, using pre-published criteria, that is fair and predictable for applicants. It is also necessary to develop guidance for independent evaluators tasked with making decisions about objections.
- iii. In its consideration of public policy aspects of new top-level domains the Committee examined the approach taken in a wide variety of jurisdictions to issues of morality and public order. This was done not to make decisions about acceptable strings but to provide a series of potential tests for independent evaluators to use should an objection be raised to an application. The use of the phrase "morality and public order" within the recommendation was done to set some guidelines for potential applicants about areas that may raise objections. The phrasing was also intended to set parameters for potential objectors so that any objection to an application could be analysed within the framework of broadly accepted legal norms that independent evaluators could use across a broad spectrum of possible objections. The Committee also sought to ensure that the objections process would have parameters set for who could object. Those suggested parameters are found within the Implementation Guidelines.
- iv. In reaching its decision about the recommendation, the Committee sought to be consistent with, for example, Article 3 (1) (f) of the 1988 European Union Trade Mark Directive 89/104/EEC and within Article 7 (1) (f) of the 1993 European Union Trade Mark Regulation 40/94. In addition, the phrasing "contrary to morality or public order and in particular of such a nature as to deceive the public" comes from Article 6quinques (B)(3) of the 1883 *Paris Convention*. The reference to the *Paris Convention* remains relevant to domain names even though, when it was drafted, domain names were completely unheard of.
- v. The concept of "morality" is captured in Article 19 United Nations Convention on Human Rights (<http://www.unhcr.ch/udhr/lang/eng.htm>) says "... Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 29 continues by saying that "...In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".
- vi. The EU Trade Mark Office's Examiner's guidelines provides assistance on how to interpret morality and deceit. "...Contrary to morality or public order. Words or images which are offensive, such as swear words or racially derogatory images, or which are blasphemous are not acceptable. There is a dividing line between this and words which might be considered in poor taste. The latter do not offend against this provision." The further element is deception of the public which is treated in the following way. "...Deceive the public. To deceive the public, is for instance as to the nature, quality or geographical origin. For example, a word may give rise to a real expectation of a particular locality which is untrue." For more information, see Sections 8.7 and 8.8 at <http://oami.europa.eu/en/mark/marque/direc.htm>
- vii. The UK Trade Mark office provides similar guidance in its Examiner's Guidance Manual. "Marks which offend fall broadly into three types: those with criminal connotations, those with religious connotations and explicit/taboo signs. Marks offending public policy are likely to offend accepted principles of morality, e.g. illegal drug terminology, although the question of public policy may not arise against marks offending accepted principles of morality, for example, taboo swear words. If a mark is merely distasteful, an objection is unlikely to be justified, whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values, then an objection will be appropriate. Offence may be caused on matters of race, sex, religious belief or general matters of taste and decency. Care should be taken when words have a religious significance and which may provoke greater offence than mere distaste, or even outrage, if used to parody a religion or its values. Where a sign has a very sacred status to members of a religion, mere use may be enough to cause outrage." For more information, see <http://www.patent.gov.uk/tm/t-decisionmaking/t-law/t-law-manual.htm>
- viii. This recommendation has been the subject of detailed Committee and small group work in an attempt to reach consensus about both the text of the recommendation and the examples included as guidance about generally accepted legal norms. The work has been informed by detailed discussion within the GAC and through

interactions between the GNSO Committee and the GAC.

**6. Recommendation 7 Discussion -- Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. The Committee agreed that the technical requirements for applicants would include compliance with a minimum set of technical standards and that this requirement would be part of the new registry operator's contractual conditions included in the proposed base contract. The more detailed discussion about technical requirements has been moved to the contractual conditions section.
- iii. Reference was made to numerous Requests for Comment (RFCs) and other technical standards which apply to existing registry operators. For example, Appendix 7 of the June 2005 net agreement<sup>[68]</sup> provides a comprehensive listing of technical requirements in addition to other technical specifications in other parts of the agreement. These requirements are consistent with that which is expected of all current registry operators. These standards would form the basis of any new top-level domain operator requirements.
- iv. This recommendation is referred to in two CISs. "The ISPCP considers recommendations 7 and 8 to be fundamental. The technical, financial, organisational and operational capabilities of the applicant are the evaluators' instruments for preventing potential negative impact on a new string on the activities of our sector (and indeed of many other sectors)." The NCUC submitted "...we record that this must be limited to transparent, predictable and minimum technical requirements only. These must be published. They must then be adhered to neutrally, fairly and without discrimination."
- v. The GAC supported this direction in its Public Policy Principles 2.6, 2.10 and 2.11.

**7. Recommendation 8 Discussion -- Applicants must be able to demonstrate their financial and organisational operational capability.**

- i. This recommendation is supported by all GNSO Constituencies and accepted with concern by Ms Doria<sup>[69]</sup>.
- ii. The Committee discussed this requirement in detail and determined that it was reasonable to request this information from potential applicants. It was also consistent with past practices including the prior new TLD rounds in 2000 and 2003-2004; the .net and .org rebids and the conditions associated with ICANN registrar accreditation.
- iii. This is also consistent with best practice procurement guidelines recommended by the World Bank ([www.worldbank.org](http://www.worldbank.org)), the OECD ([www.oecd.org](http://www.oecd.org)) and the Asian Development Bank ([www.adb.org](http://www.adb.org)) as well as a range of federal procurement agencies such as the UK telecommunications regulator, Ofcom; the US Federal Communications Commission and major public companies.
- iv. The challenging aspect of this recommendation is to develop robust and objective criteria against which applicants can be measured, recognising a vast array of business conditions and models. This will be an important element of the ongoing development of the Implementation Plan.
- v. The ISPCP discussed the importance of this recommendation in its CIS, as found in Recommendation 7 above.
- vi. The NCUC's CIS addressed this recommendation by saying "...we support this recommendation to the extent that the criteria is truly limited to minimum financial and organizational operational capability...All criteria must be transparent, predictable and minimum. They must be published. They must then be adhered to neutrally, fairly and without discrimination."
- vii. The GAC echoed these views in its Public Policy Principle 2.5 that said "...the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."

**8. Recommendation 9 Discussion -- There must be a clear and pre-published process using objective and measurable criteria.**

- i. This recommendation is supported by all GNSO Constituencies and by Ms Doria. It is consistent with ICANN's previous TLD rounds in 2000 and 2003-2004 and with its re-bid of both the .net and .org registry contracts.
- ii. It is also consistent with ICANN's Mission and Core Values especially 7, 8 and 9 which address openness in decision-making processes and the timeliness of those processes.
- iii. The Committee decided that the "process" criteria for introducing new top-level domains would follow a pre-published application system including the levying of an application fee to recover the costs of the application process. This is consistent with ICANN's approach to the introduction of new TLDs in the previous 2000 and 2004 round for new top-level domains.
- iv. The RyC reiterated its support for this recommendation in its CIS. It said that "...this Recommendation is of major importance to the RyC because the majority of constituency members incurred unnecessarily high costs in previous rounds of new gTLD introductions as a result of excessively long time periods from application submittal until they were able to start their business. We believe that a significant part of the delays were related to selection criteria and processes that were too subjective and not very measurable. It is critical in our opinion that the process for the introduction of new gTLDs be predictable in terms of evaluation requirements and timeframes so that new applicants can properly scope their costs and develop reliable implementation plans." The NCUC said that "...we strongly support this recommendation and again stress the need for all criteria to be limited to minimum operational, financial, and technical considerations. We all stress the need that all evaluation criteria be objective and measurable."

**9. Recommendation 10 Discussion -- There must be a base contract provided to applicants at the beginning of the process.**

- i. This recommendation is supported by all GNSO Constituencies and by Ms Doria.
- ii. The General Counsel's office has been involved in discussions about the provision of a base contract which would assist applicants both during the application process and in any subsequent contract negotiations.
- iii. A framework for the base contract was developed for discussion at the June 2007 ICANN meeting in Puerto Rico. The base contract will not be completed until the policy recommendations are in place. Completion of the policy recommendations will enable the completion of a draft base contract that would be available to applicants prior to the start of the new gTLD process, that is, prior to the beginning of the four-month window preceding the application submittal period.
- iv. The RyC, in its CIS, said, "...like the comments for Recommendation 9, we believe that this recommendation will facilitate a more cost-effective and timely application process and thereby minimize the negative impacts of a process that is less well-defined and objective. Having a clear understanding of base contractual requirements is essential for a new gTLD applicant in developing a complete business plan."

**10. Recommendation 11 Discussion -- (This recommendation has been removed and is left intentionally blank. Note Recommendation 20 and its Implementation Guidelines).**

**11. Recommendation 12 Discussion -- Dispute resolution and challenge processes must be established prior to the start of the process.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. The Committee has provided clear direction on its expectations that all the dispute resolution and challenge processes would be established prior to the opening of the application round. The full system will be published prior to an application round starting. However, the finalisation of this process is contingent upon a completed set of recommendations being agreed; a public comment period and the final agreement of the ICANN Board.
- iii. The draft Implementation Plan in the Implementation Team *Discussion Points* document sets out the way in which the ICANN Staff proposes that disputes between applicants and challenge processes may be handled. Expert legal and other professional advice from, for example, auctions experts is being sought to augment

the Implementation Plan.

#### **TERM OF REFERENCE THREE -- ALLOCATION METHODS**

##### **12. Recommendation 13 Discussion -- Applications must initially be assessed in rounds until the scale of demand is clear.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. This recommendation sets out the principal allocation methods for TLD applications. The narrative here should be read in conjunction with the draft flowcharts and the draft Request for Proposals.
- iii. An application round would be opened on Day 1 and closed on an agreed date in the future with an unspecified number of applications to be processed within that round.
- iv. This recommendation may be amended, after an evaluation period and report that may suggest modifications to this system. The development of objective "success metrics" is a necessary part of the evaluation process that could take place within the new TLDs Project Office.
- v. The ISPCP expressed its support for this recommendation. Its CIS said that "...this is an essential element in the deployment of new gTLDs, as it enables any technical difficulties to be quickly identified and sorted out, working with reduced numbers of new strings at a time, rather than many all at once. Recommendation 18 on the use of IDNs is also important in preventing any negative impact on network operators and ISPs."

##### **13. Recommendation 20 Discussion -- An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.**

- i. This recommendation is supported by the majority of GNSO Constituencies. Ms Doria supports the recommendation but has concerns about its implementation<sup>[70]</sup>. The NCUC has submitted a Minority Statement which is found in full in Annex C about the recommendation and its associated Implementation Guidelines F, H and P.
- ii. This recommendation was developed during the preparations for the Committee's 7 June 2007 conference call and during subsequent Committee deliberations. The intention was to factor into the process the very likely possibility of objections to applications from a wide variety of stakeholders.
- iii. The language used here is relatively broad and the implementation impact of the proposed recommendation is discussed in detail in the Implementation Team's *Discussion Points* document.
- iv. The NCUC's response to this recommendation in its earlier CIS says, in part, "... recommendation 20 swallows up any attempt to narrow the string criteria to technical, operational and financial evaluations. It asks for objections based on entirely subjective and unknowable criteria and for unlimited reasons and by unlimited parties." This view has, in part, been addressed in the Implementation Team's proposed plan but this requires further discussion and agreement by the Committee.



**TERM OF REFERENCE FOUR -- CONTRACTUAL CONDITIONS****14. Recommendation 14 Discussion -- The initial registry agreement term must be of a commercially reasonable length.**

- i. The remainder of the recommendations address Term of Reference Four on policies for contractual conditions and should be read in conjunction with Recommendation 10 on the provision of a base contract prior to the opening of an application round. The recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and .biz agreements.
- iii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.
- iv. The RyC commented on this recommendation in its CIS saying that "... the members of the RyC have learned first hand that operating a registry in a secure and stable manner is a capital intensive venture. Extensive infrastructure is needed both for redundant registration systems and global domain name constellations. Even the most successful registries have taken many years to recoup their initial investment costs. The RyC is convinced that these two recommendations [14 & 15] will make it easier for new applicants to raise the initial capital necessary and to continue to make investments needed to ensure the level of service expected by registrants and users of their TLDs. These two recommendations will have a very positive impact on new gTLD registries and in turn on the quality of the service they will be able to provide to the Internet community."

**15. Recommendation 15 -- There must be renewal expectancy.**

- i. This recommendation is consistent with the existing registry contract provisions found in, for example, the .com and .biz agreements and is supported by all Constituencies. Ms Doria supported the recommendation and provided the comments found in the footnote below.[71]
- ii. These conditions would form the baseline conditions of term length for new TLD operators. It was determined that a term of ten years would reasonably balance the start up costs of registry operations with reasonable commercial terms.
- iii. See the CIS comments from the RyC in the previous section.

**16. Recommendation 16 -- Registries must apply existing Consensus Policies[72] and adopt new Consensus Policies as they are approved.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. The full set of existing ICANN registry contracts can be found here <http://www.icann.org/registries/agreements.htm> and ICANN's seven current Consensus Policies are found at <http://www.icann.org/general/consensus-policies.htm>.
- iii. ICANN develops binding Consensus Policies through its policy development processes, in this case, through the GNSO[73].

**17. Recommendation 17 -- A clear compliance and sanctions process must be set out in the base contract which could lead to contract termination.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. Referring to the recommendations on contractual conditions above, this section sets out the discussion of the policies for contractual conditions for new top-level domain registry operators. The recommendations are consistent with the existing provisions for registry operators which were the subject of detailed community input throughout 2006[74].
- iii. The Committee developed its recommendations during the Brussels and Amsterdam face-to-face consultations, with assistance from the ICANN General Counsel's office. The General Counsel's office has also provided a draft base contract which will be completed once the policy recommendations are agreed. Reference should also be made to Recommendation 5 on reserved words as some of the findings could be part of the base contract.
- iv. The Committee has focused on the key principles of consistency, openness and transparency. It was also determined that a scalable and predictable process is consistent with industry best practice standards for services procurement. The Committee referred in particular to standards within the broadcasting, telecommunications and Internet services industries to examine how regulatory agencies in those environments conducted, for example, spectrum auctions, broadcasting licence distribution and media ownership frameworks.
- v. Since then ICANN has developed and published a new approach to its compliance activities. These are found on ICANN's website at <http://www.icann.org/compliance/> and will be part of the development of base contract materials.
- vi. The Committee found a number of expert reports[75] beneficial. In particular, the World Bank report on mobile licensing conditions provides some guidance on best practice principles for considering broader market investment conditions. "... A major challenge facing regulators in developed and developing countries alike is the need to strike the right balance between ensuring certainty for market players and preserving flexibility of the regulatory process to accommodate the rapidly changing market, technological and policy conditions. As much as possible, policy makers and regulators should strive to promote investors' confidence and give incentives for long-term investment. They can do this by favouring the principle of 'renewal expectancy', but also by promoting regulatory certainty and predictability through a fair, transparent and participatory renewal process. For example, by providing details for license renewal or reissue, clearly establishing what is the discretion offered to the licensing body, or ensuring sufficient lead-times and transitional arrangements in the event of non-renewal or changes in licensing conditions. Public consultation procedures and guaranteeing the right to appeal regulatory decisions maximizes the prospects for a successful renewal process. As technological changes and convergence and technologically neutral approaches gain importance, regulators and policy makers need to be ready to adapt and evolve licensing procedures and practices to the new environment."
- vii. The Recommendations which the Committee has developed with respect to the introduction of new TLDs are consistent with the World Bank principles.

**18. Recommendation 18 Discussion -- If an applicant offers an IDN service, then ICANN's IDN guidelines must be followed.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria. The introduction of internationalised domain names at the root presents ICANN with a series of implementation challenges. This recommendation would apply to any new gTLD (IDN or ASCII TLD) offering IDN services. The initial technical testing[76] has been completed and a series of live root tests will take place during the remainder of 2007.
- ii. The Committee recognises that there is ongoing work in other parts of the ICANN organisation that needs to be factored into the application process that will apply to IDN applications. The work includes the President's Committee on IDNs and the GAC and ccNSO joint working group on IDNs.

**19. Recommendation 19 Discussion -- Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.**

- i. This recommendation is supported by all GNSO Constituencies and Ms Doria.
- ii. There is a long history associated with the separation of registry and registrar operations for top-level domains. The structural separation of VeriSign's registry operations from Network Solutions registrar operations explains much of the ongoing policy to require the use of ICANN accredited registrars.
- iii. In order to facilitate the stable and secure operation of the DNS, the Committee agreed that it was prudent to continue the current requirement that registry operators be obliged to use ICANN accredited registrars.
- iv. ICANN's Registrar Accreditation Agreement has been in place since 2001[77]. Detailed information about the accreditation of registrars can be found on the ICANN website[78]. The accreditation process is under active discussion but the critical element of requiring the use of ICANN accredited registrars remains constant.
- v. In its CIS, the RyC noted that "... the RyC has no problem with this recommendation for larger gTLDs; the requirement to use accredited registrars has worked well for them. But it has not always worked as well for very small, specialized gTLDs. The possible impact on the latter is that they can be at the mercy of registrars for whom there is no good business reason to devote resources. In the New gTLD PDP, it was noted that this requirement would be less of a problem if the impacted

registry would become a registrar for its own TLD, with appropriate controls in place. The RYC agrees with this line of reasoning but current registry agreements forbid registries from doing this. Dialog with the Registrars Constituency on this topic was initiated and is ongoing, the goal being to mutually agree on terms that could be presented for consideration and might provide a workable solution."



**NEXT STEPS**

1. Under the GNSO's Policy Development Process, the production of this *Final Report* completes Stage 9. The next steps are to conduct a twenty-day public comment period running from 10 August to 30 August 2007. The GNSO Council is due to meet on 6 September 2007 to vote on the package of principles, policy recommendations and implementation guidelines.
2. After the GNSO Council have voted the Council Report to the Board is prepared. The GNSO's PDP guidelines stipulate that "the Staff Manager will be present at the final meeting of the Council, and will have five (5) calendar days after the meeting to incorporate the views of the Council into a report to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:
  - a. A clear statement of any Supermajority Vote recommendation of the Council;
  - b. If a Supermajority Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) that held the position;
  - c. An analysis of how the issue would affect each constituency, including any financial impact on the constituency;
  - d. An analysis of the period of time that would likely be necessary to implement the policy;
  - e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest;
  - f. The Final Report submitted to the Council; and
  - g. A copy of the minutes of the Council deliberation on the policy issue, including the all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.
3. It is expected that, according to the Bylaws, "...The Board will meet to discuss the GNSO Council recommendation as soon as feasible after receipt of the Board Report from the Staff Manager. In the event that the Council reached a Supermajority Vote, the Board shall adopt the policy according to the Council Supermajority Vote recommendation unless by a vote of more than sixty-six (66%) percent of the Board determines that such policy is not in the best interests of the ICANN community or ICANN. In the event that the Board determines not to act in accordance with the Council Supermajority Vote recommendation, the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council. The Council shall review the Board Statement for discussion with the Board within twenty (20) calendar days after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for its current recommendation. In the event that the Council is able to reach a Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than sixty-six (66%) percent of the Board determines that such policy is not in the interests of the ICANN community or ICANN. In any case in which the Council is not able to reach Supermajority, a majority vote of the Board will be sufficient to act. When a final decision on a GNSO Council Recommendation or Supplemental Recommendation is timely, the Board shall take a preliminary vote and, where practicable, will publish a tentative decision that allows for a ten (10) day period of public comment prior to a final decision by the Board."
4. The final stage in the PDP is the implementation of the policy which is also governed by the Bylaws as follows, "...Upon a final decision of the Board, the Board shall, as appropriate, give authorization or direction to the ICANN staff to take all necessary steps to implement the policy."



**Annex A – NCUC Minority Statement Recommendation 6**

**STATEMENT OF DISSENT ON RECOMMENDATION #6 OF  
GNSO'S NEW GTLD REPORT FROM  
the Non-Commercial Users Constituency (NCUC)  
20 July 2007**

NCUC supports most of the recommendations in the GNSO's Final Report, but Recommendation #6 is one we cannot support [79]

We oppose Recommendation #6 for the following reasons:

- 1) It will completely undermine ICANN's efforts to make the gTLD application process predictable, and instead make the evaluation process arbitrary, subjective and political;
- 2) It will have the effect of suppressing free and diverse expression;
- 3) It exposes ICANN to litigation risks;
- 4) It takes ICANN too far away from its technical coordination mission and into areas of legislating morality and public order.

We also believe that the objective of Recommendation #6 is unclear, in that much of its desirable substance is already covered by Recommendation #3. At a minimum, we believe that the words "relating to morality and public order" must be struck from the recommendation.

**1) Predictability, Transparency and Objectivity**

Recommendation #6 poses severe implementation problems. It makes it impossible to achieve the GNSO's goals of predictable and transparent evaluation criteria for new gTLDs.

Principle 1 of the New gTLD Report states that the evaluation process must be "predictable," and Recommendation #1 states that the evaluation criteria must be transparent, predictable, and fully available to applicants prior to their application.

NCUC strongly supports those guidelines. But no gTLD applicant can possibly know in advance what people or governments in a far away land will object to as "immoral" or contrary to "public order." When applications are challenged on these grounds, applicants cannot possibly know what decision an expert panel – which will be assembled on an ad hoc basis with no precedent to draw on – will make about it.

Decisions by expert panels on "morality and public order" *must* be subjective and arbitrary, because there is no settled and well-established international law regarding the relationship between TLD strings and morality and public order. There is no single "community standard" of morality that ICANN can apply to all applicants in every corner of the globe. What is considered "immoral" in Teheran may be easily accepted in Los Angeles or Stockholm; what is considered a threat to "public order" in China and Russia may not be in Brazil and Qatar.

**2) Suppression of expression of controversial views**

gTLD applicants will respond to the uncertainty inherent in a vague "morality and public order" standard and lack of clear standards by suppressing and avoiding any ideas that might generate controversy. Applicants will have to invest sizable sums of money to develop a gTLD application and see it through the ICANN process. Most of them will avoid risking a challenge under Recommendation #6. In other words, the presence of Recommendation #6 will result in self-censorship by most applicants.

That policy would strip citizens everywhere of their rights to express controversial ideas because someone else finds them offensive. This policy recommendation ignores international and national laws, in particular freedom of expression guarantees that permit the expression of "immoral" or otherwise controversial speech on the Internet.

**3) Risk of litigation**

Some people in the ICANN community are under the mistaken impression that suppressing controversial gTLDs will protect it from litigation. Nothing could be further from the truth. By introducing subjective and culturally divisive standards into the evaluation process Recommendation #6 will increase the likelihood of litigation.

ICANN operates under authority from the US Commerce Department. It is undisputed that the US Commerce Department is prohibited from censoring the expression of US citizens in the manner proposed by Recommendation #6. The US Government cannot "contract away" the constitutional protections of its citizens to ICANN any more than it can engage in the censorship itself.

Adoption of Recommendation #6 invites litigation against ICANN to determine whether its censorship policy is compatible with the US First Amendment. An ICANN decision to suppress a gTLD string that would be permitted under US law could and probably would lead to legal challenges to the decision as a form of US Government action.

If ICANN left the adjudication of legal rights up to courts, it could avoid the legal risk and legal liability that this policy of censorship brings upon it.

**4) ICANN's mission and core values**

Recommendation #6 exceeds the scope of ICANN's technical mission. It asks ICANN to create rules and adjudicate disputes about what is permissible expression. It enables it to censor expression in domain names that would be lawful in some countries. It would require ICANN and "expert panels" to make decisions about permitting top-level domain names based on arbitrary "morality" judgments and other subjective criteria. Under Recommendation #6, ICANN will evaluate domain names based on ideas about "morality and public order" – concepts for which there are varying interpretations, in both law and culture, in various parts of the world. Recommendation #6 risks turning ICANN into the arbiter of "morality" and "appropriate" public policy through global rules.

This new role for ICANN conflicts with its intended narrow technical mission, as embodied in its mission and core values. ICANN holds no legitimate authority to regulate in this entirely non-technical area and adjudicate the legal rights of others. This recommendation takes the adjudication of people's rights to use domain names out of the hands of democratically elected representatives and into the hands of "expert panels" or ICANN staff and board with no public accountability.

Besides exceeding the scope of ICANN's authority, Recommendation #6 seems unsure of its objective. It mandates "morality and public order" in domain names, but then lists, as examples of the type of rights to protect, the WTO TRIPS Agreement and all 24 World Intellectual Property (WIPO) Treaties, which deal with economic and trade rights, and have little to do with "morality and public order". Protection for intellectual property rights was fully covered in Recommendation #3, and no explanation has been provided as to why intellectual property rights would be listed again in a recommendation on "morality and public order", an entirely separate concept.

In conclusion Recommendation #6 exceeds ICANN's authority, ignores Internet users' free expression rights, and its adoption would impose an enormous burden on and liability for ICANN. It should not be adopted by the Board of Directors in the final policy decision for new gtlds.



**Annex B – Nominating Committee Appointee Avri Doria<sup>[80]</sup> Individual Comments**

Comments from Avri Doria

The "Personal level of support" indications fall into 3 categories:

I Support: these are principles, recommendations or guidelines that are compatible with my personal opinions

I Support with concerns: While these principles, recommendations and guidelines are not incompatible with my personal opinions, I have some concerns about them.

I Accept with concern: these recommendations and guidelines do not necessarily correspond to my personal opinions, but I am able to accept them in that they have the broad support of the committee. I do, however, have concerns with these recommendations and guideline.

I believe these comments are consistent with comments I have made throughout the process and do not constitute new input.

**Principles**

#	Personal level of support	Explanation
A	Support	
B	Support with concerns	While I strongly support the introduction of DN TLDS, I am concerned that the unresolved issues with IDN ccTLD equivalents may interfere with the introduction of DN TLDS. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers.
C	Support	
D	Support with concerns	While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability.
E-G	Support	

**Recommendations**

#	Level of support	Explanation
1	Support	
2	Accept with concern	<p>My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.</p> <p>I In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologues, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.</p> <p>I By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.</p> <p>I As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages.</p>
3	Support with concerns	<p>My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice.</p> <p>I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system.</p>
4	Support	
5	Support with concerns	<p>Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to IDNs. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the DNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration.</p>
6	Accept with concern	<p>My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order.</p> <p>This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g. a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality.</p>
7	Support	
8	Accept with concern	<p>While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts.</p> <p>Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations</p>

#	Level of support	Explanation
		or indigenous and minority peoples that have a different set of financial opportunities or capabilities than those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels.
9,10,12-14	Support	
15	Support with concerns	In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should be an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal.
16-19	Support	
20	Support with concerns	In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)

**Implementation Guidelines**

#	Level of support	Explanation
A-E	Support	
F	Accept with concern	In designing a New gTLD process, one of the original design goals had been to design a predictable and timely process that did not include the involvement of the Board of Directors except for very rare and exceptional cases and perhaps in the due diligence check of a final approval. My concern is that the use of Board in step (iii) may make them a regular part of many of the application procedure and may overload both the Board and the process. If every dispute can fall through to Board consideration in the process sieve, then the incentive to resolve the dispute earlier will be lessened.
G-M	Support	
N	Support with concerns	I strongly support the idea of financial assistance programs and fee reduction for less developed communities. I am concerned that not providing pricing that enables applications from less developed countries and communities may serve to increase the divide between the haves and the have-nots in the Internet and may lead to a foreign 'land grab' of choice TLD names, especially IDN TLD names in a new form of resource colonialism because only those with well developed funding capability will be able to participate in the process as currently planned.
O	Support	
P	Support with concerns	<p>While I essentially agree with the policy recommendation and its implementation guideline, its social justice and fairness depends heavily on the implementation issues. While the implementation details are not yet settled, I have serious concerns about the published draft plans of the ICANN staff in this regard. The current proposal involves using fees to prevent vexatious or unreasonable objections. In my personal opinion this would be a cause of social injustice in the application of the policy as it would prejudice the objection policy in favor of the rich. I also believe that an objection policy based on financial means would allow for well endowed entities to object to any term they found objectionable, hence enabling them to be as vexatious as they wish to be.</p> <p>In order for an objection system to work properly, it must be fair and it must allow for any applicant to understand the basis on which they might have to answer an objection. If the policy and implementation are clear about objections only being considered when they can be shown to cause irreparable harm to a community then it may be possible to build a just process. In addition to the necessity for there to be strict filters on which potential objections are actually processed for further review by an objections review process, it is essential that an external and impartial professional review panel have a clear basis for judging any objections.</p> <p>I do not believe that the ability to pay for a review will provide a reasonable criteria, nor do I believe that financial barriers are an adequate filter for stopping vexatious or unreasonable objections though they are a sufficient barrier for the poor.</p> <p>I believe that ICANN should investigate other methods for balancing the need to allow even the poorest to raise an issue of irreparable harm while filtering out unreasonable disputes. I believe, as recommend in the Reserved Names Working group report, that the ALAC and GAC may be an important part of the solution. IG (P) currently includes support for treating ALAC and GAC as established institutions in regard to raising objections to TLD concerns. I believe this is an important part of the policy recommendation and should be retained in the implementation. I believe that it should be possible for the ALAC or GAC, through some internal procedure that they define, to take up the cause of the individual complainant and to request a review by the external expert review panel. Some have argued that this is unacceptable because it operationalizes these Advisory Committees. I believe we do have precedence for such an operational role for volunteers within ICANN and that it is in keeping with their respective roles and responsibilities as representatives of the user community and of the international community of nations. I strongly recommend that such a solution be included in the Implementation of the New gTLD process.</p>
Q	Support	



**Annex C – NCUC Minority Statement Recommendation 20 and Implementation Guidelines F, H & P**

**STATEMENT OF DISSENT ON RECOMMENDATION #20 &  
IMPLEMENTATION GUIDELINES F, H, & P IN THE  
GNSO NEW GTLD COMMITTEE'S FINAL REPORT  
FROM THE  
NON-COMMERCIAL USERS CONSTITUENCY (NCUC)  
RE DOMAIN NAME OBJECTION AND REJECTION PROCESS  
25 July 2007**

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**Text of Recommendation #20**

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

**Text of Implementation Guideline F**

If there is contention for strings, applicants may:

- i) resolve contention between them within a pre-established timeframe
- ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and;
- iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

**Text of Implementation Guideline H**

External dispute providers will give decisions on complaints.

**Text of Implementation Guideline P**

The following process, definitions, and guidelines refer to Recommendation 20.

**Process**

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

**Guidelines**

The task of the panel is the determination of substantial opposition.

**a) substantial**

In determining substantial the panel will assess the following: significant portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment.

**b) significant portion:**

In determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

**c) community**

Community should be interpreted broadly and will include for example an economic sector, a cultural community, or a linguistic community. It may also be a closely related community which believes it is impacted.

**d) explicitly targeting**

Explicitly targeting means there is a description of the intended use of the TLD in the application.

**e) implicitly targeting**

Implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use.

**f) established institution**

An institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years. Exceptional circumstance include but are not limited to reorganisation, merger, or an inherently younger community. The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

**g) formal existence**

Formal existence may be demonstrated by: appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organisation or similar.

**h) detriment**

<< A >> Evidence of detriment to the community or to users more widely must be provided.  
 << B >> [A likelihood of detriment to the community or to users more widely must be provided ]

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#### Recommendation #20

The Non-Commercial Users Constituency (NCUC) Dissenting Statement on Recommendation #20 of the New GTLD Committee's Final Report[81] should be read in combination with Implementation Guidelines F, H & P, which detail the implementation of Recommendation #20. This statement should also be read in conjunction with its statement[82] of 13 June 2007 on the committee's draft report.

NCUC cannot support the committee's proposal for ICANN to establish a broad objection and rejection process for domain names that empowers ICANN and its "experts" to adjudicate the legal rights of domain name applicants (and objectors). The proposal would also empower ICANN and its "experts" to invent entirely new rights to domain names that do not exist in law and that will compete with existing legal rights to domains.

However "good-intentioned", the proposal would inevitably set up a system that decides legal rights based on subjective beliefs of "expert panels" and the amount of insider lobbying. The proposal would give "established institutions" veto power over applications for domain names to the detriment of innovators and start-ups. The proposal is further flawed because it makes no allowances for generic words to which no community claims exclusive "ownership" of. Instead, it wants to assign rights to use language based on subjective standards and will over-regulate to the detriment of competition, innovation, and free expression.

There is no limitation on the type of objections that can be raised to kill a domain name, no requirement that actual harm be shown to deny an application, and no recourse for the wrongful denial of legal rights by ICANN and its experts under this proposal. An applicant must be able to appeal decisions of ICANN and its experts to courts, who have more competence and authority to decide the applicant's legal rights. Legal due process requires maintaining a right to appeal these decisions to real courts.

The proposal is hopelessly flawed and will result in the improper rejection of many legitimate domain names. The reasons permitted to object to a domain are infinite in number. Anyone may make an objection; and an application will automatically be rejected upon a very low threshold of "detriment" or an even lower standard of "a likelihood of detriment" to anyone. Not a difficult bar to meet.

If ICANN attempted to put this policy proposal into practice it would intertwine itself in general policy debates, cultural clashes, business feuds, religious wars, and national politics, among a few of the disputes ICANN would have to rule on through this domain name policy.

The proposal operates under false assumptions of "communities" that can be defined, and that parties can be rightfully appointed representatives of "the community" by ICANN. The proposal gives preference to "established institutions" for domain names, and leaves applicants' without the backing of "established institutions" with little right to a top-level domain. The proposal operates to the detriment of small-scale start-ups and innovators who are clever enough to come up with an idea for a domain first, but lack the insider-connections and financial resources necessary to convince an ICANN panel of their worthiness.

It will be excessively expensive to apply for either a controversial or a popular domain name, so only well-financed "established institutions" will have both the standing and financial wherewithal to be awarded a top-level domain. The proposal privileges who is awarded a top-level domain, and thus discourages diversity of thought and the free flow of information by making it more difficult to obtain information on controversial ideas or from innovative new-comers.

#### Implementation Guideline F

NCUC does not agree with the part of Implementation Guideline F that empowers ICANN identified "communities" to support or oppose applications. Why should all "communities" agree before a domain name can be issued? How to decide who speaks for a "community"?

NCUC also notes that ICANN's Board of Directors would make the final decisions on applications and thus the legal rights of applicants under proposed IG-F. ICANN Board Members are not democratically elected, accountable to the public in any meaningful way, or trained in the adjudication of legal rights. Final decisions regarding legal rights should come from legitimate law-making processes, such as courts.

"Expert panels" or corporate officers are not obligated to respect an applicant's free expression rights and there is no recourse for a decision by the panel or ICANN for rights wrongfully denied. None of the "expert" panelists are democratically elected, nor accountable to the public for their decisions. Yet they will take decisions on the boundaries between free expression and trademark rights in domain names; and "experts" will decide what ideas are too controversial to be permitted in a domain name under this process.

#### Implementation Guideline H

Implementation Guideline H recommends a system to adjudicate legal rights that exists entirely outside of legitimate democratic law-making processes. The process sets up a system of unaccountable "private law" where "experts" are free to pick and choose favored laws, such as trademark rights, and ignore disfavored laws, such as free expression guarantees.

IG-H operates under the false premise that external dispute providers are authorized to adjudicate the legal rights of domain name applicants and objectors. It further presumes that such expert panels will be qualified to adjudicate the legal rights of applicants and others. But undertaking the creation of an entirely new international dispute resolution process for the adjudication of legal rights and the creation of new rights is not something that can be delegated to a team of experts. Existing international law that takes into account conflict of laws, choice of laws, jurisdiction, standing, and due process must be part of any legitimate process; and the applicant's legal rights including freedom of expression rights must be respected in the process.

#### Implementation Guideline P

"The devil is in the details" of Implementation Guideline P as it describes in greater detail the proposed adversarial dispute process to adjudicate legal rights to top-level domain names in Recommendation #20. IG-P mandates the rejection of an application if there is "substantial opposition" to it according to ICANN's expert panel. But "substantial" is defined in such a way so as to actually mean "insubstantial" and as a result many legitimate domain names would be rejected by such an extremely low standard for killing an application.

Under IG-P, opposition against and support for an application must be made by an "established institution" for it to count as "significant", again favoring major industry players and mainstream cultural institutions over cultural diversity, innovative individuals, small niche, and medium-sized Internet businesses.

IG-P states that "community" should be interpreted broadly, which will allow for the maximum number of objections to a domain name to count against an application. It includes examples of "the economic sector, cultural community or linguistic community" as those who have a right to complain about an application. It also includes any "related community which believes it is impacted." So anyone who claims to represent a community and believes to be impacted by a domain name can file a complaint and have standing to object to another's application.

There is no requirement that the objection be based on legal rights or the operational capacity of the applicant. There is no requirement that the objection be reasonable or the belief about impact to be reasonable. There is no requirement that the harm be actual or verifiable. The standard for "community" is entirely subjective and based on the personal beliefs of the objector.

The definition of "implicitly targeting" further confirms this subjective standard by inviting objections where "the objector makes the assumption of targeting" and also where "the objector believes there may be confusion by users". Such a subjective process will inevitably result in the rejection of many legitimate domain names.

Picking such a subjective standard conflicts with Principle A in the Final Report that states domain names must be introduced in a "predictable way", and also with Recommendation 1 that states "All applicants for a new gTLD registry should be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." The subjectivity and unpredictability invited into the process by Recommendation #20 turn Principle A and Recommendation 1 from the same report upside down.

Besides the inherent subjectivity, the standard for killing applications is remarkably low. An application need not be intended to serve a particular community for "community-based" objections to kill the application under the proposal. Anyone who believed that he or she was part of the targeted community or who believes others face "detriment" have standing to object to a domain name, and the objection weighs in favor of "significant opposition". This standard is even lower than the "reasonable person" standard, which would at least require that the belief be "reasonable" for it to count against an applicant. The proposed standard for rejecting domains is so low it even permits unreasonable beliefs about a domain name to weigh against an applicant.

If a domain name does cause confusion, existing trademark law and unfair competition law have dealt with it for years and already balanced intellectual property rights against free expression rights in domain names. There is neither reason nor authority for ICANN processes to overtake the adjudication of legal rights and invite unreasonable and illegitimate objections to domain names.

IG-P falsely assumes that the number of years in operation is indicative of one's right to use language. It privileges entities over 5 years old with objection rights that will effectively veto innovative start-ups who cannot afford the dispute resolution process and will be forced to abandon their application to the incumbents.

IG-P sets the threshold for harm that must be shown to kill an application for a domain name remarkably low. Indeed harm need not be actual or verified for an application to be killed based on "substantial opposition" from a single objector.

Whether the committee selects the unbounded definition for "detriment" that includes a "likelihood of detriment" or the narrower definition of "evidence of detriment" as the standard for killing an application for a domain name is largely irrelevant. The difference is akin to re-arranging the deck chairs on the Titanic. ICANN will become bogged down with the approval of domain names either way, although it is worth noting that "likelihood of detriment" is a very long way from "substantial harm" and an easy standard to meet, so will result in many more domain names being rejected.

The definitions and guidelines detailed in IG-P invite a lobby-fest between competing businesses, instill the "heckler's veto" into domain name policy, privilege incumbents, price out of the market non-commercial applicants, and give third-parties who have no legal rights to domain names the power to block applications for those domains. A better standard for killing an application for non-technical reasons would be for a domain name to be shown to be illegal in the applicant's jurisdiction before it can be rejected.

In conclusion, the committee's recommendation for domain name objection and rejection processes are far too broad and unwieldy to be put into practice. They would stifle freedom of expression, innovation, cultural diversity, and market competition. Rather than follow existing law, the proposal would set up an illegitimate process that usurps jurisdiction to adjudicate peoples' legal rights (and create new rights) in a process designed to favor incumbents. The adoption of this "free-for-all" objection and rejection process will further call into question ICANN's legitimacy to govern and its ability to serve the global public interest that respects the rights of all citizens.

NCUC respectfully submits that ICANN will best serve the global public interest by resisting the temptation to stray from its technical mandate and meddle in international lawmaking as proposed by Rec. #20 and IG-F, IG-H, and IG-P of the New GTLD Committee Final Report.

#### REFERENCE MATERIAL -- GLOSSARY[83]

TERM	ACRONYM & EXPLANATION
A-label	The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible (ACE) form of an IDNA string; for example "xn--11b5bs1d".
ASCII Compatible Encoding	ACE ACE is a system for encoding Unicode so each character can be transmitted using only the letters a-z, 0-9 and hyphens. Refer also to <a href="http://www.ietf.org/rfc/rfc3467.txt?number=3467">http://www.ietf.org/rfc/rfc3467.txt?number=3467</a>
American Standard Code for Information Exchange	ASCII ASCII is a common numerical code for computers and other devices that work with text. Computers can only understand numbers, so an ASCII code is the numerical representation of a character such as 'a' or '@'. See above referenced RFC for more information.
Advanced Research Projects Agency	ARPA <a href="http://www.darpa.mil/body/arpa_darpa.html">http://www.darpa.mil/body/arpa_darpa.html</a>
Commercial & Business Users Constituency	CBUC <a href="http://www.bizconst.org/">http://www.bizconst.org/</a>
Consensus Policy	A defined term in all ICANN registry contracts usually found in Article 3 (Covenants). See, for example, <a href="http://www.icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm">http://www.icann.org/tlds/agreements/biz/registry-agmt-08dec06.htm</a>
Country Code Names Supporting Organization	ccNSO <a href="http://ccnso.icann.org/">http://ccnso.icann.org/</a>
Country Code Top Level Domain	ccTLD Two letter domains, such as .uk (United Kingdom), .de (Germany) and .jp (Japan) (for example), are called country code top level domains (ccTLDs) and correspond to a country, territory, or other geographic location. The rules and policies for registering domain names in the ccTLDs vary significantly and ccTLD registries limit use of the ccTLD to citizens of the corresponding country.  Some ICANN-accredited registrars provide registration services in the ccTLDs in addition to registering names in biz, .com, info, name, net and .org, however, ICANN does not specifically accredit registrars to provide ccTLD registration services.  For more information regarding registering names in ccTLDs, including a complete database of designated ccTLDs and managers, please refer to <a href="http://www.iana.org/cctld/cctld.htm">http://www.iana.org/cctld/cctld.htm</a> .
Domain Names	The term <b>domain name</b> has multiple related meanings: A name that identifies a computer or computers on the internet. These names appear as a component of a Web site's URL, e.g. <a href="http://www.wikipedia.org">www.wikipedia.org</a> . This type of domain name is also called a <b>hostname</b> .  The product that Domain name registrars provide to their customers. These names are often called <b>registered domain names</b> .  Names used for other purposes in the Domain Name System (DNS), for example the special name which follows the @ sign in an email address, or the Top-level domains like .com, or the names used by the Session Initiation Protocol (VoIP), or DomainKeys.  <a href="http://en.wikipedia.org/wiki/Domain_names">http://en.wikipedia.org/wiki/Domain_names</a>
Domain Name System	The Domain Name System (DNS) helps users to find their way around the Internet. Every computer on the Internet has a unique address - just like a telephone number - which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type <a href="http://www.internic.net">www.internic.net</a> . It is a "mnemonic" device that makes addresses easier to remember.

Generic Top Level Domain	<p>gTLD</p> <p>Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below.</p> <p>In the 1980s, seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created. Domain names may be registered in three of these (.com, .net, and .org) without restriction; the other four have limited purposes.</p> <p>In 2001 &amp; 2002 four new unsponsored TLDs (.biz, .info, .name, and .pro) were introduced. The other three new TLDs (.aero, .coop, and .museum) were sponsored.</p> <p>Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.</p>
Governmental Advisory Committee	<p>GAC</p> <p><a href="http://gac.icann.org/web/index.shtml">http://gac.icann.org/web/index.shtml</a></p>
Intellectual Property Constituency	<p>PC</p> <p><a href="http://www.ipconstituency.org/">http://www.ipconstituency.org/</a></p>
Internet Service & Connection Providers Constituency	ISPCP
Internationalized Domain Names	<p>DNs</p> <p>DNs are domain names represented by local language characters. These domain names may contain characters with diacritical marks (required by many European languages) or characters from non-Latin scripts like Arabic or Chinese.</p>
Internationalized Domain Names in Application	<p>DNA</p> <p>DNA is a protocol that makes it possible for applications to handle domain names with non-ASCII characters. DNA converts domain names with non-ASCII characters to ASCII labels that the DNS can accurately understand. These standards are developed within the IETF (<a href="http://www.ietf.org">http://www.ietf.org</a>)</p>
Internationalized Domain Names – Labels	<p>DN A Label</p> <p>The A-label is what is transmitted in the DNS protocol and this is the ASCII-compatible ACE) form of an IDN A string. For example "xn-1q90".</p> <p>DN U Label</p> <p>The U-label is what should be displayed to the user and is the representation of the IDN in Unicode. For example "北京" ("Beijing" in Chinese).</p> <p>LDH Label</p> <p>The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an DN; for example "icann" in the domain name "icann.org"</p>
Internationalized Domain Names Working Group	<p>DN-WG</p> <p><a href="http://forum.icann.org/lists/gnso-idn-wg/">http://forum.icann.org/lists/gnso-idn-wg/</a></p>
Letter Digit Hyphen	<p>LDH</p> <p>The hostname convention used by domain names before internationalization. This meant that domain names could only practically contain the letters a-z, digits 0-9 and the hyphen "-". The term "LDH code points" refers to this subset. With the introduction of IDNs this rule is no longer relevant for all domain names.</p> <p>The LDH-label strictly refers to an all-ASCII label that obeys the "hostname" (LDH) conventions and that is not an DN; for example "icann" in the domain name "icann.org".</p>
Nominating Committee	<p>NomCom</p> <p><a href="http://nomcom.icann.org/">http://nomcom.icann.org/</a></p>
Non-Commercial Users Constituency	<p>NCUC</p> <p><a href="http://www.ncdnhc.org/">http://www.ncdnhc.org/</a></p>
Policy Development Process	<p>PDP</p> <p>See <a href="http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA">http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA</a></p>
Protecting the Rights of Others Working Group	<p>PRO-WG</p> <p>See the mailing list archive at <a href="http://forum.icann.org/lists/gnso-pro-wg/">http://forum.icann.org/lists/gnso-pro-wg/</a></p>
Punycode	<p>Punycode is the ASCII-compatible encoding algorithm described in Internet standard [RFC3492]. This is the method that will encode DN's into sequences of ASCII characters in order for the Domain Name System (DNS) to understand and manage the names. The intention is that domain name registrants and users will never see this encoded form of a domain name. The sole purpose is for the DNS to be able to resolve for example a web-address containing local characters.</p>
Registrar	<p>Domain names ending with .aero, .biz, .com, .coop, .info, .museum, .name, .net, .org, and .pro can be registered through many different companies (known as "registrars") that compete with one another. A listing of these companies appears in the Accredited Registrar Directory.</p> <p>The registrar asks registrants to provide various contact and technical information that makes up the domain name registration. The registrar keeps records of the contact information and submits the technical information to a central directory known as the "registry."</p>

Registrar Constituency	RC <a href="http://www.icann-registrars.org/">http://www.icann-registrars.org/</a>
Registry	A registry is the authoritative, master database of all domain names registered in each Top Level Domain. The registry operator keeps the master database and also generates the "zone file" which allows computers to route Internet traffic to and from top-level domains anywhere in the world. Internet users don't interact directly with the registry operator. Users can register names in TLDs including .biz, .com, .info, .net, .name, .org by using an ICANN-Accredited Registrar.
Registry Constituency	RyC <a href="http://www.gtldregistries.org/">http://www.gtldregistries.org/</a>
Request for Comment A full list of all Requests for Comment <a href="http://www.rfc-editor.org/rfcxx00.html">http://www.rfc-editor.org/rfcxx00.html</a> Specific references used in this report are shown in the next column. This document uses language, for example, "should", "must" and "may", consistent with RFC2119.	RFC <a href="ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt">ftp://ftp.rfc-editor.org/in-notes/rfc1591.txt</a> <a href="ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt">ftp://ftp.rfc-editor.org/in-notes/rfc2119.txt</a> <a href="ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt">ftp://ftp.rfc-editor.org/in-notes/rfc2606.txt</a>
Reserved Names Working Group	RN-WG See the mailing list archive at <a href="http://forum.icann.org/lists/gnso-rn-wg/">http://forum.icann.org/lists/gnso-rn-wg/</a>
Root server	A <b>root nameserver</b> is a DNS server that answers requests for the root namespace domain, and redirects requests for a particular top-level domain to that TLD's nameservers. Although any local implementation of DNS can implement its own private root nameservers, the term "root nameserver" is generally used to describe the thirteen well-known root nameservers that implement the root namespace domain for the Internet's official global implementation of the Domain Name System.  All domain names on the Internet can be regarded as ending in a full stop character e.g. "en.wikipedia.org.". This final dot is generally implied rather than explicit, as modern DNS software does not actually require that the final dot be included when attempting to translate a domain name to an IP address. The empty string after the final dot is called the root domain, and all other domains (i.e. com, .org, net, etc.) are contained within the root domain. <a href="http://en.wikipedia.org/wiki/Root_server">http://en.wikipedia.org/wiki/Root_server</a>
Sponsored Top Level Domain	sTLD  A Sponsor is an organization to which some policy making is delegated from ICANN. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.
U-label	The U-label is what should be displayed to the user and is the representation of the Internationalized Domain Name (IDN) in Unicode.
Unicode Consortium	A not-for-profit organization found to develop, extend and promote use of the Unicode standard. See <a href="http://www.unicode.org">http://www.unicode.org</a>
Unicode	Unicode is a commonly used single encoding scheme that provides a unique number for each character across a wide variety of languages and scripts. The Unicode standard contains tables that list the code points for each local character identified. These tables continue to expand as more characters are digitalized.

**Continue to Final Report Part B**

[1] <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#>

[2] The ICANN "community" is a complex matrix of intersecting organizations and which are represented graphically here. <http://www.icann.org/structure/>

[3] The *Final Report* is Step 9 in the GNSO's policy development process which is set out in full at <http://www.icann.org/general/archive-bylaws/bylaws-28feb06.htm#AnnexA>.

[4] Found here <http://gnso.icann.org/issues/new-gtlds/>.

[5] The ICANN Staff *Discussion Points* documents can be found at <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf> and <http://gnso.icann.org/drafts/PDP-Dec05-StaffMemo-19-jun-07.pdf>

[6] Authored in 1987 by Paul Mockapetris and found at <http://www.ietf.org/rfc/rfc1034>

[7] Authored in October 1984 by Jon Postel and J Reynolds and found at <http://www.ietf.org/rfc/rfc920>

[8] Found at <http://www.oecd.org/dataoecd/15/37/38336539.pdf>

[9] From Verisign's June 2007 *Domain Name Industry Brief*.

[10] The full list is available here <http://www.icann.org/registrar/accredited-list.html>

[11] Report found at <http://www.icann.org/dns/wgc-report-21mar00.htm>

[12] Found at <http://www.icann.org/announcements/announcement-31aug04.htm>

[13] <http://www.registrarstats.com/Public/ZoneFileSurvey.aspx>

[14] Verisign produce a regular report on the domain name industry. [http://www.verisign.com/Resources/Naming\\_Services\\_Resources/Domain\\_Name\\_Industry\\_Brief/index.html](http://www.verisign.com/Resources/Naming_Services_Resources/Domain_Name_Industry_Brief/index.html)

[15] The announcement is here <http://icann.org/announcements/announcement-03jan06.htm> and the results are here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[16] Found here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[17] <http://gnso.icann.org/issues/new-gtlds/>

[18] For example, see the GA List discussion thread found at <http://gnso.icann.org/mailling-lists/archives/ga/msg03337.html> & earlier discussion on IANA lists <http://www.iana.org/comments/26sep1998-02oct1998/msg00016.html>. The 13 June 2002 paper regarding a taxonomy for non-ASCII TLDs is also illuminating <http://www.icann.org/committees/idn/registry-selection-paper-13jun02.htm>

[19] Found here [http://gac.icann.org/web/home/gTLD\\_principles.pdf](http://gac.icann.org/web/home/gTLD_principles.pdf)

[20] A list of the working materials of the new TLDs Committee can be found at <http://gnso.icann.org/issues/new-gtlds/>.

[21] The Outcomes Report for the IDN-WG is found <http://gnso.icann.org/drafts/idn-wg-fr-22mar07.htm>. A full set of resources which the WG is using is found at <http://gnso.icann.org/issues/idn-tlds/>.

[22] The Final Report of the RN-WG is found at <http://gnso.icann.org/drafts/rn-wg-fr19mar07.pdf>

[23] The Final Report of the PRO-WG is found at <http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>

[24] The root server system is explained here <http://en.wikipedia.org/wiki/Rootserver>

[25] Ms Doria supports all of the Principles but expressed concern about Principle B by saying "...While I strongly support the introduction of IDN TLDs, I am concerned that the unresolved issues with DN ccTLD equivalents may interfere with the introduction of IDN TLDs. I am also concerned that some of these issues could impede the introduction of some new ASCII TLDs dealing with geographically related identifiers" and Principle D "...While I favor the establishment of a minimum set of necessary technical criteria, I am concerned that this set actually be the basic minimum set necessary to protect the stability, security and global interoperability."

[26] Note the updated recommendation text sent to the gTLD-council list after the 7 June meeting. <http://forum.icann.org/lists/gtld-council/msg00520.html>

[27] Reserved word limitations will be included in the base contract that will be available to applicants prior to the start of the application round.

[28] <http://www.icann.org/general/idn-guidelines-22feb06.htm>

[29] The Implementation Team sought advice from a number of auction specialists and examined other industries in which auctions were used to make clear and binding decisions. Further expert advice will be used in developing the implementation of the application process to ensure the fairest and most appropriate method of resolving contention for strings.

[30] Detailed work is being undertaken, lead by the Corporate Affairs Department, on establishing a translation framework for ICANN documentation. This element of the Implementation Guidelines may be addressed separately.

[31] <http://gnso.icann.org/drafts/GNSO-PDP-Dec05-StaffMemo-14Nov06.pdf>

[32] Consistent with ICANN's commitments to accountability and transparency found at <http://www.icann.org/announcements/announcement-26jan07b.htm>

[33] Found at <http://www.icann.org/dns/wgc-report-21mar00.htm>

[34] The announcement is here <http://icann.org/announcements/announcement-03jan06.htm> and the results are here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[35] Found here <http://gnso.icann.org/issues/new-gtlds/new-gtld-pdp-input.htm>

[36] Found here <http://forum.icann.org/lists/gtld-council/>

[37] Archived at <http://forum.icann.org/lists/gtld-council/>

[38] Business Constituency <http://forum.icann.org/lists/gtld-council/msg00501.html>, Intellectual Property Constituency <http://forum.icann.org/lists/gtld-council/msg00514.html>, Internet Service Providers <http://forum.icann.org/lists/gtld-council/msg00500.html>, NCUC <http://forum.icann.org/lists/gtld-council/msg00530.html>, Registry Constituency <http://forum.icann.org/lists/gtld-council/msg00494.html>

[39] "My concern involves using definitions that rely on legal terminology established for trademarks for what I believe should be a policy based on technical criteria.

In the first instance I believe that this is essentially a technical issue that should have been resolved with reference to typography, homologies, orthographic neighbourhood, transliteration and other technically defined attributes of a name that would make it unacceptable. There is a large body of scientific and technical knowledge and description in this field that we could have drawn on.

By using terms that rely on the legal language of trademark law, I believe we have created an implicit redundancy between recommendations 2 and 3. I.e., I believe both 2 and 3 can be used to protect trademarks and other intellectual property rights, and while 3 has specific limitations, 2 remains open to full and varied interpretation.

As we begin to consider IDNs, I am concerned that the interpretations of confusingly similar may be used to eliminate many potential TLDs based on translation. That is, when a translation may have the same or similar meaning to an existing TLD, that the new name may be eliminated because it is considered confusing to users who know both languages."

[40] <http://data.iana.org/TLD/tlds-alpha-by-domain.txt>

[41] See section 4A – <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

[42] In addition to the expertise within the Committee, the NCUC provided, as part of its Constituency Impact Statement expert outside advice from Professor Christine Haight Farley which said, in part, "...A determination about whether use of a mark by another is "confusingly similar" is simply a first step in the analysis of infringement. As the committee correctly notes, account will be taken of visual, phonetic and conceptual similarity. But this determination does not end the analysis. Delta Dental and Delta Airlines are confusingly similar, but are not like to cause confusion, and therefore do not infringe. ... In trademark law, where there is confusing similarity and the mark is used on similar goods or services, a likelihood of confusion will usually be found. European trademark law recognizes this point perhaps more readily than U.S. trademark law. As a result, sometimes "confusingly similar" is used as shorthand for "likelihood of confusion". However, these concepts must remain distinct in domain name policy where there is no opportunity to consider how the mark is being used."

[43] In addition, advice was sought from experts within WIPO who continue to provide guidance on this and other elements of dispute resolution procedures.

[44] Kristina Rosette provided the reference to the *Agreement on Trade-Related Aspects of Intellectual Property Rights* which is found online at [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm1\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm)

"...Article 16Rights Conferred 1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use...."

[45] <http://www.ohchr.org/english/bodies/hrc/comments.htm>

[46] <http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf>

[47] Charles Sha'ban provided a range of examples from Arabic speaking countries. For example, in Jordan, Article 7Trademarks eligible for registration are1- A trademark shall be registered if it is distinctive, as to words, letters, numbers, figures, colors, or other signs or any combination thereof and visually perceptible 2- For the purposes of this Article, "distinctive" shall mean applied in a manner which secures distinguishing the goods of the proprietor of the trademark from those of other persons. Article 8Marks which

may not be registered as trademarks. The following may not be registered as trademarks: 10- A mark identical with one belonging to a different proprietor which is already entered in the register in respect of the same goods or class of goods for which the mark is intended to be registered, or so closely resembling such trademark to the extent that it may lead to deceiving third parties.

12- The trademark which is identical or similar to, or constitutes a translation of, a well-known trademark for use on similar or identical goods to those for which that one is well-known for and whose use would cause confusion with the well-known mark, or for use of different goods in such a way as to prejudice the interests of the owner of the well-known mark and leads to believing that there is a connection between its owner and those goods as well as the marks which are similar or identical to the honorary badges, flags, and other insignia as well as the names and abbreviations relating to international or regional organizations or those that offend our Arab and Islamic age-old values.

In Oman for example, Article 2 of the Sultan Decree No. 38/2000 states:

"The following shall not be considered as trademarks and shall not be registered as such: If the mark is identical, similar to a degree which causes confusion, or a translation of a trademark or a commercial name known in the Sultanate of Oman with respect to identical or similar goods or services belonging to another business, or if it is known and registered in the Sultanate of Oman on goods and service which are neither identical nor similar to those for which the mark is sought to be registered provided that the usage of the mark on those goods or services in this last case will suggest a connection between those goods or services and the owner of the known trademark and such use will cause damage to the interests of the owner of the known trademark."

Although the laws in Egypt do not have specific provisions regarding confusion they stress in great detail the importance of distinctiveness of a trade mark.

Article 63 in the P Law of Egypt No.82 for the year 2002 states:

"A trademark is any sign distinguishing goods, whether products or services, and include is particular names represented in a distinctive manner, signatures, words, letters, numerals, design, symbols, signposts, stamps, seal, drawings, engravings, a combination of distinctly formed colors and any other combination of these elements if used, or meant to be used, to distinguish the precedents of a particular industry, agriculture, forest or mining venture or any goods, or to indicate the origin of products or goods or their quality, category, guarantee, preparation process, or to indicate the provision of any service. In all cases, a trademark shall be a sign that is recognizable by sight."

[48] Found at [http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.htm](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.htm) with 171 contracting parties.

[49] Further information can be found at the US Patent and Trademark Office's website <http://www.uspto.gov/>

[50] Found at <http://www.icann.org/registrars/ra-agreement-17may01.htm#3>

[51] Found at <http://gns0.icann.org/drafts/idn-wg-fr-22mar07.htm>.

[52] The 2003 correspondence between ICANN's then General Counsel and the then GAC Chairman is also useful <http://www.icann.org/correspondence/touton-letter-to-tarmizi-10feb03.htm>.

[53] "My first concern relates to the protection of what can be called the linguistic commons. While it is true that much of trademark law and practice does protect general vocabulary and common usage from trademark protection, I am not sure that this is always the case in practice. I am also not convinced that trademark law and policy that applies to specific product type within a specific locale is entirely compatible with a general and global naming system."

[54] For example, David Maher, Jon Bing, Steve Metalitz, Philip Sheppard and Michael Palage.

[55] Reserved Word has a specific meaning in the ICANN context and includes, for example, the reserved word provisions in ICANN's existing registry contracts. See <http://www.icann.org/registries/agreements.htm>.

[56] "Until such time as the technical work on IDNAbis is completed, I am concerned about establishing reserved name rules connected to DNS. My primary concern involves policy decisions made in ICANN for reserved names becoming hard coded in the IDNAbis technical solution and thus becoming technical constraints that are no longer open to future policy reconsideration."

[57] Found online at <http://gns0.icann.org/issues/new-gtlds/final-report-rn-wg-23may07.htm> and in full in Part B of the *Report*.

[58] The Committee are aware that the terminology used here for the purposes of policy recommendations requires further refinement and may be at odds with similar terminology developed in other context. The terminology may be imprecise in other contexts than the general discussion about reserved words found here.

[59] The subgroup was encouraged by the ccNSO not to consider removing the restriction on two-letter names at the top level. IANA has based its allocation of two-letter names at the top level on the ISO 3166 list. There is a risk of collisions between any interim allocations, and ISO 3166 assignments which may be desired in the future.

[60] The existing gTLD registry agreements provide for a method of potential release of two-character LDH names at the second level. In addition, two character LDH strings at the second level may be released through the process for new registry services, which process involves analysis of any technical or security concerns and provides opportunity for public input. Technical issues related to the release of two-letter and/or number strings have been addressed by the RSTEP Report on GNR's proposed registry service. The GAC has previously noted the WIPO II Report statement that "If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimises the potential for confusion with the ccTLDs."

[61] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[62] Internet Draft IDNAbis Issues: <http://www.ietf.org/internet-drafts/draft-klensin-idnabis-issues-01.txt> (J. Klensin), Section 3.1.1.1

[63] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[64] Considering that the current requirement in all 16 registry agreement reserves "All labels with hyphens in the third and fourth character positions (e.g., "bq--1k2n4h4b" or "xn--ndk061n")", this requirement reserves any names having any of a combination of 1296 different prefixes (36x36).

[65] With its recommendation, the sub-group takes into consideration that justification for potential user confusion (i.e., the minority view) as a result of removing the contractual condition to reserve gTLD strings for new TLDs may surface during one or more public comment periods.

[66] Note that this recommendation is a continuation of the recommendation in the original RN-WG report, modified to synchronize with the additional work done in the 30-day extension period.

[67] Ms Doria said "...My primary concern focuses on the term 'morality'. While public order is frequently codified in national laws and occasionally in international law and conventions, the definition of what constitutes morality is not generally codified, and when it is, I believe it could be referenced as public order. This concern is related to the broad set of definitions used in the world to define morality. By including morality in the list of allowable exclusions we have made the possible exclusion list indefinitely large and have subjected the process to the consideration of all possible religious and ethical systems. ICANN or the panel of reviewers will also have to decide between different sets of moral principles, e.g. a morality that holds that people should be free to express themselves in all forms of media and those who believe that people should be free from exposure to any expression that is prohibited by their faith or moral principles. This recommendation will also subject the process to the fashion and occasional demagoguery of political correctness. I do not understand how ICANN or any expert panel will be able to judge that something should be excluded based on reasons of morality without defining, at least de-facto, an ICANN definition of morality? And while I am not a strict constructionist and sometimes allow for the broader interpretation of ICANN's mission, I do not believe it includes the definition of a system of morality."

[68] <http://www.icann.org/tlds/agreements/net/appendix7.html>

[69] "While I accept that a prospective registry must show adequate operational capability, creating a financial criteria is of concern. There may be many different ways of satisfying the requirement for operational capability and stability that may not be demonstrable in a financial statement or traditional business plan. E.g., in the case of an less developed community, the registry may rely on volunteer effort from knowledgeable technical experts."

Another concern I have with financial requirements and high application fees is that they may act to discourage applications from developing nations or indigenous and minority

peoples that have a different set of financial opportunities or capabilities than those recognized as acceptable within an expensive and highly developed region such as Los Angeles or Brussels."

[70] "In general I support the policy though I do have concerns about the implementation which I discuss below in relation to IG (P)".

[71] "In general I support the idea that a registry that is doing a good job should have the expectancy of renewal. I do, however, believe that a registry, especially a registry with general market dominance, or specific or local market dominance, should be subject to comment from the relevant user public and to evaluation of that public comment before renewal. When performance is satisfactory, there should be an expectation of renewal. When performance is not satisfactory, there should be some procedure for correcting the situation before renewal."

[72] Consensus Policies has a particular meaning within the ICANN environment. Refer to <http://www.icann.org/general/consensus-policies.htm> for the full list of ICANN's Consensus Policies.

[73] <http://www.icann.org/general/bylaws.htm#AnnexA>

[74] <http://www.icann.org/registries/agreements.htm>

[75] The full list of reports is found in the Reference section at the end of the document.

[76] <http://www.icann.org/announcements/announcement-4-07mar07.htm>

[77] Found at <http://www.icann.org/registrars/ra-agreement-17may01.htm>

[78] Found at <http://www.icann.org/registrars/accreditation.htm>.

[79] Text of Recommendation #6: "Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."

[80] Ms Doria took over from former GNSO Council Chairman (and GNSO new TLDs Committee Chairman) Dr Bruce Tonkin on 7 June 2007. Ms Doria's term runs until 31 January 2008.

[81] Available at: <http://forum.icann.org/lists/gtld-council/pdfOQqgaRNRXf.pdf>

[82] Available at: <http://ipjustice.org/wp/2007/06/13/ncuc-newgtld-stmt-june2007/>

[83] This glossary has been developed over the course of the policy development process. Refer here to ICANN's glossary of terms <http://www.icann.org/general/glossary.htm> for further information.

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# ANNEX 3

# Ski

From Wikipedia, the free encyclopedia

A **ski** is narrow strip of wood, plastic, metal or combination thereof worn underfoot to glide over snow. Substantially longer than wide and characteristically employed in pairs, skis are attached to boots with bindings, either with a free, lockable, or permanently secured heel.

Originally intended as an aid to travel over snow they are now mainly used recreationally in the sport of skiing.

Skis are also fitted to vehicles dedicated to traveling over snow such as snowmobiles and snowcats.

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## Etymology and usage

The word ski comes from the Old Norse word "skið" which means stick of wood or ski.<sup>[1]</sup>



In Norwegian this word is usually pronounced [ˈʃiː]. In Swedish, another language evolved from Old Norse, the word is "skidor" (pl.).

English and French use the original spelling "ski", and modify the pronunciation. In Italian it is pronounced as in Norwegian, and the spelling is modified: "sci". German and Spanish adapt the word to their linguistic rules; "Schier" (however there is a form- Ski) and "esqui". Many languages make a verb form out of the noun, such as "to ski" in English, "skier" in French, "esquiar" in Spanish, "sciare" in Italian, or "schilaulen" (as above also Ski laufen or Ski fahren) in German.

Finnish has its own ancient words for skis and skiing. In Finnish ski is *suksi* and skiing is *hiihtää*. The Sami also have their own words for skis and skiing. For example, the Lule Sami word for ski is "sabek" and skis are "sabega".

## History

*Main article: History of skiing*

The oldest wooden skis found were in Russia (ca. 6300-5000 BC), Sweden (ca. 5200 BC) and Norway (ca. 3200 BC) respectively.

The Nordic ski technology was adapted during the early twentieth century to enable skiers to turn at higher speeds. New ski and binding designs, coupled with the introduction of ski lifts and snowcats to carry skiers up mountains, enabled the development of alpine skis. Meanwhile advances in technology in the Nordic camp allowed for the development of special skis for skating and ski jumping.

## Design

Ski nomenclature is relatively simple. Examining the ski from front to back along the direction of travel, the front of the ski (typically pointed or rounded) is the "tip", the middle is the "waist" and the rear (typically flat) is the "tail".

All skis have four basic measures that define their basic performance: length, width, sidecut and camber. Skis also differ in more minor ways to address certain niche roles. For instance, mogul skis are much softer to absorb shocks, and powder skis are much wider to provide more float.

### Length and width

The length and width of the ski define its total surface area, which provides some indication of the ski's "float", its ability to remain on top of the snow instead of sinking into it. The width by itself also has a strong relationship to the amount of drag as it moves through the snow. Efficiency in cross-country skiing depends on keeping the skis narrow to reduce drag, and thus requires them to be very long in order to produce the required amount of float. Alpine skis are generally not as concerned about drag, and tend to be shorter and wider.

### Sidecut

Sidecut is the shape of the edge of the ski as viewed from the top or bottom. Alpine skis are wider at the tip and tail than they are at the waist; when rotated onto their edge, known as "edging", this causes the ski to bend into a curved shape and allows them to "carve" a turn. Cross-country techniques use different styles of turns; edging is



A shaped, twin-tip alpine ski. This example has relatively little sidecut, and has a classic camber - note that the tip and tail are touching the snow while the middle section is in the air.

not as important, and skis have little sidecut. The Slovenian Elan SCX introduced a radical sidecut design that dramatically improved performance of alpine skis, that were for many years shaped similarly to cross-country skis, simply shorter and wider. Other companies quickly followed the Elan SCX design, and it was realized in retrospect that "It turns out that everything we thought we knew for forty years was wrong."<sup>[2]</sup> Since then, "shaped" skis have dominated alpine ski design.<sup>[2]</sup>

## Camber

Camber is the shape of the edge of the ski as viewed from one side or the other. Skis are traditionally designed so the tips and tails are naturally pressed down, and if laid on a flat surface, the waist will be in the air. Without camber, when the skier's weight is applied at the waist, the weight will be distributed on the surface closest to the foot, diminishing along the length. Camber presses the tips and tails into the snow, extending the surface area bearing the skier's weight, and thereby improving the amount of edge in contact with the surface. The technique was first introduced by ski makers in Telemark, Norway, and remained largely unchanged through the 20th century.<sup>[3]</sup> In 2002, skier Shane McConkey led development of the Volant Spatula, an alpine ski developed for skiing deep powder snow. The Spatula featured "reverse camber" with the tips and tails rising above the waist, in an effort to improve the ski's ability to float on the snow. It was quickly realized that the design was superior in many snow conditions, and as was the case with radical sidecuts, modern alpine skis generally feature some sort of "rocker" design today. This is often subtle, with natural camber at the waist, and rocker at the tip and tail.

## Construction

Skis have undergone several leaps in design, starting with hand-carved single pieces of wood and evolving into the modern torsion-box design. These can be generally classified into classic wooden, laminated wood, laminated metal and fibreglass, torsion box, and cap designs.

### Classic wooden

The classical wooden ski consists of a single long piece of suitable wood that is hand-carved to produce the required shape. Early designs were generally rectangular in cross-section, with the tip bent up through the application of steam. Over time the designs changed, and skis were thinned out to the sides, or featured prominent ridges down the center.

### Wood laminates

The perfect wood for a ski is light, flexible in length and stiff in cross-section. Such a wood does not exist. Starting in the 1940s, skis built up from a number of different types of wood glued together became common. By selecting different woods in different areas, the flex pattern could be better controlled. The glue between the pieces of wood also added to the torsional stiffness, twisting the ski along its longitudinal axis requires the sections of wood to move relative to each other, but the glue resisted this motion better than the wood itself. This method also lowered the material costs, as it is generally easier to find smaller pieces of wood, and this was a serious concern when hardwood stocks in Europe depleted.<sup>[4]</sup>

### Edges

In the 1940s, strips of steel were screwed to the bottom edges of the ski on either side. These maintained a sharp edge and allowed the ski to bite into the snow or ice when they were edged. Simple variations on the theme have remained in use to this day.

### Metal laminates

Although a number of companies had experimented with all-aluminum skis in the 1940s, none of these proved practical. It was Howard Head's experiments combining aluminum and conventional wood

designs that solved the problem. The Head Standard sandwiched a conventional wood laminate ski between two thin layers of aluminum sheet on the top and bottom. When the ski was torqued, the position of the aluminum sheets above and below the axis of rotation required them to slide sideways relative to the core, something that was resisted by the glue along the entire surface of the sheet. The Standard was dramatically stiffer in rotation, and so greatly improved edging and turning that it was known as "The Cheater".

### Fibreglass laminates

One disadvantage of the metal laminates was that they were very "springy" and tended to chatter on bumpy surfaces and especially at high speeds. As late as the 1960s, racers still used conventional all-wood designs. Fibreglass, first widely used in the 1940s, as an alternative material offered vibration damping, as well as allowing the flex pattern to be controlled along the length of the ski. Several such designs were introduced in the 1950s but the first successful one was the 1959 Toni Sailer Fibreglaski by Fred Langendorf and Art Molnar of Montreal. Fibreglass laminates were made much more famous by the Kneissl White Star and Rossignol Strato during the 1960s, and by the late 1960s they were as common as metal.

### Torsion box

The Dynamic VR7 introduced a new construction method in which a smaller wooden core was wrapped in wet fibreglass, as opposed to pre-dried sheets being glued to the core. The result was a torsion box, which made the ski much stronger. The VR7, and its more famous follow-on VR17, was the first fibreglass ski that could be used for mens racing, and quickly took over that market. Over time, materials for both the core and torsion box have changed, with wood, various plastic foams, fibreglass, kevlar and carbon fiber all being used in different designs. Torsion box designs continue to dominate cross-country ski designs, but is less common for alpine and ski touring.

### Cap skis

During the 1980s, Bucky Kashiwa developed a new construction technique using a rolled stainless steel sheet forming three sides of a torsion box over a wooden core, with the base of the ski forming the bottom. Introduced in 1989, the Volant skis proved expensive to produce, and in spite of numerous positive reviews the company never able to become profitable. In 1990, the Rossignol S9000 took the same basic concept but replaced the steel with plastics, producing a design they called "monocoque". Now referred to as the "cap ski" design, the concept eliminates the need to wrap the core and replaces this with a single-step process that is much less expensive to produce. Cap ski construction dominates alpine ski construction today.

Beginning in the early 2000s, many ski manufacturers began designing skis and bindings together, creating an *integrated binding system*. These systems serve three purposes. Firstly, they often use a *railroad track* design, to allow the toe and heel pieces to slide, which in turn allows the ski to flex deeply, without a non-flexing spot underfoot due to the binding. Secondly, it gives the skier a better control on his skis, since the binding is not only screwed on the ski, but integrated in the ski core via inserts. Thirdly, it requires the consumer to purchase both skis and bindings from the same manufacturer due to the proprietary nature of the system, thus increasing sales.

## Types

Many types of skis exist, designed for different needs, of which the following are a selection.

### Alpine

Like all skis, the original alpine "downhill" skis were little more than wood planks. Early alpine skis, developed in Switzerland and Austria during the 1890s, were wider, shorter versions of the standard Huitfeldt Telemark model, meant to be more agile in steep terrain and in deeper snow. Rudolf Lettner of Salzburg began marketing steel edges in 1928, enabling the ski to grip on hard snow ice. The following year Guido Reuge introduced the Kandahar binding, providing for heel lock-down and improved control for downhill skiing. Downhill ski construction has evolved into much more sophisticated technologies. The use of composite materials, such as carbon-Kevlar, made skis stronger, lighter, and more durable.

By the late 1980s World Cup giant slalom skiers were getting race-stock skis with deeper sidecuts. In 1991, designers at Elan produced a very exaggerated version of this race ski, and in 1993 introduced a recreational version described by the company as offering a "parabolic" turn shape. This became the prototype of modern "shaped" skis (when viewed from above or below, the centre or "waist" is significantly narrower than the tip and tail). Virtually all modern skis are made with some degree of side cut. The more dramatic the difference between the widths of the tip, waist and tail, coupled with the length, stiffness and camber of the ski, the shorter the "natural" turning radius.

Skis used in downhill race events are longer, with a subtle side cut, built for speed and wide turns. Slalom skis, as well as many recreational skis, are shorter with a greater side cut to facilitate tighter, easier turns. Many ski manufacturers label their skis with the turning radius on the top. For a racing slalom ski, this can be as low as 12 metres and for Super-G they are normally at 33 metres. For off-piste skis the trend is towards wider skis that better float on top of powder snow.

The ski is turned by applying pressure, rotation and edge angle. When the ski is set at an angle the edge cuts into the snow, the ski will follow the arc and hence turn the skier; a practice known as *carving* a turn. While old fashioned "straight skis" which had little side cut could carve turns, great leg strength was required to generate the enormous pressure necessary to flex them into a curved shape, a shape called *reverse camber*. When a modern ski is tilted on to its edge, a gap is created between the ground and the middle of the ski (under the binding) as only the sides near the tip and the tail touch the snow. Then, as the skier gently applies pressure, the ski bends easily into reverse camber.

Influenced by snowboarding, during the 1990s the side cut became significantly more pronounced to make it easier for skiers to carve turns. Such skis were once termed *carving skis*, *shaped skis*, or *parabolic skis* to differentiate them from the more traditional straighter skis, but nearly all modern recreational skis are produced with a large degree of side cut.

## Reverse Camber

Reverse Camber, more commonly called "rocker" is a term that describes skis with something other than the traditional camber shape. Reverse camber skis have tips and tails that curve up but the waist of the ski can be flat or have camber. This allows the ski tip to remain above soft powder snow and helps the skier turn easier, faster and with less effort. The first production ski to feature reverse camber was the Volant Spatula which premiered in the 2002–2003 season. Since then, many manufacturers have experimented with the concept and today rocker and reverse camber can be found in dozens of ski models. Rocker is the latest innovation in ski tech and has taken over the market. Rocker is used in many types of skis along with creating new types of skis such as free-ride, twin-tip, freestyle, and all mountain skis have at least been altered by the innovation of "rocker." This innovation has taken a 210 cm powder ski from an 80 m turn radius to a 15 to 25 m turn.

## Twin-tip

*Main article: Twin-tip ski*

Twin-tip skis are skis with turned-up ends at both the front and rear. They make it easier to ski backwards, allowing reversed take-offs and landings when performing aerial maneuvers. The turned-up tail allows less application of aft pressure on the ski, causing it to release from a turn earlier than a non-twin-tip ski. Twin-tip skis are generally wider at the tip, tail, and underfoot and constructed of softer materials to cushion landings. Bindings are typically mounted closer to the centre of the ski to facilitate the balance of fore and aft pressure while skiing backwards or "switch", and built lower to the ski for easy rail sliding. Some skis are also manufactured with special materials or a different side cut design under and close to the foot to facilitate rail sliding.

In the past five years twin tips have become popular among youth skiers, ages 14–21. The popularity explosion of twin-tip skis created a push for the inclusion of more terrain park elements at ski areas. Once considered a passing fad, twin-tip skis have become a staple in the product line of all major ski-producing companies worldwide, with a few specializing in twin tips. Line Skis, started by Jason Levinthal, was the first company to market only twin-tip skis. The first twin-tip ski was the *Olin Mark IV Comp* introduced in 1974. The first company to successfully market a twin-tip ski was Salomon, with their Teneighty ski. While the first person to first introduce the Twin-tip to Salomon was famous Freeskier "Michael Douglas". These skis are used by *freestylers* also known as *freeskiers*.

## Alpine touring ski

The Alpine touring ski is a modified lightweight downhill ski with an alpine touring binding. Like the backcountry ski, it is designed for unbroken snow. For climbing steep slopes, *skins* (originally made of seal fur, but now made of synthetic materials) can be attached at the base of the ski. The heel of the ski boot can be clamped to the ski when skiing downhill and released when climbing. The type of ski is mainly used with alpine touring boots, which are rigid but lighter than downhill skiing boots, but may be fixed with a binding suitable for skiing in technical mountaineering boots.<sup>[5]</sup>

## Monoski

The monoski is wide enough to attach both boots to a single ski. After a brief boom in the 1980s, only a few thousand enthusiasts continue to use it. Due to its extra width and flotation in deep snow, enthusiasts claim it to be a superior powder ski. The monoski is produced by a half dozen companies worldwide in limited quantities.

## Telemark

The Telemark ski is a downhill or touring ski, where the binding attaches only at the toe. The Telemark ski was the first ski with a significant side cut, and evolved in the Telemark region of southern Norway early in the 19th century. It was popularized by Sondre Norheim of Morgedal in Telemark, when he demonstrated the ski and the Telemark style of skiing to the public at Christiania, Norway beginning in 1868. The fact that the foot is only attached to the ski at the toes means that flexible ski boots are worn. The primary turning technique involves pushing one foot forward and lifting the heel of the other foot.

## Cross-country



The Böksta Runestone is believed to depict the Viking god Ullr with his skis and his bow

Cross-country skis are very light and narrow, and usually have slight sidecut, though some newer skis are a sidecut more like an alpine ski. The boots attach to the bindings at the toes only. Three binding systems are popular: Rottefella's NNN, Salomon's SNS profil, and SNS pilot.

The ski bases are waxed to reduce friction during forward motion, and kick wax can also be applied for adhesion when walking uphill. Some waxless models may have patterns on the bottom to increase the friction when the ski slides backward.

The two major techniques are *classic* (traditional striding) and *freestyle* or *skating*, which was developed in the 1980s. Skating skis are shorter than classic skis and do not need grip wax. The skating technique is used in biathlons. *V1 skating* is done when going up a hill and one arm is the lead arm which poles ahead of the second with its side. *V2 skating* is done while going down a hill or on a flat area. It involves poling with every stride of the ski.

## Backcountry

Skis for backcountry skiing (also known as *free range* and *Big Mountain* skis) are designed for unbroken snow where an established track is lacking. Employed by military forces to fight in winter conditions, they are the most closely related modern type to the original ski.

Characteristically 10 cm or more in width, they're often fitted with cable bindings to provide general sturdiness and to make it easier to extract one's feet from deep snow banks, in case it should be impossible to reach the bindings by hand.<sup>[*citation needed*]</sup>



The 1903 rendition of medieval Russian soldiers' use of skis to facilitate their movement during winter campaigns.

## Mogul

Skis specifically designed for moguls typically have a different flex pattern, are narrower, and have a smaller sidecut than a common carving ski. The differences let the ski absorb the impact of the moguls with the tip yet have a tail stiff enough to push off the previous mogul.

## Jumping

Skis for ski jumping. Long and wide skis, with bindings attaching at the toe.

## Custom

Since 2004 a few small companies have emerged in the United States making custom skis.<sup>[*citation needed*]</sup> The process begins with a questionnaire and interview to determine what flex, materials and ski shape will best suit the skier's skills, weight and target snow and terrain. Core materials, structural components, base and edge materials can be of superior quality and durability. Customers often design their own decorative topsheets.

## Other uses

### On vehicles

Skis are fitted in place of tires on snowmobiles, snowcats, snow coaches, and airplanes, among other similar applications.

## See also

- History of skiing
- Roller skiing – a type of inline skate that resembles a ski
- Snowboarding – a newer way to ride on snow, on one large board rather than two skis
- Skiboarding – very short, twintip skis
- Ski boot – specially designed boots for skiing
- Ski patrol – patrollers on skis
- Snowshoe

## References

- ↑ Merriam-Webster's Dictionary (<http://www.merriam-webster.com/dictionary/ski>)
- ↑ ***<sup>a</sup> <sup>b</sup>*** Seth Masia, "The Evolution of Modern Ski Shape" (<http://books.google.ca/books?id=cIgEAAAAMBAJ&pg=PA33>), *Skiing Heritage Journal*, September 2005, pp. 33-37
- ↑ Seth Masia, "Milestones and Detours in Ski Design" ([http://books.google.ca/books?id=\\_7YDcDEqBcEC&pg=PA18](http://books.google.ca/books?id=_7YDcDEqBcEC&pg=PA18)), *Skiing Heritage Journal*, March 2004, p. 18
- ↑ Seth Masia, "Milestones and Detours in Ski Design" ([http://books.google.ca/books?id=\\_7YDcDEqBcEC&pg=PA18](http://books.google.ca/books?id=_7YDcDEqBcEC&pg=PA18)), *Skiing Heritage Journal*, March 2004, p. 19
- ↑ "Silvretta" (<http://www.silvretta.de/products.php?chid=7&m=4&lang=uk&sid=81c...96948316299d598c9455587c6&prid=13&ac=det>). Silvretta.de. Retrieved 2011-10-25.

## External links

- Physics of skiing (<http://www.math.utah.edu/~eyre/rsbfaq/physics.html>)
- FIS equipment tolerances (<http://www.fis-ski.com/uk/insidefis/fisgeneralrules/equipment.html>)
- A history of the modern shaped ski (<http://www.skiinghistory.org/index.php/2011/08/evolution-of-ski-shape/>)
- History of skis from about 1850 (<http://www.skiinghistory.org/index.php/2011/08/a-short-history-of-skis/>)
- Origin of the laminated ski ([http://books.google.com/books?id=rVgEAAAAMBAJ&lpq=PA16&dq=splitkein&as\\_pt=MAGAZINES&pg=PA13#v=onepage&q=splitkein&f=false](http://books.google.com/books?id=rVgEAAAAMBAJ&lpq=PA16&dq=splitkein&as_pt=MAGAZINES&pg=PA13#v=onepage&q=splitkein&f=false))

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Categories: Human-powered vehicles | Skiing equipment | Sliding vehicles

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# EXHIBIT 30

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**From:** John M. Genga Contact Information Redacted

**Sent:** Wednesday, July 03, 2013 7:24 PM

**To:** Contact Information Redacted

**Cc:** Contact Information Redacted

**Subject:** RE: ICC EXP/421/ICANN/38

Dear ICC, parties and counsel:

Wild Lake, LLC (“Applicant”), a subsidiary of Donuts Inc. (“Donuts”), strenuously opposes the attempt by objector Fédération Internationale de Ski (the “Objector”) to make a “supplemental” submission (the “Unsolicited Submission”) without the Panel having first requested it to do so. Specifically, Article 17 of ICANN’s New gTLD Dispute Resolution Procedure (“Procedure”) gives the Panel only the discretion to “decide” whether it “shall” allow any “written statements” beyond the Objection and the Response for which the Procedure solely provides. In other words, the Panel must first make the determination that it wishes additional “statements” before any party “shall” – future tense – submit any such thing.

The Procedure most certainly does *not* provide *any* basis for a party simply to take it upon *itself* to make any such submissions absent such Panel permission. To the contrary, subsection (d) of Module 3, Article 1 provides that “[t]he parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.” It is particularly insidious for Objector to attempt so blatantly to bias the Panel against Applicant by accompanying its request with the Unsolicited Submission itself.

Further, while a Panel “may” consider “written statements” that it “decides” to allow, it cannot even *request* further “evidence” except in “exceptional cases.” *Id.*, Arts. 17, 18. Nevertheless, Objector attempts to submit additional evidence in the form of a set of “guidelines” suggested in 2007 by ICANN’s Generic Names Supporting Organization (GNSO).

No “exceptional case” exists for the Panel to consider such untimely matter. First, Objector had that information available to it at the time of its original Objection, but chose not to offer it. Second, that extremely preliminary document has no relevance to this proceeding. It predates by *more than an entire year* even the very *first* of *nine* drafts of the New gTLD Applicant Guidebook (the “Guidebook” or “AGB”) before ICANN issued the final version in June 2012. See <http://newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v1>. The later materials cited by Applicant in its Response supersede those on which Objector now seeks to rely and, unlike those earlier recommendations, have actual relevance to interpreting the Guidebook provisions that apply to this case.

The entire new gTLD objection process was “designed with an eye toward timely and efficient dispute resolution.” Procedure, Preamble; see *also* Art. 18 (reiterating “the goal of resolving disputes over new gTLDs rapidly and at reasonable cost”). Consistent with this objective, the Procedure provides for solely one mandatory filing from each side. *Id.*, Arts. 7, 11, 17. The ICC and other dispute resolution service providers formulated fee-structures based on

this model for expeditious and cost-effective resolution of disputes. *Id.*, Art. 14(a). For example, with respect to “Legal Rights Objections,” the World Intellectual Property Organization (“WIPO”) affirms on its website that “the ICANN dispute resolution procedure typically contemplates a *single round of pleadings*.” See [www.wipo.int/amc/en/domains/lro/#8a](http://www.wipo.int/amc/en/domains/lro/#8a) (emphasis added).

Fully aware of these goals and the limitations in effect to achieve them, Objector chose to file its Objection against the Applicant. Objector had ample opportunity – indeed, nine months from the June 13, 2012 deadline for submission of all new gTLD applications to the March 13, 2013 deadline to file objections – to prepare and evaluate its evidence and arguments and to anticipate that which it might receive in response. Knowing that it bore the burden of proof, AGB at 3-18, Objector should have considered whether it could prove its case with the sole submission it was allowed as of right, and in light of the response it should have expected to receive. Whether Objector miscalculated the strength of the Application or the lack of merit to its Objection, neither reason suffices now to introduce more briefing and to burden the ICC, the Panel and the Applicant with the consequences of Objector’s own lack of foresight.

We encourage the ICC and the Panel to consider the precedent that may be established for this and other objections, including how granting Objector’s request could negatively impact the new gTLD program’s overarching scheme of timely and cost-effective dispute resolution in this and future application rounds. The issue is not theoretical. Donuts has responded to over 50 objections, including 10 on the same day it responded to the Objection at issue here. Since so completing the ICANN-envisioned “single round of pleadings,” Donuts has had to respond an inordinate number of attempts by several objectors to make unsolicited supplemental filings, notwithstanding the conscious determination of ICANN’s multiple stakeholders not to allow, other than in “exceptional cases,” such activities antithetical to this alternative dispute resolution process.

Applicant respectfully submits that Objector’s failure to anticipate evidence and arguments that it had the better part of a year to consider does not constitute an “exceptional case” as contemplated by the Procedure. Applicant further respectfully suggests that holding otherwise would render the limitations of the Procedure meaningless, as any objector could simply claim it failed to anticipate certain evidence and arguments made in a Response. It also would open the door for potential harassment and gamesmanship by objectors working collaboratively with one another in order to drive up costs and complexity for everyone involved, in hopes of garnering a perceived tactical advantage and distracting the Panel from the lack of merit to objectors’ substantive arguments. Again, this is not a theoretical issue. Such collaboration among objectors apparently already has occurred, as Donuts has received other unsolicited submissions in addition to the one presented here, many of which use verbatim language despite coming from different parties and counsel.

Applicant therefore respectfully urges the Panel to reject Objector’s Unsolicited Submission without considering it. Should the Panel nevertheless allow any portion of the Reply into the record, it should:

- Permit only a “written statement” responding to new matter, if any, in Applicant’s response – as opposed to issues that the Objection already has raised or should have raised, such as applicable objection standards and historical references in attempted support of same;
- Reject any additional “evidence” from Objector, as this does not constitute an “exceptional case” contemplated by Article 18; and
- Permit Applicant to respond to any portion that the Panel does allow, as the Procedure at minimum provides for an equal number of submissions per side.

Thank you for your consideration of this important issue.

Respectfully submitted,

*John M. Genga*

THE IP AND TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes

Contact Information Redacted

**From:** Godefroy Jordan Contact Information Redacted

**Sent:** Monday, July 01, 2013 1:27 PM

**To:** Contact Information Redacted

**Cc:** Contact Information Redacted

**Subject:** RE: ICC EXP/421/ICANN/38

Dear Center of Expertise,

Attached please find the answer by Objector *Fédération Internationale de Ski (FIS)* to objection by Applicant/respondent *Wild Lake, LLC* to the appointment of Mr. Jonathan Peter Taylor as panelist in this matter.

Kind Regards,

Godefroy Jordan

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Starting Dot s.a.s.

Paris, France

Contact Information Redacted

# EXHIBIT 31

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**From:** Jonathan Taylor Contact Information Redacted  
**Sent:** Friday, August 02, 2013 4:28 AM  
**To:** Contact Information Redacted  
**Cc:** Contact Information Redacted  
**Subject:** RE: ICC EXP/421/ICANN/38 (1/7) [B&B-M.FID6981577]

**ICC EXP/421/ICANN/38**

Dear Ms Kosak

As the expert appointed to determine this matter, I acknowledge receipt of the documents sent on 26 July 2013.

I have copied in the parties to this response to make email contact with them, and to invite them to use this email address for all future communications with me.

I have reviewed the file, including the Objector's "supplemental filing" dated 27 June 2013, and the Applicant's objection to that supplemental filing (email dated 4 July 2013).

In exercise of the discretion given to me by Article 17 of the New gTLD Dispute Resolution Procedure, I have decided to allow the Objector's supplemental filing, but the Applicant shall have two weeks from today (ie until close of business on 16 August 2013) to file such written response to the issues raised in the supplemental filing as it sees fit.

Yours sincerely,

Jonathan Taylor

---

**From:** KOSAK Spela Contact Information Redacted   **On Behalf Of** EXPERTISE  
**Sent:** 26 July 2013 19:37  
**To:** Contact Information Redacted  
**Cc:** Contact Information Redacted  
**Subject:** ICC EXP/421/ICANN/38 (1/7)

Dear Sirs,

Please find attached our letter of today along with Note on Personal Expenses and Guidance to Experts documents. The Objection, the Response, the transmission of the Centre's communications with the parties and Objector's additional submission with the relevant correspondence will follow in six additional e-mails.

Faithfully yours,

Špela Košak

Deputy Manager  
ICC Dispute Resolution Services  
International Centre for Expertise

ICC International Centre for Expertise  
Contact Information Redacted

Contact Information Redacted



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# EXHIBIT 32



International Chamber of Commerce

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## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

<i>Fédération Internationale de Ski (FIS),</i>  (Objector)  -v-  <i>Wild Lake, LLC,</i>  (Applicant/Respondent)	ICC Case No. EXP/421/ICANN/38  In re Community Objection to: <.SKI/> Application ID 1-1636-27531
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### Applicant’s Response to Objector’s Additional Written Statement

#### **Introduction**

Objector has made a supplemental filing (“Reply”) that does little more than rehash arguments already presented in the original Objection and refuted in Applicant’s Response. The Reply inadequately deals with Objector’s lack of standing, misconstrues substantive elements of the community Objection, and completely ignores Objector’s failure to prove the essential “material detriment” factor of the Objection. AGB § 3.5.4.

Objector “must meet all four tests in the standard for the objection to prevail.” *Id.* at 3-25. Objector has not done so to overcome the strong “presumption ... in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD,” or to satisfy its “corresponding burden ... to show why that gTLD should not be granted to the applicant.” <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>.

#### **Objector Fails to Establish Standing.**

The Reply claims standing to object even though Objector also applied for the same string as a community itself. However, the Guidebook already provides a process for a community applicant to attempt to establish a “clearly delineated community” with “substantial support” and a “strong association” with the string – and having “security measures,” which Objector (incorrectly) claims Applicant lacks, to the alleged “material detriment” of the “community” – the effect of which “eliminates all directly contending standard applications,” such as that made by Applicant here. See AGB §§ 1.2.3.1 and 4.2.3 at 4-9 *et seq.* If Objector is correct, there would be no need for both processes. Instead, the

ICC International Centre for ADR Centre international d’ADR de la CCI  
Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

intent was for community applicants to use the Community Priority Evaluation (CPE) process and for communities that did not apply to use the objection process. Allowing a community applicant to assert a community objection against a competing application gives the objecting applicant an unfair advantage in the new gTLD delegation process. Not only does this give Objector access to a string by knocking out its sole competition in advance of its CPE; a denial of the Objection also may provide Objector a second bite at the apple and an opportunity to modify its application to obtain a more favorable outcome. ICANN did not design the community objection as a process for a community applicant to obtain an “advisory opinion” to bolster its application.

Also with respect to standing, Objector contends that Applicant has made a “false statement and truncated text from the Applicant Guidebook” that pertains to the *substantive* elements of a community objection in Section 3.5.4. Reply at 2. Not so at all. Applicant has quoted directly from the Guidebook’s standing requirements for community objections – specifically that, to have standing, an objector must represent “a community strongly associated with the applied-for gTLD string.” AGB § 3.2.2.4 at 3-7. While the substantive factors require a “strong association” between the applied-for string and the purported *community*, *id.* §3.5.4 at 3-22, the standing elements emphasize the relation between the string and the *Objector*. Thus, Applicant has accurately stated that the Objector must be “strongly associated” with a <SKI> string, such that the string would readily bring Objector’s organization to mind. Objector has demonstrated no such association.

***Objector Fails to Establish the Substantive Elements of Its Objection.***

ICANN designed the community objection as a vehicle for legitimate, clearly delineated communities of people (e.g., Navajo) to block an applicant that would harm that specific community – that is, “to prevent the misappropriation of a string that *uniquely or nearly uniquely* identifies a well-established and *closely connected group* of people or organizations.” See <http://archive.icann.org/en/topics/new-gtlds/aqve-analysis-public-comments-04oct09-en.pdf> at 19 (emphases added). Nothing in the Objection or Reply does or could demonstrate that the word “SKI” so “uniquely or nearly uniquely identifies” a “closely connected group of people or organizations.” To the contrary, as Applicant notes in its Response, the word has many other definitions, with differing meanings to many other constituencies, such that it simply does not so “uniquely or nearly uniquely” identify a discrete and “closely connected group” so as to constitute a “clearly delineated community.” Objector posits a preliminary “clearly delineated” concept from 2007, Reply Annex 2, superseded by the above-cited later commentary.

Regarding the “strong association” and “substantial opposition” element of the substantive objection test, the Reply offers nothing more than the original Objection. It simply repeats that a “primary meaning” of the word “SKI” creates the requisite association, and that its alleged representation of “hundreds of ski federations” and “millions of skiers” means that it speaks for all of them so as to make “community” opposition “substantial.” Absent that one of many dictionary definitions of the term, Objector presents no evidence “strongly associating” it with its claimed community. Nor does the fact that Objector boasts many members mean that it speaks for them so as to make the alleged community’s opposition “substantial.” Rather, Objector is a commercial actor attempting to misuse the objection process to try to gain an unfair competitive position in the delegation process.

Most notably, completely missing from the Reply, as from the original Objection, is any *evidence* to discharge Objector’s burden of proving the fourth “material detriment” factor. This failure alone suffices to deny the Objection, since Objector “*must meet all four* tests in the standard for the objection to prevail.” AGB § 3.5.4 at 3-25.

**Conclusion**

The Reply offers nothing that Objector did not or could not have presented at the time of its initial Objection. As such, it warrants no consideration at all. Yet, even if accepted, the Reply fails to overcome the Objection's lack of evidence needed to carry Objector's burden to prove standing and all four substantive elements of the Objection. Without such proof, the Panel must deny the Objection.

**Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Response is/was transmitted to the Objector on August 16, 2013 by email to the following addresses: Contact Information Redacted

A copy of this Response is/was transmitted to ICANN on August 16, 2013 by e-mail to the following address: [DRfiling@icann.org](mailto:DRfiling@icann.org)

NO ANNEXES ACCOMPANY THIS RESPONSE.

DATED: August 16, 2013

Respectfully submitted,

THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes

By: \_\_\_\_\_/jmg/\_\_\_\_\_  
John M. Genga  
Contact Information Redacted

By: \_\_\_\_\_/dcm/\_\_\_\_\_  
Don C. Moody  
Contact Information Redacted

Attorneys for Applicant/Respondent  
WILD LAKE, LLC

# EXHIBIT 33

---

**From:** Jonathan Taylor Contact Information Redacted

**Sent:** Thursday, September 19, 2013 1:34 PM

**To:** Khurram A. Nizami

**Cc:** Contact Information Redacted

**Subject:** RE: ICC EXP/421/ICANN/38 (1/7) [B&B-M.FID7025977]

Dear parties

Please be advised that, the Centre having granted my request for a short extension of the 45 day deadline, I will be sending my determination in draft form to the Centre tomorrow (Friday 20 September).

Very best regards,

Jonathan Taylor

Expert

---

**From:** Jonathan Taylor Contact Information Redacted

**Sent:** 16 September 2013 12:06

**To:** Contact Information Redacted

**Cc:** Contact Information Redacted

**Subject:** FW: ICC EXP/421/ICANN/38 (1/7) [B&B-M.FID7025977]

It has been brought to my attention that I failed formally to acknowledge receipt of this submission. I apologise for this oversight.

The file is now complete and I plan to forward my draft determination to the ICC this week.

**From:** "Khurram A. Nizami" Contact Information Redacted

**Date:** 17 August 2013 01:39:54 EEST

**To:** Contact Information Redacted

**Cc:** Contact Information Redacted

**Subject:** RE: ICC EXP/421/ICANN/38 (1/7) [B&B-M.FID6981577]

Dear ICC, parties and counsel,

Applicant Wild Lake, LLC submits the attached brief pursuant to the Panel's allowance of a supplemental filing from each party.

Sincerely,

Khurram

Khurram A. Nizami  
THE IP AND TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes  
Contact Information Redacted

---

**From:** Jonathan Taylor Contact Information Redacted  
**Sent:** Friday, August 02, 2013 4:29 AM  
**To:** Contact Information Redacted

**Cc:** Contact Information Redacted  
**Subject:** RE: ICC EXP/421/ICANN/38 (1/7) [B&B-M.FID6981577]

**ICC EXP/421/ICANN/38**

Dear Ms Kosak

As the expert appointed to determine this matter, I acknowledge receipt of the documents sent on 26 July 2013.

I have copied in the parties to this response to make email contact with them, and to invite them to use this email address for all future communications with me.

I have reviewed the file, including the Objector's "supplemental filing" dated 27 June 2013, and the Applicant's objection to that supplemental filing (email dated 4 July 2013).

In exercise of the discretion given to me by Article 17 of the New gTLD Dispute Resolution Procedure, I have decided to allow the Objector's supplemental filing, but the Applicant shall have two weeks from today (ie until close of business on 16 August 2013) to file such written response to the issues raised in the supplemental filing as it sees fit.

Yours sincerely,

Jonathan Taylor

---

**From:** KOSAK Spela Contact Information Redacted    **On Behalf Of** EXPERTISE  
**Sent:** 26 July 2013 19:37  
**To:** Contact Information Redacted

**Cc:** Contact Information Redacted  
**Subject:** ICC EXP/421/ICANN/38 (1/7)

Dear Sirs,

Please find attached our letter of today along with Note on Personal Expenses and Guidance to Experts documents. The Objection, the Response, the transmission of the Centre's communications with the parties and Objector's additional submission with the relevant correspondence will follow in six additional e-mails.

Faithfully yours,

Špela Košak

Deputy Manager  
ICC Dispute Resolution Services  
International Centre for Expertise

ICC International Centre for Expertise  
Contact Information Redacted

Contact Information Redacted



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# EXHIBIT 34

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/421/ICANN/38

FÉDÉRATION INTERNATIONALE DE SKI

(SWITZERLAND)

vs/

WILD LAKE, LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

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## EXPERT DETERMINATION OF A COMMUNITY OBJECTION TO AN APPLICATION FOR A NEW GENERIC TOP-LEVEL DOMAIN NAME (<.SKI>)

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The undersigned Expert, appointed by the ICC's International Centre for Expertise to sit alone as the Expert Panel in the above-referenced matter, hereby issues the following Expert Determination resolving the above-referenced objection:

### A INTRODUCTION

1. This dispute arises under the programme established by the Internet Corporation for Assigned Names and Numbers ('**ICANN**') for the operation of new generic top-level domain names ('**gTLD**'). Background information about that programme can be found in the ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (the '**GNSO Final Report**').
2. Wild Lake, LLC of 155 108<sup>th</sup> Avenue NE, Suite 510, Bellevue, WA 20166, United States of America (the '**Applicant**'), represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C., 15260 Ventura Blvd. Suite 1810, Sherman Oaks, CA 91403, USA, is a subsidiary of Donuts Inc., which has applied (either directly or through its affiliated enterprises, including the Applicant) for more than 300 new gTLDs.
3. Fédération Internationale de Ski of Blochstrasse, 2, CH-3653 Oberhofen/Thunersee, Switzerland (the '**Objector**'), is an association organised under Swiss law.
4. On 13 June 2012, the Applicant submitted an application for the new gTLD <.SKI> (Application No. 1-1636-27531: the '**Application**'). On 13 March 2013, the Objector filed a 'Community Objection' to the Application, i.e., it objected to the Application on the basis that ['there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted'](#) (the '**Objection**').
5. The purpose of these proceedings is to determine whether or not the Objection is well-founded and should therefore prevail over the Application. The rules that govern this matter are (1) the ICANN's gTLD Applicant Guidebook (v. 2012-06-04) (the '**Guidebook**'); (2) in particular, the New gTLD Dispute Resolution Procedure attached to Module 3 of the Guidebook (the '**Procedure**'); and (3) the Rules for Expertise of the ICC (the '**Rules**'), as supplemented by (4) the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure. Article 20 of the Procedure states that to determine whether an objection to an application for a new gTLD should prevail, ['the Panel shall apply the standards that have been defined by ICANN. In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable'](#). The standards defined by ICANN in relation to Community Objections to new gTLD

applications are set out in Module 3 of the Guidebook, and the most relevant parts are quoted below.

## **B. PROCEDURAL HISTORY**

### **B.1 Administrative review of the Objection, and Response**

6. Under Article 3(d) of the Procedure, Community Objections are administered by the ICC's International Centre for Expertise (the '**Centre**'). On 2 April 2013, the Centre completed its administrative review of the Objection, determined that the Objection complied with all applicable requirements, and therefore notified the Applicant of the Objection on 15 April 2013.
7. The Applicant filed a response to the Objection on 16 May 2013 (the '**Response**').

### **B.2 Appointment of the Expert**

8. On 19 June 2013, the Centre notified the parties that it had appointed the undersigned, Jonathan Taylor of Bird & Bird LLP, 15 Fetter Lane, London, UK, to sit alone as the Expert determining this matter, and provided them with the undersigned's Declaration of Acceptance and Availability, Statement of Impartiality and Independence, in which the undersigned had included the following statement:

Acceptance with disclosure: I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below ... .

Neither my firm nor I has ever acted for either party. However, I do know Sarah Lewis of FIS. I met her in 2007, when I advised a working party convened by the World Anti-Doping Agency to consider revisions to the International Standard for Testing, and she was a member of that Working Party. I have seen her at anti-doping seminars from time to time since then. I do not consider this affects my independence and impartiality but note it in the interests of full disclosure.

9. On 1 July 2013, the Applicant objected to the appointment of the undersigned as Expert in this matter on the following grounds: '**Applicant has considered and appreciates Mr. Taylor's disclosure [that he personally knows and has specifically worked with someone within Objector's organization]. It does not doubt his best intentions when he states that he does not expect that his professional familiarity with Sarah Lewis of FIS would affect his independence and impartiality. However, Applicant respectfully submits that the connection between the two impacts the *appearance* of impartiality, regrettably making disqualification of Mr. Taylor *appropriate*'.** The Objector opposed that request on 1 July 2013, asserting that there were no factual grounds to doubt the undersigned's independence and impartiality.
10. On 12 July 2013, the Centre requested that the undersigned provide his comments on the Applicant's objection (which it treated as a request for replacement of the Expert). The undersigned provided the following comments on 16 July 2013:

My understanding is that the Applicant is not suggesting actual bias on my part. I am grateful for that and can confirm it would be my clear intention and commitment to decide the matter based on the merits alone.

However, the Applicant is concerned that there is an 'appearance of bias' that necessitates my replacement as Expert in this matter. It is for others to decide whether this is a proper ground for objection under the applicable rules and, if so, what is the proper test to determine if appearance of bias exists. (For what it is worth, the test under English law would be whether the facts would lead a fair-minded and informed observer to conclude that there was a real possibility that I would be pre-disposed or prejudiced in favour of the Objector and/or against the Applicant for reasons unconnected with the merits of the case). For my part, I would only say that I do not think it unreasonable for the Applicant to raise this concern and I am not offended in any way by its doing so.

I obviously could not rule on any such objection myself. I can only comment on the relevant facts, as to which I can confirm that the Objector is correct in saying that (a) neither my firm nor I has ever acted for either party in the past; (b) I have never been engaged by or acted for FIS 'as legal counsel, advisor or suchlike'; (c) I was instructed by WADA to work on the revision of the International Standard for Testing in the period 2007-2009; (d) WADA also convened a working party (which had 8 members in total, as I recall, including Sarah Lewis) of representatives of stakeholders to provide their input into proposed revisions to the Standard, and I attended the meetings of that working party; (e) no register was taken of attendance at meetings so I cannot specifically confirm that Ms Lewis attended only two meetings of the working party, but I recall that she did not attend all of the meetings and that her assistant Ms Fussek took on some of the role on her behalf at some point; and (f) while I am currently working on a further revision of the International Standard for Testing for WADA, neither Sarah Lewis nor anyone else from the FIS is involved in that process.

11. On 25 July 2013 the Chairman of the Standing Committee of the Centre rejected the Applicant's request for replacement of the Expert, and confirmed the appointment of the undersigned as Expert in this matter. On 26 July 2013 the file was transferred to the Expert. All subsequent communications between the Parties, the Expert and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. The language of all submissions and proceedings was English pursuant to Article 5(a) of the Procedure.

### **B.3 Reply and Sur-Reply**

12. On 27 June 2013, the Objector sought to make a supplementary submission (the '**Reply**'), 'solely for the purpose of responding to certain factual and legal inaccuracies set forth in' the Response. By email dated 4 July 2013, the Applicant objected to the Reply and asked that it be rejected without consideration.
13. On 2 August 2013, the Expert advised the parties that he was willing to accept the Reply, in exercise of the discretion given to him under Article 17 of the Procedure, on the basis that the Applicant would have two weeks to file any response to the Reply that it saw fit. The Applicant submitted such response (the '**Sur-Reply**') on 16 August 2013.
14. Neither party has sought leave to file any further submissions since then, and therefore the record is considered complete. No hearing was requested or took place.
15. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of '**the constitution of the Panel**'. The Centre considers that the Panel is constituted when the Expert is appointed, the

Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 26 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 9 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). Pursuant to Article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.

16. The Expert has considered carefully all of the submissions made and the materials put forward by the Objector (in the Objection and the Reply) and by the Applicant (in the Application and the Sur-Reply) to determine whether the Objection satisfies the standards defined by ICANN and set out in Module 3 of the Procedure. The Expert's findings are set out below, first in relation to standing and then in relation to the substantive requirements.

**C. FINDINGS IN RELATION TO STANDING (SECTIONS 3.2.2 AND 3.2.2.4 OF THE GUIDEBOOK)**

17. The Guidebook states that to be 'eligible' to file a Community Objection, the objector must show that it is an 'established institution associated with a clearly delineated community' that is 'strongly associated with the applied-for gTLD string'. (Guidebook sections 3.2.2 and 3.2.2.4). However, it then states that 'standing' to make the objection is established by proof that the objector is an 'established institution associated with a clearly delineated community', and appears to leave the issue of whether that community is 'strongly associated with the applied-for gTLD string' to the substantive part of the process. The Expert will therefore do the same. (See section D.3 below).

**C.1 'Threshold Considerations'**

18. Before getting to the 'Guidebook Elements' of the standing requirements, however, the Applicant raises two 'Threshold Considerations'. (Response pp.5-6).
19. First, the Applicant states that 'the Objector's organization' does not 'constitute a "community" as ICANN contemplated it. ... ICANN envisaged a "community" as a locality, a group of individuals sharing specific characteristics or interests, or entities that provide common services. See, e.g., AGB s.4.2.3 at 4-11. It did not intend for private parties purportedly representing an entire industry to claim community status. *Id.*' (Response pp.6-7). However, these citations are to Module 4 of the Procedure, relating to a Community-Based Evaluation conducted as part of a string contention procedure, where the applicant for a new gTLD has to show that it will operate the gTLD on behalf of a community. That is an entirely separate process from the objection procedure set out at Module 3 of the Procedure, which is the Module that governs these proceedings. The standing requirements for Community Objections, as specified in Module 3, are set out and discussed in detail in the next section of this Expert Determination. Either the Objector can meet those requirements or it cannot, but if

it can, then whether or not it could also meet requirements set out in a different Module in relation to a string contention procedure is irrelevant.

20. Second, the Applicant notes that if a party (or an affiliate) makes a community-based application for a new gTLD, and there is also a standard (i.e., not community-based) application for the same gTLD, then that will trigger a string contention procedure under Module 4 of the Procedure, in which the community-based application will prevail over the standard application if it passes the 'Community Priority Evaluation' set out in that Module 4. The Applicant asserts that in that situation, it is an 'abuse [of] the process' for the community-based applicant also to file an objection to the standard application, in order to get 'a "free shot" at eliminating its principal's competitor'. The Applicant says that is what the Objector is doing here, since it is a 'proxy' for Starting Dot SAS, which has made a community-based application for the <.SKI> gTLD. It says the Expert 'should not countenance such subversive behaviour'. (Response, pp.6-7). In other words, if you (or your affiliate) make a community-based application for a new gTLD and someone else makes a standard application for that same gTLD, you are confined to the string contention procedure, and do not have standing to object to the standard application as well. Otherwise, 'there would be no need for both processes'. (Sur-Reply p.1).
21. The Objector disagrees, noting: 'This assertion is not part of the criteria set by ICANN in the Applicant Guidebook related to the standing of an Objector. Applying for a TLD or supporting an existing Application which serves the interest of a community does not prevent the same community to defend its rights and interests against any other application the community consider as detrimental to its interests'. (Reply p.2).
22. The Expert agrees with the Objector. If ICANN had intended that a community had a choice of either making a community-based application for a new gTLD or opposing a standard application for that new gTLD, but not both, it could easily have said so in the Guidebook. Whereas in fact section 3.2.2 of the Guidebook states what a party must show to establish standing to bring a Community Objection; and section 3.2.2 does not require the party to show that neither it (nor anyone associated with it) has filed a community-based application for the same gTLD. If there was nevertheless such a requirement, tucked away somewhere else, one would assume that the Centre would have disallowed the Objection on that basis alone during its administrative review, i.e., there would have been no need to appoint an Expert to deal with it. The Expert therefore finds there is no such requirement: the fact that the Objector is associated with a community-based application for the <.SKI> gTLD does not prevent it from filing the Objection to the (standard) Application for that gTLD.

## **C.2 'Guidebook Elements'**

23. Focusing, then, on the 'standing' requirements set out in Module 3 of the Guidebook (identified at paragraph 17 above), the Objector must show that it is (i) an established institution (ii) associated with (iii) a clearly delineated community. The Guidebook identifies factors that may

be considered in determining these issues, but explains that '[t]he panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements'. (Guidebook, section 3.2.2.4).

24. First, then, is the Objector 'an established institution'?

24.1 According to the Guidebook (at p.3-8), '[f]actors that may be considered in making this determination include, but are not limited to, level of global recognition of the institution; length of time the institution has been in existence; and public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process'.

24.2 The Objector states that it is an association organised under Swiss law that has been in existence since 1924, and that it is recognised by the International Olympic Committee as the sole international governing body for ski sport, governing, regulating and administering ski sport around the world, and directing the development and promotion of ski sport both at the recreational level and at competitive level (local, national, world, and Olympic level competition), directly and/or through its 115 member national federations. (See FIS Statutes, Article 2, Objection Annex 4; and list of registered members, Objection Annex 10). For example, the Objector organises the ski sport events at the quadrennial Winter Olympic Games, as well as World Championships, World Cups and Continental Cups, 'which total around 7,000 international competitions globally each year involving the nine ski disciplines of Cross-Country Skiing, Ski-jumping, Nordic Combined, Alpine skiing, Freestyle Skiing, Snowboard, Speed Skiing, Grass Skiing and Telemark'. (Objection p.5).

24.3 The Applicant says that 'independent evidence' of the existence and 'global recognition' of the Objector is required, and that copies of its Statutes, 'entirely unsworn statements', and references to 'its self-promotional website', do not satisfy this requirement. (Response p.6). However, the Applicant does not cite any authority for this alleged requirement, and in fact as far as the Expert is aware there is no such requirement. To the contrary, according to the Guidebook, an institution's existence 'may' be demonstrated by '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'. (Guidebook, section 3.2.2.4). The 'may' indicates that this is not mandatory, i.e., other evidence may suffice. Such evidence comes here in the form of the Objector's detailed account of its creation, its

history, its current membership, and its extensive activities as the international governing body of ski sport. That account may be 'unsworn', but in the absence of any suggestion from the Applicant that any of it is untrue, the Expert is prepared to accept its accuracy. And as a result, it is more than clear, in the Expert's view, that the Objector's existence as an established institution has been sufficiently evidenced.

25. Next, is the community on behalf of which the Objector claims to bring the objection 'a clearly delineated community'?

25.1 According to the GNSO Final Report, the term 'community' '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'. (GNSO Final Report, Implementation Guideline P). According to the Guidebook, factors that may be considered in determining whether the 'community' identified by the objector is a clearly delineated community 'include, but are not limited to, ... the level of formal boundaries around the community'.

25.2 The Objector brings the objection on behalf of 'the Ski community'. It says that community 'is highly organized on local, national and international levels. It is clearly delineated by way of its organizational structure, its values and specialized equipment and resorts'. (Objection p.4). It identifies the following persons and entities as members of that community (ibid. pp.4-6):

25.2.1 Itself, as the sports federation recognised by the IOC as having sole authority to govern and regulate ski sport on a global level, and to organise the ski sport events at the Winter Olympic Games.

25.2.2 Its 115 member national federations (from all five continents), whose responsibility is to govern and regulate ski sport on behalf of the FIS at the national level, directing the developing and promotion of ski sport both as a recreational pastime and as a competitive activity, from the amateur level up to national level and beyond.

25.2.3 The local and regional ski clubs, ski schools, and individuals who are members of the FIS's member national federations. This includes those who compete at international-level competition (for example, in 2012 more than 34,000 registered athletes competed in international ski sport competitions: Objection Annex 20), as well as those who only compete at national level and below.

25.2.4 In addition, some member national federations admit leisure skiers as members. Eleven of FIS's member national federations together have more than 3 million individual members. (Objection Annex 9). And while others do

not, leisure skiers in those countries still 'consider themselves part of the broad ski community', and they can be clearly identified by a 'physical boundary', in that 'without use of equipment ... and access to alpine ski slopes or cross-country courses, it is not possible to be a skier'.

- 25.3 In response, the Applicant states first that to be 'clearly delineated' the community must be 'strongly associated with the applied-for gTLD string'. It says this means 'the word "ski" must readily bring Objector's organization to mind. Merely stating that proposition reveals its folly'. (Response, p.6). The Expert does not agree with this analysis. It conflates the Objector with the community that it is claiming to represent, and it also conflates the requirement that the community be 'clearly delineated' with the requirement that the community be 'strongly associated with the applied-for gTLD'. The 'strong association' requirement is a distinct one, to be addressed separately. (See section D.3 below).
- 25.4 The Applicant asserts that the Objection 'fails to identify what comprises [the Ski community] or what "boundaries" surround it, and instead simply describes the boundaries of its own structure'. (Response p.6). The Expert does not agree. The Objection describes with specificity those who are in 'the Ski community' that it claims to speak for, and how they are identified. (See paragraph 25.2 above). In fact, the community it describes extends beyond 'the boundaries of its own structure' to encompass leisure skiers who are not in membership of one of its member national federations, but that does not matter: the Objector and the community it says it speaks for do not have to be coterminous.
- 25.5 The Applicant notes that 'the Ski community' that the Objector claims to speak for excludes many people who have an interest in 'ski' topics, such as 'spectators, enthusiasts, consumers, retailers, journalists, commentators, historians and others, and involves other activities such as water, sand and jet skiing, to name a few'. (Response p.7). But this is not an argument that the Ski community identified by the Objector is not clearly delineated. Rather it is a separate and distinct argument, that the gTLD <.SKI> and the Ski community identified by the Objector are not synonymous. That argument is addressed at paragraph 42 below.
- 25.6 The Applicant also asserts that the 'community' defined by Starting Dot in its separate community-based application for the gTLD <.SKI> is not clearly delineated. (Response p.7). Whether or not that is true is not for the Expert to decide; all that is relevant here is whether the community that the Objector claims to speak for in relation to this Objection is clearly delineated. For the reasons set out above, the Expert finds that it is.

26. Finally, is the Objector 'associated with' the Ski community?
- 26.1 According to the Guidebook, factors that may be considered in determining whether the objector is associated with the community in question 'include, but are not limited to, the presence of mechanisms for participation in activities, membership, and leadership; institutional purpose related to the benefit of the associated community; performance of regular activities that benefit the associated community; ...'. (Guidebook pp. 3-8).
- 26.2 Clearly the Objector is associated with its member national federations and their members, all of whom can benefit (by means of membership and/or registration) from participation in competitive ski sport as organised and/or sanctioned by the FIS and its members. The Objector runs an Aid & Promotion programme through which it has provided financial support for 50 national ski associations. (Objection p.6). It has also organised a Symposium on the Development of Alpine Ski Sport to investigate cost reduction strategies for top level alpine ski competition, which has involved working with representatives of the ski industry and national ski associations. (Objection, Annex 6 p.58).
- 26.3 However, the Objector asserts that it also works for the benefit of those leisure skiers who may not be formally members of one of its member national federations, but who nevertheless participate in the sport on a recreational level. For example, the Objector backs projects such as 'Bring Children to the Snow' and 'World Snow Day'. (Objection Annex 6 p.59).<sup>1</sup> In addition, it has promulgated the '10 FIS Rules of Conduct of Skiers and Snowboarders' (Objection Annex 16 pp.2-5), which are 'considered globally as the laws for conduct on the [ski] pistes' (Objection Annex 19 p.5) and are adopted by 'hundreds of ski resorts all over the world to define and encourage safe behaviour on the slopes'.
- 26.4 The Applicant asserts that '[t]he only information that [the Objector] offers concerning its activities consists of unsworn statements in the Objection and reference to its self-serving statutes and website. Such sweeping pronouncements with no evidentiary support do not demonstrate an institutional purpose or activities to benefit its putative community'. (Response p.7). Again, the Expert is not aware of any requirement that evidence offered in support of the Objection be 'sworn'. Given the detail that the Objector has provided in relation to those activities, and in the absence of any

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<sup>1</sup> According to the Objector (and not disputed by the Applicant), 'Bring Children to the Snow' is 'designed to be a worldwide campaign to encourage children and families to skiing and the snow'. The second phase of the campaign is the annual event 'World Snow Day', a project initiated and co-ordinated by the Objector to raise public awareness of 'the pleasures that can be enjoyed through activities in the snow'. The World Snow Day website states that the project 'looks beyond FIS membership to the wider snow sports community' and indicates that 435 events were organised across 39 countries on World Snow Day 2013 ([www.world-snow-day.com/cmsfiles/2nd edition world snow day final report.pdf](http://www.world-snow-day.com/cmsfiles/2nd%20edition%20world%20snow%20day%20final%20report.pdf)).

suggestion from the Applicant that anything the Objector says is untrue, the Expert accepts its accuracy.

26.5 The Applicant asserts that the Objector lacks 'any significant relationship with a substantial portion of the community it claims to represent' (Response p.7), but it bases that assertion not on the description of Ski community put forward by the Objector but on the description of community included in Starting Dot's community-based application for the gTLD <.SKI>, which is not relevant for purposes of these proceedings. (See paragraph 25.6 above).

26.6 The Expert therefore finds that the Objector is 'associated with' the Ski community that it has identified in the Objection.

27. Based on the foregoing, the Expert determines that the Objector meets the standing requirements set out in sections 3.2.2 and 3.2.2.4 of the Guidebook, and therefore has standing to object to the Application.

**D. FINDINGS IN RELATION TO THE SUBSTANTIVE REQUIREMENTS FOR A COMMUNITY OBJECTION (SECTION 3.5.4 OF THE GUIDEBOOK)**

28. The Applicant correctly states (Response p.8) that there is a presumption in favour of granting new gTLDs, and therefore a corresponding burden on those who object to an application for a new gTLD to show why the application should not be granted. (See Guidebook, section 3.5). For example, to sustain a Community Objection, the Objector must show that 'there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted'. (Ibid., section 3.2.1). According to section 3.5.4 of the Guidebook, in order to do that, the Objector must satisfy each of the following four substantive requirements. If it does so, it has made the requisite showing; if it does not, then it has not.

**D.1 The Objector must prove that 'the community invoked by the objector is a clearly delineated community'**

29. The Guidebook states: 'The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community and what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community ...; and the number of people or entities that make up the community. If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail'.

30. The Expert has already determined, in the context of the standing requirements, that the community on behalf of which the Objector claims to bring the objection is 'a clearly delineated community'. (See paragraph 25 above). Having done so, it would seem difficult (to say the least) for the Expert not to find, in this new context, that 'the community invoked by the objector is a clearly delineated community'.
31. The Applicant disagrees, asserting that the test here must be 'more stringent' than the test applied in the context of standing, because 'ICANN would have no reason to make "clearly delineated" a substantive element of objection if it meant nothing more than the criterion for standing. Rules "should be interpreted so as not to render one part inoperative"'. (Response p.8). It therefore proposes the following test: 'Objector must show that the string itself describes a clearly delineated community', and asserts that the word 'ski' has several different meanings, including water-skiing and sand-skiing, and therefore does not meet that test. (Ibid.).
32. The Expert rejects this argument, for the following reasons:
- 32.1 Where a set of rules uses a specific phrase ('clearly delineated community') twice, it would be very strange to interpret that phrase one way the first time it appears and another way the second time it appears. Indeed, that approach is so counter-intuitive that absolutely compelling grounds would be required to adopt it.
- 32.2 Without wishing to split hairs, technically speaking, interpreting the phrase in the same way each time it appears does not render the second requirement 'inoperative' (as the Applicant suggests) – the Objector has to show that he meets it. Rather, it renders the second requirement redundant (because it does not add anything to what has gone before). Redundancy is never ideal, but the Expert does not consider it to be a compelling reason to construe the same phrase differently in two parts of the same rule.
- 32.3 The fact that the Applicant suggests that 'clearly delineated community' as it appears in the first substantive requirement should be construed to mean that the 'Objector must show that the string itself describes a clearly delineated community' is both ironic (because the Applicant also suggests that that is how the third substantive requirement should be construed [see paragraph 42 below], i.e., it proposes the same redundancy that it says the Expert should avoid) and unhelpful to the Applicant (because [as noted below: see paragraph 42] there is no support for any such test either in the Guidebook or in the material that the Applicant cites in purported support of that test).
- 32.4 While there is no system of binding precedent in expert determination proceedings, the Expert notes that another expert considering a Community Objection under exactly the same rules as apply here has found that the first substantive requirement is satisfied by

satisfaction of the second standing requirement: see Case No. EXP/493/ICANN/110 (<.FLY>), Expert Determination dated 3 September 2013, para 13.

33. As a result, since the Expert has already found (in the context of the second standing requirement) that the 'Ski community' that the Objector invokes in the Objection is a clearly delineated community, it follows that the Objector has also satisfied this first substantive requirement.

**D.2 The Objector must prove that 'community opposition to the application is substantial'**

34. The Guidebook states (at section 3.5.4): 'The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: number of expressions of opposition relative to the composition of the community; the representative nature of entities expressing opposition; level of recognised stature or weight among sources of opposition; diversity amongst sources of expressions of opposition, including regional, subsectors of community, leadership of community, membership of community; historical defence of the community in other contexts; and costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail'. The Applicant suggests that the Objector must establish each of these factors (Response p.9), but in fact the words quoted make it clear that these factors are not an exhaustive list of relevant factors, and that the Objector may meet its burden by establishing all of them, or some of them, or even none of them, provided that it establishes enough relevant factors (which may or may not be factors listed in the Guidebook) to outweigh any countervailing factors established by the Applicant.
35. The Objector states that it has received 'not just significant, but overwhelming' support from the Ski community for the Objection, both from its 115 member federations, and from six leading international ski sport related organisations: (i) the International Olympic Committee (the leader of the Olympic Movement); (ii) the World Anti-Doping Agency (an institution whose stakeholders are half members of the Olympic Movement and half public/governmental authorities); (iii) the International Ski Instructor Association (a body representing professional ski instructors from 39 countries); (iv) the Ski Racing Supplier's Association (which has 57 industry members: Objection Annex 11); (v) the World Federation of the Sporting Goods Industry; and (vi) the National Ski Areas Association (a trade association for ski area owners and operators that represents 325 resorts in Colorado and 472 suppliers providing equipment, goods and services to the mountain resort industry). (Objection p.8 and Annex 11).
36. The Applicant says these assertions of support are worthless because the letters from the six bodies listed that are annexed to the Objection 'reflect no independent thought showing

genuine opposition by each such member itself', no evidence is provided about the 'stature' of those bodies, and they do not 'add up to a meaningful number of expressions of opposition within the larger ski "community" that Objector claims to represent'. (Response p.9).

37. The Expert does not agree with the Applicant's criticisms of the letters of support from the six listed institutions, nor does he agree that their 'stature' is questionable. Furthermore, the opposition of the Objector as the international governing body of the sport and its 115 member federations must also be weighed in the balance. The Expert finds that the Objector has satisfied this second substantive requirement.

### **D.3 The Objector must prove that 'there is a strong association between the community invoked and the applied-for gTLD string'**

38. The Guidebook states (at section 3.5.4): '**Targeting.** The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: statements contained in application; other public statements by the applicant; and associations by the public. If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail'. Again, the Applicant suggests that this is a definitive list, and the Objector must satisfy this requirement by reference to these factors and these factors alone. Again, the Expert disagrees, for the same reasons as before. (See paragraph 34 above).
39. The Applicant says it is not 'targeting' the string 'toward any particular community, let alone that which Objector claims to represent'. (Response p.10). But the Objector notes that the Application itself states that the <.SKI> gTLD 'will be appealing to the millions of people and organizations who are involved with or who simply enjoy the many variations of skiing, including alpine, snowboard, cross-country, telemark, as well as water, and sand skiing'. The Objector notes that the Ski community for which it speaks encompasses all such persons and organizations, save only for those involved in water-skiing and sand skiing. It further asserts that the word 'ski' calls those ski sports to mind for most people (including as a result of the wide television coverage of the competitions it organises in each of those sports). (Objection p.9). In addition, the Objector provides spelling and phonetic evidence that the word 'ski' is used (or recognised) in the local language of 12 of the top 16 countries for snow ski visits. (Objection Annex 8). As those 12 countries represent 79% of global snow ski visits, the Objector alleges that the ski community is therefore 'clearly recognized by the single word SKI by at least 79% of the relevant global ski-related population', in their local language. (Objection p.7).
40. The Applicant in contrast insists that the word 'ski' has 'multiple meanings ... apart from the interests for which Objector lobbies', so it cannot be said to be 'strongly associated' solely with the Ski community. (Response p.10). The Applicant presses this point more firmly in its Sur-

Reply, arguing that the Objector must show that the applied-for gTLD 'uniquely or nearly uniquely identifies' the community the Objector is representing, and that it cannot meet this requirement because the word 'ski' encompasses many meanings and activities other than just snow-skiing. (Sur-Reply p.2).

41. The Expert agrees that the word 'ski' does not mean snow-skiing alone. It is also used in the separate sports of water-skiing and (apparently) sand-skiing, albeit that it must be fair to say that the number of adherents to those sports is very small compared to the number of adherents to the ski sports that the Objector represents. (Indeed, the Expert admits that he had never even heard of sand-skiing before this case). So if the Applicant is right that the Objector must show that the <.SKI> gTLD 'uniquely or nearly uniquely identifies' the Ski community that the Objector represents, there could perhaps be an argument about whether the number of snow-skiers relative to the number of water/sand-skiers makes the identification of the word 'ski' and snow-skiing 'nearly unique'. But is this actually a requirement?
42. The Applicant insists that it is, asserting that 'ICANN designed the community objection ... "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people"'. (Sur-Reply at p.2). The Applicant says that quote comes from a 'commentary' on the requirements, to which it provides a link. The clear impression given is that ICANN has said that an objector on behalf of a community must show that the applied-for gTLD 'uniquely or nearly uniquely identifies' the community represented by the objector. However, upon inspection of the document from which the Applicant has taken the quote (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda'), it transpires that the words quoted are not the words of ICANN, but rather the words of a private company called eNOM, asserting (as part of its comments on the July 2009 draft of the Guidebook) what it contends the objective of the Community Objection is (or should be). In its own 'Commentary and Proposed Position' on the comments by eNOM and other stakeholders, ICANN did not endorse the eNOM comment, instead simply saying that 'the established criteria' (i.e., those set out in the draft Guidebook) should be used. And eNOM's proposed gloss on the Community Objection criteria did not make its way into the final version of the Guidebook issued in June 2012. As a result, the Expert considers this submission by the Applicant to be extremely misleading. Contriving an argument to support a particular position (viz., that the required 'strong association' between the gTLD and the community represented by the Objector does not exist) creates a strong inference that there is no valid argument for that position, and seriously undermines the Applicant's general credibility.
43. As a result, the Expert rejects the suggestion that to satisfy this third substantive requirement of 'strong association' the Objector must show that the <.SKI> gTLD 'uniquely or nearly uniquely identifies' the Ski community. The fact that a minority of people might think, when they hear the

word 'ski', not of snow-skiing but of water-skiing or (even) sand-skiing, does not change the fact that the word 'ski' is 'strongly associated' with the (snow) Ski community.

**D.4 The Objector must prove that 'the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted'**

44. The Expert does not consider that the reference in this fourth and final substantive requirement to 'the community to which the string may be explicitly or implicitly targeted' adds anything material to the already-discussed requirement of proof of 'a strong association between the applied-for gTLD string and the community represented by the objector'. (See section D.3 above). Since the Expert has already found that that requirement is satisfied, it follows that this part of the fourth substantive requirement is also satisfied.
45. That leaves the question of whether the Applicant's proposed operation of the string 'creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of' the Ski community. The Guidebook provides the following guidance on this issue (at page 3-24): 'An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment. Factors that could be used by a panel in making this determination include but are not limited to: nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; dependence of the community on the DNS [domain name system] for its core activities; nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD; and level of certainty that alleged detrimental outcomes would occur'. Again, the Objector does not have to establish that each of these factors is present in order to sustain its burden. It can invoke some of these factors (and/or other factors that it can show are relevant), and those factors are then balanced against any countervailing factors established by the Applicant. However, since the Objector has the burden on this point as well, the factors it invokes must outweigh any factors invoked by the Applicant, or else the Objection must be rejected.
46. The Objector's submissions on this point (Objection pp. 11-15 and related Annexes) may be summarised as follows:
  - 46.1 The 'internet is already playing a very strong, and ever increasing role, within the ski community'. (Numerous examples are given at page 10 of the Objection). And the Objector 'has developed core principles and activities [including organising

competitions and commercialising those competitions, as well as promulgating anti-racism, anti-bullying, and anti-doping values and fighting illegal or undesirable betting] ... that are key factors in communicating with all categories of skiers and potential skiers, from young newcomers to enthusiastic skiers of all ages'. A policy (such as the Applicant intends to follow) of unrestricted access to the <.SKI> gTLD 'without sports-specific registry policies and oversight' would 'allow many web sites, based on words and activities that are in fundamental contradiction with and in opposition to the core principles and values of the FIS, ski sport and the ski community at large, to benefit from, deteriorate and/or abuse the reputation of skiing and ski sport and the positive image projected by the FIS'. Because the use of the <.SKI> TDL gives an 'aura of official sanction', visitors to <.SKI> websites may perceive, through the use of that TLD, that the content of those sites is linked to, and even sanctioned by, the Objector and its member governing bodies of the Ski community, so interfering with and undermining the Objector's efforts to promote and develop ski sport through the promulgation of strong values that emphasise honesty, fairness and integrity of competition. Another well-established type of abuse is the misuse of sports themes for pornography (e.g., [www.porn.ski](http://www.porn.ski)). The Objector asserts that the proliferation of such activities 'will significantly damage the image and reputation of the ski community, with related concrete and economic damages in terms of a decrease in ski activity and skier visits'.

46.2 The Objector asserts that the Applicant's intended 'open access' operation of the gTLD would also permit abuse of the commercial assets and goodwill of the Ski community through activities such as cybersquatting, brand jacking, and registration of names of clubs, federations, events and athletes as a means of ambush of them and their commercial activities, thereby allowing unscrupulous users to benefit without authorisation from the goodwill that the Objector and its members (and star individual skiers competing in their events) have built up in their names, images, and events. For example, the Applicant is 'unwilling to ensure that second level domains related to FIS member National Associations and to FIS Alpine Ski World Cup events, and especially the "city + year" marks associated with each event, will be protected'.

46.3 The Objector asserts that it and its members 'would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access'. It is therefore concerned about many further opportunities for abuse (indeed, more targeted abuse) being created through the free availability of the <.SKI> gTLD. It asserts that the only way to prevent abuse of the kind it has identified would be to submit the gTLD operator to 'a ski community-specific acceptable use policy', and to make it accountable to the Ski community for compliance with that policy. Otherwise, for example, an unaccountable operator of a <.SKI> gTLD 'will neither be willing nor able to monitor its name space with respect to doping-abetting content' and is therefore

'certain to encumber community efforts against doping'. It notes that these elements are absent from the Applicant's plans for operation of the gTLD <.SKI>.

- 46.4 The Objector asserts that, as a result of the above, the Ski community will suffer substantial monetary losses and costs, but also reputational damage, and damage to the values and image of ski sport.
47. The Applicant responds as follows:
- 47.1 The Applicant acknowledges the risks of cyber-squatting and the other forms of abuse identified by the Objector, but asserts that the Objector 'offers no evidence that Applicant's proposed string would create any greater or different harm to the "community" than it appears to experience under the existing regime of .com and other generics. As such, objector does not prove that an open <.ski> gTLD itself would cause any such harm, since, by Objector's own admission, the issues of which it warns already exist'. (Response p.11).
- 47.2 The Applicant openly acknowledges and indeed seeks to make a virtue out of the fact that it 'will not limit eligibility or otherwise exclude legitimate registrants in second level names'. (Application p.12). However, the Applicant disagrees with the Objector that this will cause material detriment to the Ski community. In particular, it asserts it will put in place registration policies that include the 14 mechanisms required by ICANN for the new gTLDs, but also 'eight additional measures, including those to address the exact types of concerns raised by Objector' (Response p.11), to 'protect Internet users and rights-holders from fraud and abuse'. (Ibid. p.12).
- 47.3 The Applicant acknowledges these policies will not prevent the Ski community losing domain names corresponding to non-trademark protected clubs, federations, events and athletes to speculators, but contends that this is a 'reasonable consequence rather than a detriment', because 'a group without trademark status or comparable protection on existing gTLDs should not enjoy trade-mark level protection on as against any new gTLD'. (Response p.12). It argues that imposing registration restrictions as suggested by the Objector would 'stifle growth, free speech, legitimate activity and consumer choice', which would be contrary to the objectives of ICANN. (Response p.12).
- 47.4 The Applicant asserts that the Objector has not provided any competent evidence to support its assertion that the harm it is concerned about will occur, or to support its purported quantification of the monetary damage it alleges will result. (Response p.13).
48. The Expert finds as follows:
- 48.1 The Applicant does not dispute that use of current TLDs includes abusive use that unfairly prejudices the reputational and commercial interests of the Ski community. Its

argument that there is no evidence that such abuse will be 'any greater or different' if the Applicant is delegated the <.SKI> gTLD (and so that delegation cannot be considered the cause of such abuse) does not seem to the Expert to be a very attractive argument. Nor does it find any support in the Guidebook. The test is whether the Objector can show that detriment is likely to result to the rights or legitimate interests of the community it invokes from the Applicant's proposed use of the new gTLD. There is nothing in the Guidebook or elsewhere to suggest that detriment of the type that that community already suffers from abuse of the existing TLDs should be disregarded for these purposes. And in any event, the operation of the new TLD <.SKI> would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the Ski community to identify and try to take action against such abuse). And if the Objector's concern that the new gTLD risks giving new sites and their content an aura of official sanction is reasonable (as the Expert finds that it is: see paragraph 48.3 below), then not only are there more opportunities for abuse, but the risk of detriment is greater from those further opportunities. As a result, the Expert considers that this factor tips in favour of the Objector.

- 48.2 Furthermore, the Applicant's assertion that permitting speculators to register domain names corresponding to non-trademark protected individuals, events and organisations is not a detriment but a 'reasonable consequence' of the freedoms contemplated by the new gTLD programme seems to the Expert to boil down to the following question: assuming that such conduct does not infringe a formal legal 'right' of those members of the Ski community, does the Ski community nevertheless have a 'legitimate interest' in preventing speculators creating and exploiting an unauthorised association between their websites and the individuals, events and organisations in question for their own commercial and other purposes, and to the detriment of those individuals, events and organisations? The Expert sees no reason why this should not be recognised as a 'legitimate interest' in this context. The Applicant's assertion that doing so would 'stifle growth, free speech, legitimate activity and consumer choice' seems to the Expert to beg the question. The purpose of the new gTLD programme is indeed stated to be to promote free speech, competition and innovation. However, the creation of the 'Community Objection' mechanism reflects a consensus that those are not absolute values, but instead can and should be subject to proportionate restrictions where necessary to avoid detriment to the rights and legitimate interests of a community. The balance is struck by putting the burden of proof on the party making the objection on behalf of the community to satisfy each of the elements of the Community Objection. Therefore, it adds nothing to say that the Objector's stance would 'stifle growth, free speech, legitimate activity and consumer choice'. The only question is whether the Objector has shown the required likelihood of detriment to the rights or legitimate interests of the Ski community. If so, then any hindrance of free speech, etc. that follows is necessarily justified, and so not a reason to reject the Objection.

- 48.3 The Expert also considers that the Ski community has a 'legitimate interest' in promoting the values, image and integrity of ski sport, and in ensuring the public has confidence in its readiness, willingness and ability to do so. Indeed, unless sport is not only 'straight' but seen to be 'straight', then the public's confidence in uncertainty of outcome – the very essence of sport -- will be compromised, which would be nothing short of disastrous for the Ski community. Therefore, if the Objector is correct that use of the <.SKI> gTLD will give the related websites an 'aura of official sanction', the Expert would agree that a likelihood of detriment to the legitimate interests of the Ski community has been established. So is the Objector's fear well-founded? The Expert has already found that there is a 'strong association' between the <.SKI> gTLD and the Ski community, in that the word will call to mind for most people the ski sports organised, promoted and developed by the Objector and its members. (See paragraph 39 above). That does not automatically mean that the public would assume that sites (or content on sites) with that string in their domain name would necessarily be 'official' or 'sanctioned' content, but it is clearly reasonable to think there is a risk that they might. As a result, this is also a factor that tilts in favour of finding the detriment requirement met.
- 48.4 The Applicant does not make good its assertion that its intended registration policies will 'address the exact type of concerns raised by Objector'. In fact, the 'fraud and abuse' that the Applicant seeks to prevent in its policies appears to be confined to infringements of intellectual property rights and 'fraudulent activity' such as distribution of malware, phishing, DNS hijacking or poisoning, and spam. (Application p.52). As noted above, the Applicant openly says it would not prevent ambush marketing through unauthorised use of famous names (because it does not regard that as improper). (See paragraph 47.3 above). Similarly, there is nothing in the Applicant's policies that would prevent users from operating their sites and/or putting content on them in a manner that falsely suggested an association with or endorsement by the Ski community. The Expert therefore accepts the Objector's submission that the Applicant's policies 'give no protection against terms in clear contradiction with the cores [sic] values of ski and sports (doping, illicit gambling, racism ...)'. It is also relevant in this regard that ICANN has said that '[w]hile ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs'. (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda', p.21).
- 48.5 The Expert agrees with the Applicant that the Objector's assessment of economic and other losses (including opportunity costs) is not well-evidenced. In particular, the Objector has not been able to come up with a meaningful estimate of the economic damage it would suffer if the Application were granted. That is not surprising, however,

given the nature of the potential detriment identified by the Objector. As the Objector says, 'many affected values cannot be measured in terms of money'. (Objection p.15). Furthermore, and in any event, the detriment test under section 3.5.4 of the Guidebook is that of 'a likelihood of material detriment', not an actual, quantified damage. As a result, the Expert does not regard this as a sufficiently strong negative factor to outweigh the factors in the Objector's favour on this point.

49. Balancing all of these factors, the Expert considers that the factors the Objector has established showing detriment to the rights and legitimate interests of the Ski community outweigh the contrary factors cited by the Applicant, and therefore the Objector has met its burden of proof on this issue as well.

**E. DETERMINATION**

50. For the reasons set out above and in accordance with Article 21(d) of the Procedure, the Expert renders the following Expert Determination:

- i. The Objection is successful and therefore the Objector is the prevailing party.
- ii. The Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.



.....  
Jonathan Taylor, Expert

Dated: 21 January 2014

EXHIBITS 35-38

INTENTIONALLY OMITTED

# EXHIBIT 39



## New gTLD Application Submitted to ICANN by: Atomic Cross, LLC

String: rugby

Originally Posted: 13 June 2012

Application ID: 1-1612-2805

### Applicant Information

#### 1. Full legal name

Atomic Cross, LLC

#### 2. Address of the principal place of business

Contact Information Redacted

#### 3. Phone number

Contact Information Redacted

#### 4. Fax number

Contact Information Redacted

5. If applicable, website or URL

## Primary Contact

6(a). Name

Daniel Schindler

6(b). Title

EVP, Donuts Inc.

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number

6(f). Email Address

Contact Information Redacted

## Secondary Contact

7(a). Name

Jonathon Nevett

### 7(b). Title

EVP, Donuts Inc.

### 7(c). Address

### 7(d). Phone Number

Contact Information Redacted

### 7(e). Fax Number

### 7(f). Email Address

Contact Information Redacted

## Proof of Legal Establishment

### 8(a). Legal form of the Applicant

Limited Liability Company

8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).

Delaware.

<http://delcode.delaware.gov/title6/c018/sc01/index.shtml>

8(c). Attach evidence of the applicant's establishment.

Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.

9(b). If the applying entity is a subsidiary, provide the parent company.

Covered TLD, LLC

9(c). If the applying entity is a joint venture, list all joint venture partners.

## Applicant Background

11(a). Name(s) and position(s) of all directors

N/A	N/A
-----	-----

11(b). Name(s) and position(s) of all officers and partners

N/A	N/A
-----	-----

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Covered TLD, LLC	N/A
------------------	-----

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

Paul Stahura	CEO, Donuts Inc.
--------------	------------------

## Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

rugby

14(a). If an IDN, provide the A-label (beginning with "xn--").

14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14(c). If an IDN, provide the language of the label (in English).

14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).

14(d). If an IDN, provide the script of the label (in English).

14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).

14(e). If an IDN, list all code points contained in the U-label according to Unicode form.

15(a). If an IDN, Attach IDN Tables for the proposed registry.

Attachments are not displayed on this form.

15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Donuts has conducted technical analysis on the applied-for string, and concluded that there are no known potential operational or rendering issues associated with the string.

The following sections discuss the potential operational or rendering problems that can arise, and how Donuts mitigates them.

#### ## Compliance and Interoperability

The applied-for string conforms to all relevant RFCs, as well as the string requirements set forth in Section 2.2.1.3.2 of the Applicant Guidebook.

#### ## Mixing Scripts

If a domain name label contains characters from different scripts, it has a higher likelihood of encountering rendering issues. If the mixing of scripts occurs within the top-level label, any rendering issue would affect all domain names registered under it. If occurring within second level labels, its ill-effects are confined to the domain names with such labels.

All characters in the applied-for gTLD string are taken from a single script. In addition, Donuts's IDN policies are deliberately conservative and compliant with the ICANN Guidelines for the Implementation of IDN Version 3.0. Specifically, Donuts does not allow mixed-script labels to be registered at the second level, except for languages with established orthographies and conventions that require the commingled use of multiple scripts, e.g. Japanese.

#### ## Interaction Between Labels

Even with the above issue appropriately restricted, it is possible that a domain name composed of labels with different properties such as script and directionality may introduce unintended rendering behaviour.

Donuts adopts a conservative strategy when offering IDN registrations. In particular, it ensures that any IDN language tables used for offering IDN second level registrations involve only scripts and characters that would not pose a risk when combined with the top level label.

## ## Immature Scripts

Scripts or characters added in Unicode versions newer than 3.2 (on which IDNA2003 was based) may encounter interoperability issues due to the lack of software support.

Donuts does not currently plan to offer registration of labels containing such scripts or characters.

## ## Other Issues

To further contain the risks of operation or rendering problems, Donuts currently does not offer registration of labels containing combining characters or characters that require IDNA contextual rules handling. It may reconsider this decision in cases where a language has a clear need for such characters.

Donuts understands that the following may be construed as operational or rendering issues, but considers them out of the scope of this question. Nevertheless, it will take reasonable steps to protect registrants and Internet users by working with vendors and relevant language communities to mitigate such issues.

- missing fonts causing string to fail to render correctly; and
- universal acceptance of the TLD;

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

## Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

Q18A CHAR: 6300

### ABOUT DONUTS

Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model. To achieve its objectives, Donuts has recruited seasoned executive management with proven track records of excellence in the industry. In addition to this business and operational experience, the Donuts team also has contributed broadly to industry policymaking and regulation, successfully launched TLDs, built industry-leading companies from the ground up, and brought innovation, value and choice to the domain name marketplace.

### THE .RUGBY TLD

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD 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.

This TLD 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 consistent with the competition goals of the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

.RUGBY will be attractive to the millions of enthusiasts that play, enjoy or are involved otherwise with this worldwide activity. There are many variations of the game—professional and amateur leagues, tag rugby, touch rugby, flag rugby, wheelchair rugby—all of which involve players, officials, organizations, suppliers, arena operators, promoters, and others who make the activity so widely available and appealing. We would operate .RUGBY in the best interests of the full spectrum of the game's enthusiasts and fans and in a secure and legitimate manner.

#### DONUTS' APPROACH TO PROTECTIONS

No entity, or group of entities, has exclusive rights to own or register second level names in this TLD. There are superior ways to minimize the potential abuse of second level names, and in this application Donuts will describe and commit to an extensive array of protections against abuse, including protections against the abuse of trademark rights.

We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD. As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.

By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.

#### OUR PROTECTIONS

Donuts has consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs, and bring to the Internet namespace nearly two dozen new rights and protection mechanisms to raise user safety and protection to a new level.

These include eight, innovative and forceful mechanisms and resources that far exceed the already powerful protections in the applicant guidebook. These are:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

They also include fourteen new measures that were developed specifically by ICANN for the new TLD process. These are:

1. Controls to ensure proper access to domain management functions;
2. 24/7/365 abuse point of contact at registry;

3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;
4. Thick WhoIs;
5. Use of the Trademark Clearinghouse;
6. A Sunrise process;
7. A Trademark Claims process;
8. Adherence to the Uniform Rapid Suspension system;
9. Adherence to the Uniform Domain Name Dispute Resolution Policy;
10. Adherence to the Post Delegation Dispute Resolution Policy;
11. Detailed security policies and procedures;
12. Strong security controls for access, threat analysis and audit;
13. Implementation DNSSEC; and
14. Measures for the prevention of orphan glue records.

#### DONUTS' INTENTION FOR THIS TLD

As a senior government authority has recently said, "a successful applicant is entrusted with operating a critical piece of global Internet infrastructure." Donuts' plan and intent is for this TLD to serve the international community by bringing new users online through opportunities for economic growth, increased productivity, the exchange of ideas and information and greater self-expression.

## 18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Q18B CHAR: 8712

#### DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:

1. to make sure that the Internet remains as safe, stable and secure as possible, while
2. helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits. While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1. Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;
2. Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3. Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4. Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

#### ABOUT DONUTS' RESOURCES

Donuts' financial resources are extensive. The company has raised more than US\$100 million from a number of capital sources including multiple multi-billion dollar venture capital and private equity funds, a top-tier bank, and other well-capitalized investors. Should circumstances warrant, Donuts is prepared to raise additional funding from current or new investors. Donuts also has in place pre-funded, Continued Operations Instruments to protect future registrants. These resource commitments mean Donuts has the capability and intent to launch, expand and operate its TLDs in a secure manner, and to properly protect Internet users and rights-holders from potential abuse.

Donuts firmly believes a capable and skilled organization will operate multiple TLDs and benefit Internet users by:

1. Providing the operational and financial stability necessary for TLDs of all sizes, but particularly for those with smaller volume (which are more likely to succeed within a shared resources and shared services model);
2. Competing more powerfully against incumbent gTLDs; and
3. More thoroughly and uniformly executing consumer and rights holder protections.

Donuts will be the industry leader in customer service, reputation and choice. The reputation of this, and other TLDs in the Donuts portfolio, will be built on:

1. Our successful launch and marketplace reach;
2. The stability of registry operations; and
3. The effectiveness of our protection mechanisms.

#### THE GOAL OF THIS TLD

This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences. In reviewing potential strings, we deeply researched discrete industries and sectors of human activity and consulted extensive data sources relevant to the online experience. Our methodology resulted in the selection of this TLD – one that offers a very high level of user utility, precision in content delivery, and ability to contribute positively to economic growth.

#### SERVICE LEVELS

Donuts will endeavor to provide a service level that is higher than any existing TLD. Donuts' commitment is to meet and exceed ICANN-mandated availability requirements, and to provide industry-leading services, including non-mandatory consumer and rights protection mechanisms (as described in answers to Questions 28, 29, and 30) for a beneficial customer experience.

#### REPUTATION

As noted, Donuts management enjoys a reputation of excellence as domain name industry contributors and innovators. This management team is committed to the successful expansion of the Internet, the secure operation of the DNS, and the creation of a new segment of the web that will be admired and respected.

The Donuts registry and its operations are built on the following principles:

1. More meaningful product choice for registrants and users;
2. Innovative services;
3. Competitive pricing; and
4. A more secure environment with better protections.

These attributes will flow to every TLD we operate. This string's reputation will develop as a compelling product choice, with innovative offerings, competitive pricing, and safeguards for consumers, businesses and other users.

Finally, the Donuts team has significant operational experience with registrars, and will collaborate knowledgeably with this channel to deliver new registration opportunities to end-users in way that is consistent with Donuts principles.

#### NAMESPACE COMPETITION

This TLD will contribute significantly to the current namespace. It will present multiple new domain name alternatives compared to existing generic and country code TLDs. The DNS today offers very limited addressing choices, especially for registrants who seek a specific identity.

#### INNOVATION

Donuts will provide innovative registration methods that allow registrants the opportunity to

secure an important identity using a variety of easy-to-use tools that fit individual needs and preferences.

Consistent with our principle of innovation, Donuts will be a leader in rights protection, shielding those that deserve protection and not unfairly limiting or directing those that don't. As detailed in this application, far-reaching protections will be provided in this TLD. Nevertheless, the Donuts approach is inclusive, and second level registrations in this TLD will be available to any responsible registrant with an affinity for this string. We will use our significant protection mechanisms to prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility.

This TLD will contribute to the user experience by offering registration alternatives that better meet registrants' identity needs, and by providing more intuitive methods for users to locate products, services and information. This TLD also will contribute to marketplace diversity, an important element of user experience. In addition, Donuts will offer its sales channel a suite of innovative registration products that are inviting, practical and useful to registrants.

As noted, Donuts will be inclusive in its registration policies and will not limit registrant eligibility at the second level at the moment of registration. Restricting access to second level names in this broadly generic TLD would cause more harm than benefit by denying domain access to legitimate registrants. Therefore, rather than artificially limiting registrant access, we will control abuse by carefully and uniformly implementing our extensive range of user and rights protections.

Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names. Our primary focus will be the behavior of registrants, not their identity.

Donuts will specifically adhere to ICANN-required registration policies and will comply with all requirements of the Registry Agreement and associated specifications regarding registration policies. Further, Donuts will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary.

Donuts TLDs will comply with all applicable laws and regulations regarding privacy and data protection. Donuts will provide a highly secure registry environment for registrant and user data (detailed information on measures to protect data is available in our technical response).

Donuts will permit the use of proxy and privacy services for registrations in this TLD, as there are important, legitimate uses for such services (including free speech rights and the avoidance of spam). Donuts will limit how such proxy and privacy services are offered (details on these limitations are provided in our technical response). Our approach balances the needs of legitimate and responsible registrants with the need to identify registrants who illegally use second level domains.

Donuts will build on ICANN's outreach and media coverage for the new TLD Program and will initiate its own effort to educate Internet users and rights holders about the launch of this TLD. Donuts will employ three specific communications efforts. We will:

1. Communicate to the media, analysts, and directly to registrants about the Donuts enterprise.
2. Build on existing relationships to create an open dialogue with registrars about what to expect from Donuts, and about the protections required by any registrar selling this TLD.
3. Communicate directly to end-users, media and third parties interested in the attributes and benefits of this TLD.

## 18(c). What operating rules will you adopt to eliminate or minimize social

## costs?

Q18C Standard CHAR: 1440

Generally, during the Sunrise phase of this TLD, Donuts will conduct an auction if there are two or more competing applications from validated trademark holders for the same second level name. Alternatively, if there is a defined trademark classification reflective of this TLD, Donuts may give preference to second-level applicants with rights in that classification of goods and services. Post-Sunrise, requests for registration will generally be on a first-come, first-served basis.

Donuts may offer reduced pricing for registrants interested in long-term registration, and potentially to those who commit to publicizing their use of the TLD. Other advantaged pricing may apply in selective cases, including bulk purchase pricing.

Donuts will comply with all ICANN-related requirements regarding price increases: advance notice of any renewal price increase (with the opportunity for existing registrants to renew for up to ten years at their current pricing); and advance notice of any increase in initial registration pricing.

The company does not otherwise intend, at this time, to make contractual commitments regarding pricing. Donuts has made every effort to correctly price its offerings for end-user value prior to launch. Our objective is to avoid any disruption to our customers after they have registered. We do not plan or anticipate significant price increases over time.

## Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).

Attachments are not displayed on this form.

## Geographic Names

21(a). Is the application for a geographic name?

No

## Protection of Geographic Names

22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.

Q22 CHAR: 4979

As previously discussed (in our response to Q18: Mission / Purpose) Donuts believes in an open Internet. Consistent with this we also believe in an open DNS, where second level domain names are available to all registrants who act responsibly.

The range of second level names protected by Specification 5 of the Registry Operator contract is extensive (approx. 2,000 strings are blocked). This list resulted from a lengthy process of collaboration and compromise between members of the ICANN community, including the Governmental Advisory Committee. Donuts believes this list represents a healthy balance between the protection of national naming interests and free speech on the Internet.

Donuts does not intend to block second level names beyond those detailed in Specification 5. Should a geographic name be registered in this TLD and used for illegal or abusive activity

Donuts will remedy this by applying the array of protections implemented in this TLD. (For details about these protections please see our responses to Questions 18, 28, 29 and 30).

Donuts will strictly adhere to the relevant provisions of Specification 5 of the New gTLD Agreement. Specifically:

1. All two-character labels will be initially reserved, and released only upon agreement between Donuts and the relevant government and country code manager.
2. At the second level, country and territory names will be reserved at the second and other levels according to these standards:
  - 2.1. Short form (in English) of country and territory names documented in the ISO 3166-1 list;
  - 2.2. Names of countries and territories as documented by the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
  - 2.3. The list of United Nations member states in six official UN languages, as prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names.

Donuts will initially reserve country and territory names at the second level and at all other levels within the TLD. Donuts supports this requirement by using the following internationally recognized lists to develop a comprehensive master list of all geographic names that are initially reserved:

1. The short form (in English) of all country and territory names contained on the ISO 3166-1 list, including the European Union, which is exceptionally reserved on the ISO 3166-1 List, and its scope extended in August 1999 to any application needing to represent the name European Union [[http://www.iso.org/iso/support/country\\_codes/iso\\_3166\\_code\\_lists/iso-3166-1\\_decoding\\_table.htm#EU](http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU)].
2. The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World.
3. The list of UN member states in six official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names
4. The 2-letter alpha-2 code of all country and territory names contained on the ISO 3166-1 list, including all reserved and unassigned codes

This comprehensive list of names will be ineligible for registration. Only in consultation with the GAC and ICANN would Donuts develop a proposal for release of these reserved names, and seek approval accordingly. Donuts understands governmental processes require time-consuming, multi-department consultations. Accordingly, we will apportion more than adequate time for the GAC and its members to review any proposal we provide.

Donuts recognizes the potential use of country and territory names at the third level. We will address and mitigate attempted third-level use of geographic names as part of our operations.

Donuts' list of geographic names will be transmitted to Registrars as part of the onboarding process and will also be made available to the public via the TLD website. Changes to the list are anticipated to be rare; however, Donuts will regularly review and revise the list as changes are made by government authorities.

For purposes of clarity the following will occur for a domain that is reserved by the registry:

1. An availability check for a domain in the reserved list will result in a "not available" status. The reason given will indicate that the domain is reserved.
2. An attempt to register a domain name in the reserved list will result in an error.
3. An EPP info request will result in an error indicating the domain name was not found.
4. Queries for a reserved name in the WHOIS system will display information indicating the reserved status and indicate it is not registered nor is available for registration.
5. Reserved names will not be published or used in the zone in any way.

6. Queries for a reserved name in the DNS will result in an NXDOMAIN response.

## Registry Services

23. Provide name and full description of all the Registry Services to be provided.

Q23 CHAR: 22971

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

The following response describes our registry services, as implemented by Donuts and our partners. Such partners include Demand Media Europe Limited (DMEL) for back-end registry services; AusRegistry Pty Ltd. (ARI) for Domain Name System (DNS) services and Domain Name Service Security Extensions (DNSSEC); an independent consultant for abuse mitigation and prevention consultation; Equinix and SuperNap for datacenter facilities and infrastructure; and Iron Mountain Intellectual Property Management, Inc. (Iron Mountain) for data escrow services. For simplicity, the term “company” and the use of the possessive pronouns “we”, “us”, “our”, “ours”, etc., all refer collectively to Donuts and our subcontracted service providers.

DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD). DMEL is structured to operate a robust and reliable Shared Registration System by leveraging the infrastructure and expertise of DMIH and Demand Media, Inc., which includes years of experience in the operation side for domain names in both gTLDs and ccTLDs for over 10 years.

### 1.0. EXECUTIVE SUMMARY

We offer all of the customary services for proper operation of a gTLD registry using an approach designed to support the security and stability necessary to ensure continuous uptime and optimal registry functionality for registrants and Internet users alike.

### 2.0. REGISTRY SERVICES

#### 2.1. Receipt of Data from registrars

The process of registering a domain name and the subsequent maintenance involves interactions between registrars and the registry. These interactions are facilitated by the registry through the Shared Registration System (SRS) through two interfaces:

- EPP: A standards-based XML protocol over a secure network channel.
- Web: A web based interface that exposes all of the same functionality as EPP yet accessible through a web browser.

Registrants wishing to register and maintain their domain name registrations must do so through an ICANN accredited registrar. The XML protocol, called the Extensible Provisioning Protocol (EPP) is the standard protocol widely used by registrars to communicate provisioning actions. Alternatively, registrars may use the web interface to create and manage registrations.

The registry is implemented as a “thick” registry meaning that domain registrations must have contact information associated with each. Contact information will be collected by registrars and associated with domain registrations.

#### 2.1.1. SRS EPP Interface

The SRS EPP Interface is provided by a software service that provides network based connectivity. The EPP software is highly compliant with all appropriate RFCs including:

- RFC 5730 Extensible Provisioning Protocol (EPP)
- RFC 5731 Extensible Provisioning Protocol (EPP) Domain Name Mapping
- RFC 5732 Extensible Provisioning Protocol (EPP) Host Mapping
- RFC 5733 Extensible Provisioning Protocol (EPP) Contact Mapping
- RFC 5734 Extensible Provisioning Protocol (EPP) Transport over TCP
- RFC 5910 Domain Name System (DNS) Security Extensions for Extensible Provisioning Protocol (EPP)
- RFC 3915 Domain Registry Grace Period Mapping for EPP

##### 2.1.1.1. SRS EPP Interface Security Considerations

Security precautions are put in place to ensure transactions are received only from authorized registrars in a private, secure manner. Registrars must provide the registry with narrow subnet ranges, allowing the registry to restrict network connections that originate only from these pre-arranged networks. The source IP address is verified against the authentication data received from the connection to further validate the source of the connection. Registrars may only establish a limited number of connections and the network traffic is rate limited to ensure that all registrars receive the same quality of service. Network connections to the EPP server must be secured with TLS. The revocation status and validity of the certificate are checked.

Successful negotiation of a TLS session begins the process of authentication using the protocol elements of EPP. Registrars are not permitted to continue without a successful EPP session establishment. The EPP server validates the credential information passed by the registrar along with validation of:

- Certificate revocation status
- Certificate chain
- Certificate Common Name matches the Common Name the registry has listed for the source IP address
- User name and password are correct and match those listed for the source IP address

In the event a registrar creates a level of activity that threatens the service quality of other registrars, the service has the ability to rate limit individual registrars.

##### 2.1.1.2. SRS EPP Interface Stability Considerations

To ensure the stability of the EPP Interface software, strict change controls and access controls are in place. Changes to the software must be approved by management and go through a rigorous testing and staged deployment procedure.

Additional stability is achieved by carefully regulating the available computing resources. A policy of conservative usage thresholds leaves an equitable amount of computing resources available to handle spikes and service management.

### 2.1.2. SRS Web Interface

The SRS web interface is an alternative way to access EPP functionality using a web interface, providing the features necessary for effective operations of the registry. This interface uses the HTTPS protocol for secure web communication. Because users can be located worldwide, as with the EPP interface, the web interface is available to all registrars over multiple network paths.

Additional functionality is available to registrars to assist them in managing their account. For instance, registrars are able to view their account balance in near real time as well as the status of the registry services. In addition, notifications that are sent out in email are available for viewing.

#### 2.1.2.1. Web Interface Security Considerations

Only registrars are authorized to use the SRS web interface, and therefore the web interface has several security measures to prevent abuse. The web interface requires an encrypted network channel using the HTTPS protocol. Attempts to access the interface through a clear channel are redirected to the encrypted channel.

The web interface restricts access by requiring each user to present authentication credentials before proceeding. In addition to the typical user name and password combinations, the web interface also requires the user to possess a hardware security key as a second factor of authentication.

Registrars are provided a tool to create and manage users that are associated with their account. With these tools, they can set access and authorization levels for their staff.

#### 2.1.2.2. Web Interface Stability Considerations

Both the EPP interface and web interface use a common service provider to perform the work required to fulfill their requests. This provides consistency across both interfaces and ensures all policies and security rules are applied.

The software providing services for both interfaces executes on a farm of servers, distributing the load more evenly ensuring stability is maintained.

## 2.2. Dissemination of TLD Zone Files

### 2.2.1. Communication of Status Information of TLD Zone Servers to Registrars

The status of TLD zone servers and their ability to reflect changes in the SRS is of great importance to registrars and Internet users alike. We ensure that any change from normal operations is communicated to the relevant stakeholders as soon as is appropriate. Such communication might be prior to the status change, during the status change and/or after the status change (and subsequent reversion to normal) – as appropriate to the party being informed and the circumstance of the status change.

Normal operations are:

- DNS servers respond within SLAs for DNS resolution.
- Changes in the SRS are reflected in the zone file according to the DNS update time SLA.

The SLAs are those from Specification 10 of the Registry Agreement.

A deviation from normal operations, whether it is registry wide or restricted to a single DNS node, will result in the appropriate status communication being sent.

### 2.2.2. Communication Policy

We maintain close communication with registrars regarding the performance and consistency of the TLD zone servers.

A contact database containing relevant contact information for each registrar is maintained. In many cases, this includes multiple forms of contact, including email, phone and physical mailing address. Additionally, up-to-date status information of the TLD zone servers is provided within the SRS Web Interface.

Communication using the registrar contact information discussed above will occur prior to any maintenance that has the potential to effect the access to, consistency of, or reliability of the TLD zone servers. If such maintenance is required within a short timeframe, immediate communication occurs using the above contact information. In either case, the nature of the maintenance and how it affects the consistency or accessibility of the TLD zone servers, and the estimated time for full restoration, are included within the communication.

That being said, the TLD zone server infrastructure has been designed in such a way that we expect no downtime. Only individual sites will potentially require downtime for maintenance; however the DNS service itself will continue to operate with 100% availability.

### 2.2.3. Security and Stability Considerations

We restrict zone server status communication to registrars, thereby limiting the scope for malicious abuse of any maintenance window. Additionally, we ensure registrars have effective operational procedures to deal with any status change of the TLD nameservers and will seek to align its communication policy to those procedures.

### 2.3. Zone File Access Provider Integration

Individuals or organizations that wish to have a copy of the full zone file can do so using the Zone Data Access service. This process is still evolving; however the basic requirements are unlikely to change. All registries will publish the zone file in a common format accessible via secure FTP at an agreed URL.

DMEL will fully comply with the processes and procedures dictated by the Centralized Zone Data Access Provider (CZDA Provider or what it evolves into) for adding and removing Zone File access consumers from its authentication systems. This includes:

- Zone file format and location.
- Availability of the zone file access host via FTP.
- Logging of requests to the service (including the IP address, time, user and activity log).
- Access frequency.

### 2.4. Zone File Update

To ensure changes within the SRS are reflected in the zone file rapidly and securely, we update the zone file on the TLD zone servers following a staged but rapid propagation of zone update information from the SRS, outwards to the TLD zone servers - which are visible to the Internet. As changes to the SRS data occur, those changes are updated to isolated systems which act as the authoritative primary server for the zone, but remain inaccessible to systems outside our network. The primary servers notify the designated secondary servers, which service queries for the TLD zone from the public. Upon notification, the secondary servers transfer the incremental changes to the zone and publicly present those changes.

The mechanisms for ensuring consistency within and between updates are fully implemented in our TLD zone update procedures. These mechanisms ensure updates are quickly propagated while the data remains consistent within each incremental update, regardless of the speed or order of individual update transactions.

### 2.5. Operation of Zone Servers

ARI maintains TLD zone servers which act as the authoritative servers to which the TLD is delegated.

### 2.5.1. Security and Operational Considerations of Zone Server Operations

The potential risks associated with operating TLD zone servers are recognized by us such that we will perform the steps required to protect the integrity and consistency of the information they provide, as well as to protect the availability and accessibility of those servers to hosts on the Internet. The TLD zone servers comply with all relevant RFCs for DNS and DNSSEC, as well as BCPs for the operation and hosting of DNS servers. The TLD zone servers will be updated to support any relevant new enhancements or improvements adopted by the IETF.

The DNS servers are geographically dispersed across multiple secure data centers in strategic locations around the world. By combining multi-homed servers and geographic diversity, ARI's zone servers remain impervious to site level, supplier level or geographic level operational disruption.

The TLD zone servers are protected from accessibility loss by malicious intent or misadventure, via the provision of significant over-capacity of resources and access paths. Multiple independent network paths are provided to each TLD zone server and the query servicing capacity of the network exceeds the extremely conservatively anticipated peak load requirements by at least 10 times, to prevent loss of service should query loads significantly increase.

As well as the authentication, authorization and consistency checks carried out by the registrar access systems and DNS update mechanisms, ARI reduces the scope for alteration of DNS data by following strict DNS operational practices:

- TLD zone servers are not shared with other services.
- The primary authoritative TLD zone server is inaccessible outside ARI's network.
- TLD zone servers only serve authoritative information.
- The TLD zone is signed with DNSSEC and a DNSSEC Practice/Policy Statement published.

### 2.6. Dissemination of Domain Registration Information

Domain name registration information is required for a variety of purposes. Our registry provides this information through the required WHOIS service through a standard text based network protocol on port 43. Whois also is provided on the registry's web site using a standard web interface. Both interfaces are publically available at no cost to the user and are reachable worldwide.

The information displayed by the Whois service consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use of it does not require prior authorization or permission.

#### 2.6.1. Whois Port 43 Interface

The Whois port 43 interface consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted ASCII text. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

#### 2.6.2. Whois Web Interface

The Whois web interface also uses clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 43 using the HTTPS protocol.

#### 2.6.3. Security and Stability Considerations

Abuse of the Whois system through data mining is a concern as it can impact system performance and reduce the quality of service to legitimate users. The Whois system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

In addition, the Whois web interface adds a simple challenge-response CAPCHA that requires a user to type in the characters displayed in image format.

Both systems have blacklist functionality to provide a complete block to individual IPs or IP ranges.

## 2.7. Internationalized Domain Names (IDNs)

An Internationalized Domain Name (IDN) contains at least one label that is displayed in a specific language script in IDN aware software. We will offer registration of second level IDN labels at launch,

IDNs are published into the TLD zone. The SRS EPP and Web Interfaces also support IDNs.

The IDN implementation is fully compliant with the IDNA 2008 suite of standards (RFC 5890, 5891, 5892 and 5893) as well as the ICANN Guidelines for the Implementation of IDN Version 3.0 (<http://www.icann.org/en/resources/idn/implementation-guidelines>). To ensure stability and security, we have adopted a conservative approach in our IDN registration policies, as well as technical implementation.

All IDN registrations must be requested using the A-label form, and accompanied by an RFC 5646 language tag identifying the corresponding language table published by the registry. The candidate A-label is processed according to the registration protocol as specified in Section 4 of RFC 5891, with full U-label validation. Specifically, the "Registry Restrictions" steps specified in Section 4.3 of RFC 5891 are implemented by validating the U-label against the identified language table to ensure that the set of characters in the U-label is a proper subset of the character repertoire listed in the language table.

### 2.7.1. IDN Stability Considerations

To avoid the intentional or accidental registration of visually similar characters, and to avoid identity confusion between domains, there are several restrictions on the registration of IDNs.

Domains registered within a particular language are restricted to only the characters of that language. This avoids the use of visually similar characters within one language which mimic the appearance of a label within another language, regardless of whether that label is already within the DNS or not.

Child domains are restricted to a specific language and registrations are prevented in one language being confused with a registration in another language; for example Cyrillic a (U+0430) and Latin a (U+0061).

## 2.8. DNSSEC

DNSSEC provides a set of extensions to the DNS that allow an Internet user (normally the resolver acting on a user's behalf) to validate that the DNS responses they receive were not manipulated en-route.

This type of fraud, commonly called 'man in the middle', allows a malicious party to misdirect Internet users. DNSSEC allows a domain owner to sign their domain and to publish the signature, so that all DNS consumers who visit that domain can validate that the responses they receive are as the domain owner intended.

Registries, as the operators of the parent domain for registrants, must publish the DNSSEC material received from registrants, so that Internet users can trust the material they receive from the domain owner. This is commonly referred to as a "chain of trust." Internet users trust the root (operated by IANA), which publishes the registries' DNSSEC material, therefore registries inherit this trust. Domain owners within the TLD subsequently inherit trust from the parent domain when the registry publishes their DNSSEC material.

In accordance with new gTLD requirements, the TLD zone will be DNSSEC signed and the receipt of DNSSEC material from registrars for child domains is supported in all provisioning systems.

### 2.8.1. Stability and Operational Considerations for DNSSEC

#### 2.8.1.1. DNSSEC Practice Statement

ARI's DNSSEC Practice Statement is included in our response to Question 43. The DPS following the guidelines set out in the draft IETF DNSOP DNSSEC DPS Framework document.

#### 2.8.1.2. Resolution Stability

DNSSEC is considered to have made the DNS more trustworthy; however some transitional considerations need to be taken into account. DNSSEC increases the size and complexity of DNS responses. ARI ensures the TLD zone servers are accessible and offer consistent responses over UDP and TCP.

The increased UDP and TCP traffic which results from DNSSEC is accounted for in both network path access and TLD zone server capacity. ARI will ensure that capacity planning appropriately accommodates the expected increase in traffic over time.

ARI complies with all relevant RFCs and best practice guides in operating a DNSSEC-signed TLD. This includes conforming to algorithm updates as appropriate. To ensure Key Signing Key Rollover procedures for child domains are predictable, DS records will be published as soon as they are received via either the EPP server or SRS Web Interface. This allows child domain operators to rollover their keys with the assurance that their timeframes for both old and new keys are reliable.

### 3.0. APPROACH TO SECURITY AND STABILITY

Stability and security of the Internet is an important consideration for the registry system. To ensure that the registry services are reliably secured and remain stable under all conditions, DMEL takes a conservative approach with the operation and architecture of the registry system.

By architecting all registry services to use the least privileged access to systems and data, risk is significantly reduced for other systems and the registry services as a whole should any one service become compromised. By continuing that principal through to our procedures and processes, we ensure that only access that is necessary to perform tasks is given. ARI has a comprehensive approach to security modeled of the ISO27001 series of standards and explored further in the relevant questions of this response.

By ensuring all our services adhering to all relevant standards, DMEL ensures that entities which interact with the registry services do so in a predictable and consistent manner. When variations or enhancements to services are made, they are also aligned with the appropriate interoperability standards.

## Demonstration of Technical & Operational Capability

### 24. Shared Registration System (SRS) Performance

Q24 CHAR: 19964

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

## 1.0. INTRODUCTION

Our Shared Registration System (SRS) complies fully with Specification 6, Section 1.2 and the SLA Matrix provided with Specification 10 in ICANN's Registry Agreement and is in line with the projections outlined in our responses to Questions 31 and 46. The services provided by the SRS are critical to the proper functioning of a TLD registry.

We will adhere to these commitments by operating a robust and reliable SRS founded on best practices and experience in the domain name industry.

## 2.0. TECHNICAL OVERVIEW

A TLD operator must ensure registry services are available at all times for both registrants and the Internet community as a whole. To meet this goal, our SRS was specifically engineered to provide the finest levels of service derived from a long pedigree of excellence and experience in the domain name industry. This pedigree of excellence includes a long history of technical excellence providing long running, highly available and high-performing services that help thousands of companies derive their livelihoods.

Our SRS services will give registrars standardized access points to provision and manage domain name registration data. We will provide registrars with two interfaces: an EPP protocol over TCP/IP and a web site accessible from any web browser (note: throughout this document, references to the SRS are inclusive of both these interfaces).

Initial registration periods will comply with Specification 6 and will be in one (1) year increments up to a maximum of ten (10) years. Registration terms will not be allowed to exceed ten (10) years. In addition, renewal periods also will be in one-year increments and renewal periods will only allow an extension of the registration period of up to ten years from the time of renewal.

The performance of the SRS is critical for the proper functioning of a TLD. Poor performance of the registration systems can adversely impact registrar systems that depend on its responsiveness. Our SRS is committed to exceeding the performance specifications described in Specification 10 in all cases. To ensure that we are well within specifications for performance, we will test our system on a regular basis during development to ensure that changes have not impacted performance in a material way. In addition, we will monitor production systems to ensure compliance. If internal thresholds are exceeded, the issue will be escalated, analyzed and addressed.

Our SRS will offer registry services that support Internationalized Domain Names (IDNs). Registrations can be made through both the EPP and web interfaces.

## 3.0. ROBUST AND RELIABLE ARCHITECTURE

To ensure quality of design, the SRS software was designed and written by seasoned and experienced software developers. This team designed the SRS using modern software architecture principles geared toward ensuring flexibility in its design not only to meet business needs but also to make it easy to understand, maintain and test.

A classic 3-tier design was used for the architecture of the system. 3-tier is a well-proven architecture that brings flexibility to the system by abstracting the application layer from the protocol layer. The data tier is isolated and only accessible by the services tier. 3-tier adds an additional layer of security by minimizing access to the data tier through possible exploits of the protocol layer.

The protocol and services layers are fully redundant. A minimum of three physical servers is in place in both the protocol and services layers. Communications are balanced across the servers. Load balancing is accomplished with a redundant load balancer pair.

#### 4.0. SOFTWARE QUALITY

The software for the SRS, as well as other registry systems, was developed using an approach that ensures that every line of source code is peer reviewed and source code is not checked into the source code repository without the accompanying automated tests that exercise the new functionality. The development team responsible for building the SRS and other registry software applies continuous integration practices to all software projects; all developers work on an up-to-date code base and are required to synchronize their code base with the master code base and resolve any incompatibilities before checking in. Every source code check-in triggers an automated build and test process to ensure a minimum level of quality. Each day an automated "daily build" is created, automatically deployed to servers and a fully-automated test suite run against it. Any failures are automatically assigned to developers to resolve in the morning when they arrive.

When extensive test passes are in order for release candidates, these developers use a test harness designed to run usability scenarios that exercise the full gamut of use cases, including accelerated full registration life cycles. These scenarios can be entered into the system using various distributions of activity. For instance, the test harness can be run to stress the system by changing the distribution of scenarios or to stress the system by exaggerating particular scenarios to simulate land rushes or, for long running duration scenarios, a more common day-to-day business distribution.

#### 5.0. SOFTWARE COMPLIANCE

The EPP interface to our SRS is compliant with current RFCs relating to EPP protocols and best practices. This includes RFCs 5910, 5730, 5731, 5732, 5733 and 5734. Since we are also supporting Registry Grace Period functionality, we are also compliant with RFC 3915. Details of our compliance with these specifications are provided in our response to Question 25. We are also committed to maintaining compliance with future RFC revisions as they apply as documented in Section 1.2 of Specification 6 of the new gTLD Agreement.

We strive to be forward-thinking and will support the emerging standards of both IPv6 and DNSSEC on our SRS platform. The SRS was designed and has been tested to accept IPv6 format addresses for nameserver glue records and provision them to the gTLD zone. In addition, key registry services will be accessible over both IPv4 and IPv6. These include both the SRS EPP and SRS web-based interfaces, both port 43 and web-based WHOIS interfaces and DNS, among others. For details regarding our IPv6 reachability plans, please refer to our response to Question 36.

DNSSEC services are provided, and we will comply with Specification 6. Additionally, our DNSSEC implementation complies with RFCs 4033, 4034, 4035, and 4509; and we commit to complying with the successors of these RFCs and following the best practices described in RFC 4641. Additional compliance and commitment details on our DNSSEC services can be found in our response to Question 43.

#### 6.0. DATABASE OPERATIONS

The database for our gTLD is Microsoft SQL Server 2008 R2. It is an industry-leading database engine used by companies requiring the highest level of security, reliability and trust. Case studies highlighting SQL Server's reliability and use indicate its successful application in many industries, including major financial institutions such as Visa, Union Bank of Israel, KeyBank, TBC Bank, Paymark, Coca-Cola, Washington State voter registration and many others. In addition, Microsoft SQL Server provides a number of features that ease the management and maintenance of the system. Additional details about our database system can be found in our response to Question 33.

Our SRS architecture ensures security, consistency and quality in a number of ways. To prevent eavesdropping, the services tier communicates with the database over a secure channel. The SRS is architected to ensure all data written to the database is atomic. By convention, leave all matters of atomicity are left to the database. This ensures consistency of the data and reduces the chance of error. So that we can examine data versions at any point in time, all changes to the database are written to an audit database. The audit data contains all previous and new values and the date/time of the change. The audit data is saved as part of each atomic transaction to ensure consistency.

To minimize the chance of data loss due to a disk failure, the database uses an array of redundant disks for storage. In addition, maintain an exact duplicate of the primary site is maintained in a secondary datacenter. All hardware is fully duplicated and set up to take over operations at any time. All database operations are replicated to the secondary datacenter via synchronous replication. The secondary datacenter always maintains an exact copy of our live data as the transactions occur.

#### 7.0. REDUNDANT HARDWARE

The SRS is composed of several pieces of hardware that are critical to its proper functioning, reliability and scale. At least two of each hardware component comprises the SRS, making the service fully redundant. Any component can fail, and the system is designed to use the facility of its pair. The EPP interface to the SRS will operate with more than two servers to provide the capacity required to meet our projected scale as described in Question 46: Projections Template.

#### 8.0. HORIZONTALLY SCALABLE

The SRS is designed to scale horizontally. That means that, as the needs of the registry grow, additional servers can be easily added to handle additional loads.

The database is a clustered 2-node pair configured for both redundancy and performance. Both nodes participate in serving the needs of the SRS. A single node can easily handle the transactional load of the SRS should one node fail. In addition, there is an identical 2-node cluster in our backup datacenter. All data from the primary database is continuously replicated to the backup datacenter.

Not only is the registry database storage medium specified to provide the excess of capacity necessary to allow for significant growth, it is also configured to use techniques, such as data sharing, to achieve horizontal scale by distributing logical groups of data across additional hardware. For further detail on the scalability of our SRS, please refer to our response to Question 31.

#### 9.0. REDUNDANT HOT FAILOVER SITE

We understand the need for maximizing uptime. As such, our plan includes maintaining at all times a warm failover site in a separate datacenter for the SRS and other key registry services. Our planned failover site contains an exact replica of the hardware and software configuration contained in the primary site. Registration data will be replicated to the failover site continuously over a secure connection to keep the failover site in sync.

Failing over an SRS is not a trivial task. In contrast, web site failover can be as simple as changing a DNS entry. Failing over the SRS, and in particular the EPP interface, requires careful planning and consideration as well as training and a well-documented procedure. Details of our failover procedures as well as our testing plans are detailed in our response to Question 41.

#### 10.0. SECURE ACCESS

To ensure security, access to the EPP interface by registrars is restricted by IP/subnet. Access Control Lists (ACLs) are entered into our routers to allow access only from a restricted, contiguous subnet from registrars. Secure and private communication over mutually

authenticated TLS is required. Authentication credentials and certificate data are exchanged in an out-of-band mechanism. Connections made to the EPP interface that successfully establish an EPP session are subject to server policies that dictate connection maximum lifetime and minimal activity to maintain the session.

To ensure fair and equal access for all registrars, as well as maintain a high level of service, we will use traffic shaping hardware to ensure all registrars receive an equal number of resources from the system.

To further ensure security, access to the SRS web interface is over the public Internet via an encrypted HTTPS channel. Each registrar will be issued master credentials for accessing the web interface. Each registrar also will be required to use 2-factor authentication when logging in. We will issue a set of Yubikey (<http://yubico.com>) 2-factor, one-time password USB keys for authenticating with the web site. When the SRS web interface receives the credentials plus the one-time password from the Yubikey, it communicates with a RADIUS authentication server to check the credentials.

## 11.0. OPERATING A ROBUST AND RELIABLE SRS

### 11.1. AUTOMATED DEPLOYMENT

To minimize human error during a deployment, we use a fully-automated package and deployment system. This system ensures that all dependencies, configuration changes and database components are included every time. To ensure the package is appropriate for the system, the system also verifies the version of system we are upgrading.

### 11.2. CHANGE MANAGEMENT

We use a change management system for changes and deployments to critical systems. Because the SRS is considered a critical system, it is also subject to all change management procedures. The change management system covers all software development changes, operating system and networking hardware changes and patching. Before implementation, all change orders entered into the system must be reviewed with careful scrutiny and approved by appropriate management. New documentation and procedures are written; and customer service, operations, and monitoring staff are trained on any new functionality added that may impact their areas.

### 11.3. PATCH MANAGEMENT

Upon release, all operating system security patches are tested in the staging environment against the production code base. Once approved, patches are rolled out to one node of each farm. An appropriate amount of additional time is given for further validation of the patch, depending on the severity of the change. This helps minimize any downtime (and the subsequent roll back) caused by a patch of poor quality. Once validated, the patch is deployed on the remaining servers.

### 11.4. REGULAR BACKUPS

To ensure that a safe copy of all data is on hand in case of catastrophic failure of all database storage systems, backups of the main database are performed regularly. We perform full backups on both a weekly and monthly basis. We augment these full backups with differential backups performed daily. The backup process is monitored and any failure is immediately escalated to the systems engineering team. Additional details on our backup strategy and procedures can be found in our response to Question 37.

### 11.5. DATA ESCROW

Data escrow is a critical registry function. Escrowing our data on a regular basis ensures that a safe, restorable copy of the registration data is available should all other attempts to restore our data fail. Our escrow process is performed in accordance with Specification 2. Additional details on our data escrow procedures can be found in our response to Question 38.

## 11.6. REGULAR TRAINING

Ongoing security awareness training is critical to ensuring users are aware of security threats and concerns. To sustain this awareness, we have training programs in place designed to ensure corporate security policies pertaining to registry and other operations are understood by all personnel. All employees must pass a proficiency exam and sign the Information Security Policy as part of their employment. Further detail on our security awareness training can be found in our response to Question 30a.

We conduct failover training regularly to ensure all required personnel are up-to-date on failover process and have the regular practice needed to ensure successful failover should it be necessary. We also use failover training to validate current policies and procedures. For additional details on our failover training, please refer to our response to Question 41.

## 11.7. ACCESS CONTROL

User authentication is required to access any network or system resource. User accounts are granted the minimum access necessary. Access to production resources is restricted to key IT personnel. Physical access to production resources is extremely limited and given only as needed to IT-approved personnel. For further details on our access control policies, please refer to our response to Question 30a.

## 11.8. 24/7 MONITORING AND REGISTRAR TECHNICAL SUPPORT

We employ a full-time staff trained specifically on monitoring and supporting the services we provide. This staff is equipped with documentation outlining our processes for providing first-tier analysis, issue troubleshooting, and incident handling. This team is also equipped with specialty tools developed specifically to safely aid in diagnostics. On-call staff second-tier support is available to assist when necessary. To optimize the service we provide, we conduct ongoing training in both basic and more advanced customer support and conduct additional training, as needed, when new system or tool features are introduced or solutions to common issues are developed.

## 12.0. SRS INFRASTRUCTURE

As shown in Attachment A, Figure 1, our SRS infrastructure consists of two identically provisioned and configured datacenters with each served by multiple bandwidth providers.

For clarity in Figure 1, connecting lines through the load balancing devices between the Protocol Layer and the Services Layer are omitted. All hardware connecting to the Services Layer goes through a load-balancing device. This device distributes the load across the multiple machines providing the services. This detail is illustrated more clearly in subsequent diagrams in Attachment A.

## 13.0 RESOURCING PLAN

Resources for the continued development and maintenance of the SRS and ancillary services have been carefully considered. We have a significant portion of the required personnel on hand and plan to hire additional technical resources, as indicated below. Resources on hand are existing full time employees whose primary responsibility is the SRS.

For descriptions of the following teams, please refer to the resourcing section of our response to Question 31, Technical Review of Proposed Registry. Current and planned allocations are below.

### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, two, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 25. Extensible Provisioning Protocol (EPP)

Q25 CHAR: 20820

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry. The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

### 1.0. INTRODUCTION

Our SRS EPP interface is a proprietary network service compliant with RFC 3735 and RFCs 5730-4. The EPP interface gives registrars a standardized programmatic access point to provision and manage domain name registrations.

### 2.0. IMPLEMENTATION EXPERIENCE

The SRS implementation for our gTLD leverages extensive experience implementing long-running, highly available network services accessible. Our EPP interface was written by highly experienced engineers focused on meeting strict requirements developed to ensure quality of service and uptime. The development staff has extensive experience in the domain name industry.

### 3.0. TRANSPORT

The EPP core specification for transport does not specify that a specific transport method be used and is, thus, flexible enough for use over a variety of transport methods. However, EPP

is most commonly used over TCP/IP and secured with a Transport Layer Security (TLS) layer for domain registration purposes. Our EPP interface uses the industry standard TCP with TLS.

#### 4.0. REGISTRARS' EXPERIENCE

Registrars will find our EPP interface familiar and seamless. As part of the account creation process, a registrar provides us with information we use to authenticate them. The registrar provides us with two subnets indicating the connection's origination. In addition, the registrar provides us with the Common Name specified in the certificate used to identify and validate the connection.

Also, as part of the account creation process, we provide the registrar with authentication credentials. These credentials consist of a client identifier and an initial password and are provided in an out-of-band, secure manner. These credentials are used to authenticate the registrar when starting an EPP session.

Prior to getting access to the production interfaces, registrars have access to an Operational Test and Evaluation (OT&E) environment. This environment is an isolated area that allows registrars to develop and test against registry systems without any impact to production. The OT&E environment also provides registrars the opportunity to test implementation of custom extensions we may require.

Once a registrar has completed testing and is prepared to go live, the registrar is provided a Scripted Server Environment. This environment contains an EPP interface and database pre-populated with known data. To verify that the registrar's implementations are correct and minimally suitable for the production environment, the registrar is required to run through a series of exercises. Only after successful performance of these exercises is a registrar allowed access to production services.

#### 5.0. SESSIONS

The only connections that are allowed are those from subnets previously communicated during account set up. The registrar originates the connection to the SRS and must do so securely using a Transport Layer Security (TLS) encrypted channel over TCP/IP using the IANA assigned standard port of 700.

The TLS protocol establishes an encrypted channel and confirms the identity of each machine to its counterpart. During TLS negotiation, certificates are exchanged to mutually verify identities. Because mutual authentication is required, the registrar certificate must be sent during the negotiation. If it is not sent, the connection is terminated and the event logged.

The SRS first examines the Common Name (CN). The SRS then compares the Common Name to the one provided by the registrar during account set up. The SRS then validates the certificate by following the signature chain, ensures that the chain is complete, and terminates against our store of root Certificate Authorities (CA). The SRS also verifies the revocation status with the root CA. If these fail, the connection is terminated and the event logged.

Upon successful completion of the TLS handshake and the subsequent client validation, the SRS automatically sends the EPP greeting. Then the registrar initiates a new session by sending the login command with their authentication credentials. The SRS passes the credentials to the database for validation over an encrypted channel. Policy limits the number of failed login attempts. If the registrar exceeds the maximum number of attempts, the connection to the server is closed. If authentication was successful, the EPP session is allowed to proceed and a response is returned indicating that the command was successful.

An established session can only be maintained for a finite period. EPP server policy specifies the timeout and maximum lifetime of a connection. The policy requires the registrar to send a protocol command within a given timeout period. The maximum lifetime policy for our registry restricts the connection to a finite overall timespan. If a command is not received within the timeout period or the connection lifetime is exceeded, the connection is terminated and must be reestablished. Connection lifecycle details are explained in detail in our Registrar

Manual.

The EPP interface allows pipelining of commands. For consistency, however, the server only processes one command at a time per session and does not examine the next command until a response to the previous command is sent. It is the registrar's responsibility to track both the commands and their responses.

## 6.0. EPP SERVICE SCALE

Our EPP service is horizontally scalable. Its design allows us to add commodity-grade hardware at any time to increase our capacity. The design employs a 3-tier architecture which consists of protocol, services and data tiers. Servers for the protocol tier handle the loads of SSL negotiation and protocol validation and parsing. These loads are distributed across a farm of numerous servers balanced by load-balancing devices. The protocol tier connects to the services tier through load-balancing devices.

The services tier consists of a farm of servers divided logically based on the services provided. Each service category has two or more servers. The services tier is responsible for registry policy enforcement, registration lifecycle and provisioning, among other services. The services tier connects to the data tier which consists of Microsoft SQL Server databases for storage.

The data tier is a robust SQL Server installation that consists of a 2-node cluster in an active/active configuration. Each node is designed to handle the entire load of the registry should the alternate node go offline.

Additional details on scale and our plans to service the load we anticipate are described in detail on questions 24: SRS Performance and 32: Architecture.

## 7.0. COMPLIANCE WITH CORE AND EPP EXTENSION RFCs

The EPP interface is highly compliant with the following RFCs:

- RFC 5730 Extensible Provisioning Protocol
- RFC 5731 EPP Domain Name Mapping
- RFC 5732 EPP Host Mapping
- RFC 5733 EPP Contact Mapping
- RFC 5734 EPP Transport over TCP
- RFC 3915 Domain Registry Grace Period Mapping
- RFC 5910 Domain Name System (DNS) Security Extensions Mapping

The implementation is fully compliant with all points in each RFC. Where an RFC specifies optional details or service policy, they are explained below.

### 7.1. RFC 5730 EXTENSIBLE PROVISIONING PROTOCOL

Section 2.1 Transport Mapping Considerations - ack.

Transmission Control Protocol (TCP) in compliance with RFC 5734 with TLS.

Section 2.4 Greeting Format - compliant

The SRS implementation responds to a successful connection and subsequent TLS handshake with the EPP Greeting. The EPP Greeting is also transmitted in response to a <hello/> command. The server includes the EPP versions supported which at this time is only 1.0. The Greeting contains namespace URIs as <objURI/> elements representing the objects the server manages.

The Greeting contains a <svcExtension> element with one <extURI> element for each extension namespace URI implemented by the SRS.

Section 2.7 Extension Framework - compliant

Each mapping and extension, if offered, will comply with RFC 3735 Guidelines for Extending EPP.

## Section 2.9 Protocol Commands - compliant

Login command's optional `<options>` element is currently ignored. The `<version>` is verified and 1.0 is currently the only acceptable response. The `<lang>` element is also ignored because we currently only support English (en). This server policy is reflected in the greeting.

The client mentions `<objURI>` elements that contain namespace URIs representing objects to be managed during the session inside `<svcs>` element of Login request. Requests with unknown `<objURI>` values are rejected with error information in the response. A `<logout>` command ends the client session.

## Section 4 Formal syntax - compliant

All commands and responses are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against base schema (epp-1.0), common elements schema (eppcom-1.0) and object-specific schema.

## Section 5 Internationalization Considerations - compliant

EPP XML recognizes both UTF-8 and UTF-16. All date-time values are presented in Universal Coordinated Time using Gregorian calendar.

## 7.2. RFC 5731 EPP DOMAIN NAME MAPPING

### Section 2.1 Domain and Host names - compliant

The domain and host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

### Section 2.2 Contact and Client Identifiers - compliant

All EPP contacts are identified by a server-unique identifier. Contact identifiers conform to "clIDType" syntax described in RFC 5730.

### Section 2.3 Status Values - compliant

A domain object always has at least one associated status value. Status value can only be set by the sponsoring client or the registry server where it resides. Status values set by server cannot be altered by client. Certain combinations of statuses are not permitted as described by RFC.

### Section 2.4 Dates and Times - compliant

Date and time attribute values are represented in Universal Coordinated Time (UTC) using Gregorian calendar, in conformance with XML schema.

### Section 2.5 Validity Periods - compliant

Our SRS implementation supports validity periods in unit year ("y"). The default period is 1y.

### Section 3.1.1 EPP `<check>` Command - compliant

A maximum of 5 domains can be checked in a single command request as defined by server policy.

### Section 3.1.2 EPP `<info>` Command - compliant

EPP `<info>` command is used to retrieve information associated with a domain object. If the querying Registrar is not the sponsoring registrar and the registrar does not provide valid authorization information, the server does not send any domain elements in response per server policy.

### Section 3.1.3 EPP `<transfer>` Query Command - compliant

EPP `<transfer>` command provides a query operation that allows a client to determine the real-time status of pending and completed transfer requests. If the authInfo element is not provided or authorization information is invalid, the command is rejected for authorization.

### Section 3.2.4 EPP `<transfer>` Command - compliant

All subordinate host objects to the domain are transferred along with the domain object.

### 7.3. RFC 5732 EPP HOST MAPPING

#### Section 2.1 Host Names - compliant

The host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

#### Section 2.2 Contact and Client Identifiers - compliant

All EPP clients are identified by a server-unique identifier. Client identifiers conform to "clIDType" syntax described in RFC 5730.

#### Section 2.5 IP Addresses - compliant

The syntax for IPv4 addresses conform to RFC0791. The syntax for IPv6 addresses conform to RFC4291.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of five host names can be checked in a single command request set by server policy.

#### Section 3.1.2 EPP <info> Command - compliant

If the querying client is not a sponsoring client, the server does not send any host object elements in response and the request is rejected for authorization according to server policy.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the host is not delegated.

#### Section 3.2.2 EPP <update> Command - compliant

Any request to change host name of an external host that has associations with objects that are sponsored by a different client fails.

### 7.4. RFC 5733 EPP CONTACT MAPPING

#### Section 2.1 Contact and Client Identifiers - compliant

Contact identifiers conform to "clIDType" syntax described in RFC 5730.

#### Section 2.6 Email Addresses - compliant

Email address validation conforms to syntax defined in RFC5322.

#### Section 3.1.1 EPP <check> Command - compliant

Maximum of 5 contact id can be checked in a single command request.

#### Section 3.1.2 EPP <info> Command - compliant

If querying client is not sponsoring client, server does not send any contact object elements in response and the request is rejected for authorization.

#### Section 3.2.2 EPP <delete> Command - compliant

A delete is permitted only if the contact object is not associated with other known objects.

### 7.5. RFC 5734 EPP TRANSPORT OVER TCP

#### Section 2 Session Management - compliant

The SRS implementation conforms to the required flow mentioned in the RFC for initiation of a connection request by a client, to establish a TCP connection. The client has the ability to end the session by issuing an EPP <logout> command, which ends the session and closes the TCP connection. Maximum life span of an established TCP connection is defined by server policy. Any connections remaining open beyond that are terminated. Any sessions staying inactive beyond the timeout policy of the server are also terminated similarly. Policies regarding timeout and lifetime values are clearly communicated to registrars in documentation provided to them.

#### Section 3 Message Exchange - compliant

With the exception of EPP server greeting, EPP messages are initiated by EPP client in the form of EPP commands. Client-server interaction works as a command-response exchange where the

client sends one command to the server and the server returns one response to the client in the exact order as received by the server.

Section 8 Security considerations - ack.

TLS 1.0 over TCP is used to establish secure communications from IP restricted clients. Validation of authentication credentials along with the certificate common name, validation of revocation status and the validation of the full certificate chain are performed. The ACL only allows connections from subnets prearranged with the Registrar.

Section 9 TLS Usage Profile - ack.

The SRS uses TLS 1.0 over TCP and matches the certificate common name. The full certificate chain, revocation status and expiry date is validated. TLS is implemented for mutual client and server authentication.

## 8.0. EPP EXTENSIONS

### 8.1. STANDARDIZED EXTENSIONS

Our implementation includes extensions that are accepted standards and fully documented. These include the Registry Grace Period Mapping and DNSSEC.

### 8.2. COMPLIANCE WITH RFC 3735

RFC 3735 are the Guidelines for Extending the Extensible Provisioning Protocol. Any custom extension implementations follow the guidance and recommendations given in RFC 3735.

### 8.3. COMPLIANCE WITH DOMAIN REGISTRY GRACE PERIOD MAPPING RFC 3915

Section 1 Introduction - compliant

Our SRS implementation supports all specified grace periods particularly, add grace period, auto-renew grace period, renew grace period, and transfer grace period.

Section 3.2 Registration Data and Supporting Information - compliant

Our SRS implementation supports free text and XML markup in the restore report.

Section 3.4 Client Statements - compliant

Client can use free text or XML markup to make 2 statements regarding data included in a restore report.

Section 5 Formal syntax - compliant

All commands and responses for this extension are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against RGP specific schema (rgp-1.0).

### 8.4. COMPLIANCE WITH DOMAIN NAME SYSTEM (DNS) SECURITY EXTENSIONS MAPPING RFC 5910

RFC 5910 describes an Extensible Provisioning Protocol (EPP) extension mapping for the provisioning and management of Domain Name System Security Extensions (DNSSEC) for domain names stored in a shared central repository. Our SRS and DNS implementation supports DNSSEC.

The information exchanged via this mapping is extracted from the repository and used to publish DNSSEC Delegate Signer (DS) resource records (RR) as described in RFC 4034.

Section 4 DS Data Interface and Key Data Interface - compliant

Our SRS implementation supports only DS Data Interface across all commands applicable with DNSSEC extension.

Section 4.1 DS Data Interface - compliant

The client can provide key data associated with the DS information. The collected key data along with DS data is returned in an info response, but may not be used in our systems.

#### Section 4.2 Key Data Interface - compliant

Since our gTLD's SRS implementation does not support Key Data Interface, when a client sends a command with Key Data Interface elements, it is rejected with error code 2306.

#### Section 5.1.2 EPP <info> Command - compliant

This extension does not add any elements to the EPP <info> command. When an <info> command is processed successfully, the EPP <resData> contains child elements for EPP domain mapping. In addition, it contains a child <secDNS:infData> element that identifies extension namespace if the domain object has data associated with this extension. It is conditionally based on whether or the client added the <extURI> element for this extension in the <login> command. Multiple DS data elements are supported.

#### Section 5.2.1 EPP <create> Command - compliant

The client must add an <extension> element, and the extension element MUST contain a child <secDNS:create> element if the client wants to associate data defined in this extension to the domain object. Multiple DS data elements are supported. Since the SRS implementation does not support maxSigLife, it returns a 2102 error code if the command included a value for maxSigLife.

#### Section 5.2.5 EPP <update> Command - compliant

Since the SRS implementation does not support the <secDNS:update> element's optional "urgent" attribute, an EPP error result code of 2102 is returned if the "urgent" attribute is specified in the command with value of Boolean true.

### 8.5. PROPRIETARY EXTENSION DOCUMENTATION

We are not proposing any proprietary EPP extensions for this TLD.

### 8.6. EPP CONSISTENT WITH THE REGISTRATION LIFECYCLE DESCRIBED IN QUESTION 27

Our EPP implementation makes no changes to the industry standard registration lifecycle and is consistent with the lifecycle described in Question 27.

### 9.0. RESOURCING PLAN

For descriptions of the following teams, please refer to our response to Question 31. Current and planned allocations are below.

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, 2 Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

#### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

#### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 26. Whois

Q26 CHAR: 19908

### 1.0. INTRODUCTION

Our registry provides a publicly available Whois service for registered domain names in the top-level domain (TLD). Our planned registry also offers a searchable Whois service that includes web-based search capabilities by domain name, registrant name, postal address, contact name, registrar ID and IP addresses without an arbitrary limit. The Whois service for our gTLD also offers Boolean search capabilities, and we have initiated appropriate precautions to avoid abuse of the service. This searchable Whois service exceeds requirements and is eligible for a score of 2 by providing the following:

- Web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit.
- Boolean search capabilities.
- Appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users).
- Compliance with any applicable privacy laws or policies.

The Whois service for our planned TLD is available via port 43 in accordance with RFC 3912. Also, our planned registry includes a Whois web interface. Both provide free public query-based access to the elements outlined in Specification 4 of the Registry Agreement. In addition, our registry includes a searchable Whois service. This service is available to authorized entities and accessible from a web browser.

### 2.0. HIGH-LEVEL WHOIS SYSTEM DESCRIPTION

The Whois service for our registry provides domain registration information to the public. This information consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use does not require prior authorization or permission. To maximize accessibility to the data, Whois service is provided over two mediums, as described below. Where the medium is not specified, any reference to Whois pertains to both mediums. We describe our searchable Whois solution in Section 11.0.

One medium used for our gTLD's Whois service is port 43 Whois. This consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted text. If no query is received by the server within the allotted time or a malformed query is detected, the connection is closed. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the

requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

The other medium used for Whois is via web interface using clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 443 using the HTTPS protocol.

The steps for accessing the web-based Whois will be prominently displayed on the registry home page. The web-based Whois is for interactive use by individual users while the port 43 Whois system is for automated use by computers and lookup clients.

Both Whois service offerings comply with Specification 4 of the New GTLD Agreement. Although the Whois output is free text, it follows the output format as described for domain, registrar and nameserver data in Sections 1.4, 1.5 and 1.6 of Specification 4 of the Registry Agreement.

Our gTLD's WHOIS service is mature, and its current implementation has been in continuous operation for seven years. A dedicated support staff monitors this service 24/7. To ensure high availability, multiple redundant servers are maintained to enable capacity well above normal query rates.

Most of the queries sent to the port 43 Whois service are automated. The Whois service contains mechanisms for detecting abusive activity and, if abuse is detected, reacts appropriately. This capability contributes to a high quality of service and availability for all users.

## 2.1. PII POLICY

The services and systems for this gTLD do not collect, process or store any personally identifiable information (PII) as defined by state disclosure and privacy laws. Registry systems collect the following Whois data types: first name, last name, address and phone numbers of all billing, administration and technical contacts. Any business conducted where confidential PII consisting of customer payment information is collected uses systems that are completely separate from registry systems and segregated at the network layer.

## 3.0. RELEVANT NETWORK DIAGRAM(S)

Our network diagram (Q 26 - Attachment A, Figure 1) provides a quick-reference view of the Whois system. This diagram reflects the Whois system components and compliance descriptions and explanations that follow in this section.

### 3.1. NARRATIVE FOR Q26 - FIGURE 1 OF 1 (SHOWN IN ATTACHMENT A)

The Whois service for our gTLD operates from two datacenters from replicated data. Network traffic is directed to either of the datacenters through a global load balancer. Traffic is directed to an appropriate server farm, depending on the service interface requested. The load balancer within the datacenter monitors the load and health of each individual server and uses this information to select an appropriate server to handle the request.

The protocol server handling the request communicates over an encrypted channel with the Whois service provider through a load-balancing device. The WHOIS service provider communicates directly with a replicated, read-only copy of the appropriate data from the registry database. The Whois service provider is passed a sanitized and verified query, such as a domain name. The database attempts to locate the appropriate records, then format and return them. Final output formatting is performed by the requesting server and the results are returned back to the original client.

## 4.0. INTERCONNECTIVITY WITH OTHER REGISTRY SYSTEMS

The Whois port 43 interface runs as an unattended service on servers dedicated to this task. As shown in Attachment A, Figure 1, these servers are delivered network traffic by redundant load-balancing hardware, all of which is protected by access control methods. Balancing the

load across many servers helps distribute the load and allows for expansion. The system's design allows for the rapid addition of new servers, typically same-day, should load require them.

Both our port 43 Whois and our web-based Whois communicate with the Whois service provider in the middle tier. Communication to the Whois service provider is distributed by a load balancing pair. The Whois service provider calls the appropriate procedures in the database to search for the registration records.

The Whois service infrastructure operates from both datacenters, and the global load balancer distributes Whois traffic evenly across the two datacenters. If one datacenter is not responding, the service sends all traffic to the remaining datacenter. Each datacenter has sufficient capacity to handle the entire load.

To avoid placing an abnormal load on the Shared Registration System (SRS), both service installations read from replicated, read-only database instances (see Figure 1). Because each instance is maintained via replication from the primary SRS database, each replicated database contains a copy of the authoritative data. Having the Whois service receive data from this replicated database minimizes the impact of services competing for the same data and enables service redundancy. Data replication is also monitored to prevent detrimental impact on the primary SRS.

#### 5.0. FREQUENCY OF SYNCHRONIZATION BETWEEN SERVERS

As shown in Figure 1, the system replicates WHOIS services data continuously from the authoritative database to the replicated database. This persistent connection is maintained between the databases, and each transaction is queued and published as an atomic unit. Delays, if any, in the replication of registration information are minimal, even during periods of high load. At no time will the system prioritize replication over normal operations of the SRS.

#### 6.0. POTENTIAL FORMS OF ABUSE

Potential forms of abuse of this feature, and how they are mitigated, are outlined below. For additional information on our approach to preventing and mitigating Whois service abuse, please refer to our response to Question 28.

##### 6.1. DATA MINING ABUSE

This type of abuse consists primarily of a user using queries to acquire all or a significant portion of the registration database.

The system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate-limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

##### 6.2. INVALID DATA INJECTION

This type of abuse is mitigated by 1) ensuring that all Whois systems are strictly read-only; and 2) ensuring that any input queries are properly sanitized to prevent data injection.

##### 6.3. DISCLOSURE OF PRIVATE INFORMATION

The Whois system mitigates this type of abuse by ensuring all responses, while complete, only contain information appropriate to Whois output and do not contain any private or non-public information.

#### 7.0. COMPLIANCE WITH WHOIS SPECIFICATIONS FOR DATA OBJECTS, BULK ACCESS, AND LOOKUPS

Whois specifications for data objects, bulk access, and lookups for our gTLD are fully

compliant with Specifications 4 and 10 to the Registry Agreement, as explained below.

#### 7.1. COMPLIANCE WITH SPECIFICATION 4

Compliance of Whois specifications with Specification 4 is as follows:

- Registration Data Directory Services Component: Specification 4.1 is implemented as described. Formats follow the outlined semi-free text format. Each data object is represented as a set of key/value pairs with lines beginning with keys followed by a colon and a space as delimiters, followed by the value. Fields relevant to RFCs 5730-4 are formatted per Section 1.7 of Specification 4.
- Searchability compliance is achieved by implementing, at a minimum, the specifications in section 1.8 of specification 4. We describe this searchability feature in Section 11.0.
- Co-operation, ICANN Access and Emergency Operator Access: Compliance with these specification components is assured.
- Bulk Registration Data Access to ICANN: Compliance with this specification component is assured.

Evidence of Whois system compliance with this specification consists of:

- Matching existing Whois output with specification output to verify that it is equivalent.

#### 7.2. COMPLIANCE WITH SPECIFICATION 10 FOR WHOIS

Our gTLD's Whois complies fully with Specification 10. With respect to Section 4.2, the approach used ensures that Round-Trip Time (RTT) remains below five times the corresponding Service Level Requirement (SLR).

##### 7.2.1. Emergency Thresholds

To achieve compliance with this Specification 10 component, several measures are used to ensure emergency thresholds are never reached:

- 1) Provide staff training as necessary on Registry Transition plan components that prevent Whois service interruption in case of emergency (see the Question 40 response for details).
- 2) Conduct regular failover testing for Whois services as outlined in the Question 41 response.
- 3) Adhere to recovery objectives for Whois as outlined in the Question 39 response.

##### 7.2.2. Emergency Escalation

Compliance with this specification component is achieved by participation in escalation procedures as outlined in this section.

#### 8.0. COMPLIANCE WITH RFC 3912

Whois service for our gTLD is fully compliant with RFC 3912 as follows:

- RFC 3912 Element, "A Whois server listens on TCP port 43 for requests from Whois clients": This requirement is properly implemented, as described in Section 1 above. Further, running Whois on ports other than port 43 is an option.
- RFC 3912 Element, "The Whois client makes a text request to the Whois server, then the Whois server replies with text content": The port 43 Whois service is a text-based query and response system. Thus, this requirement is also properly implemented.
- RFC 3912 Element, "All requests are terminated with ASCII CR and then ASCII LF. The response might contain more than one line of text, so the presence of ASCII CR or ASCII LF characters does not indicate the end of the response": This requirement is properly implemented for our TLD.
- RFC 3912 Element, "The Whois server closes its connection as soon as the output is finished": This requirement is properly implemented for our TLD, as described in Section 1 above.

- RFC 3912 Element, "The closed TCP connection is the indication to the client that the response has been received": This requirement is properly implemented.

## 9.0. RESOURCING PLAN

Resources for the continued development and maintenance of the Whois have been carefully considered. Many of the required personnel are already in place. Where gaps exist, technical resource addition plans are outlined below as "First Year New Hires." Resources now in place, shown as "Existing Department Personnel", are employees whose primary responsibility is the registry system.

### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

### Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

### Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

## 11.0. PROVISION FOR SEARCHABLE WHOIS CAPABILITIES

The searchable Whois service for our gTLD provides flexible and powerful search ability for users through a web-based interface. This service is provided only to entities with a demonstrated need for it. Where access to registration data is critical to the investigation of cybercrime and other potentially unlawful activity, we authorize access for fully vetted law enforcement and other entities as appropriate. Search capabilities for our gTLD's searchable Whois meet or exceed the requirements indicated in section 1.8 of specification 4.

Once authorized to use the system, a user can perform exact and partial match searches on the following fields:

- Domain name
- Registrant name
- Postal address including street, city and state, etc., of all registration contacts

- Contact names
- Registrant email address
- Registrar name and ID
- Nameservers
- Internet Protocol addresses

In addition, all other EPP Contact Object fields and sub-fields are searchable as well. The following Boolean operators are also supported: AND, OR, NOT. These operators can be used for joining or excluding results.

Certain types of registry related abuse are unique to the searchable Whois function. Providing searchable Whois warrants providing protection against this abuse. Potential problems include:

- Attempts to abuse Whois by issuing a query that essentially returns the entire database in the result set.
- Attempts to run large quantities of queries sufficient to reduce the performance of the registry database.

Precautions for preventing and mitigating abuse of the Whois search service include:

- Limiting access to authorized users only.
- Establishing legal agreements with authorized users that clearly define and prohibit system abuse.
- Queuing search queries into a job processing system.
- Executing search queries against a replicated read-only copy of the database.
- Limiting result sets when the query is clearly meant to cause a wholesale dump of registration data.

Only authorized users with a legitimate purpose for searching registration data are permitted to use the searchable Whois system. Examples of legitimate purpose include the investigation of terrorism or cybercrime by authorized officials, or any of many other official activities that public officials must conduct to fulfill their respective duties. We grant access for these and other purposes on a case-by-case basis.

To ensure secure access, a two-factor authentication device is issued to each authorized user of the registry. Subsequent access to the system requires the user name, password and a one-time generated password from the issued two-factor device.

Upon account creation, users are provided with documentation describing our terms of service and policies for acceptable use. Users must agree to these terms to use the system. These terms clearly define and illustrate what constitutes legitimate use and what constitutes abuse. They also inform the user that abuse of the system is grounds for limiting or terminating the user's account.

For all queries submitted, the searchable Whois system first sanitizes the query to deter potential harm to our internal systems. The system then submits the query to a queue for job processing. The system processes each query one by one and in the order received. The number of concurrent queries executed varies, depending on the current load.

To ensure Whois search capabilities do not affect other registry systems, the system executes queries against a replicated read-only version of the database. The system updates this database frequently as registration transactions occur. These updates are performed in a manner that ensures no detrimental load is placed on the production SRS.

To process successfully, each query must contain the criteria needed to filter its results down to a reasonable result set (one that is not excessively large). If the query does not meet this, the user is notified that the result set is excessive and is asked to verify the search criteria. If the user wishes to continue without making the indicated changes, the user must contact our support team to verify and approve the query. Each successful query submitted results in immediate execution of the query.

Query results are encrypted using the unique shared secret built into each 256-bit Advanced Encryption Standard (AES) two-factor device. The results are written to a secure location dedicated for result storage and retrieval. Each result report has a unique file name in the user's directory. The user's directory is assigned the permissions needed to prevent unauthorized access to report files. For the convenience of Registrars and other users, each query result is stored for a minimum of 30 days. At any point following this 30-day period, the query result may be purged by the system.

## 27. Registration Life Cycle

Q27 CHAR: 19951

### 1.0. INTRODUCTION

To say that the lifecycle of a domain name is complex would be an understatement. A domain name can traverse many states throughout its lifetime and there are many and varied triggers that can cause a state transition. Some states are triggered simply by the passage of time. Others are triggered by an explicit action taken by the registrant or registrar. Understanding these is critical to the proper operation of a gTLD registry. To complicate matters further, a domain name can contain one or more statuses. These are set by the registrar or registry and have a variety of uses.

When this text discusses EPP commands received from registrars, with the exception of a transfer request, the reader can assume that the command is received from the sponsoring registrar and successfully processed. The transfer request originates from the potential gaining registrar. Transfer details are explicit for clarity.

### 2.0. INDUSTRY STANDARDS

The registration life cycle approach for our gTLD follows industry standards for registration lifecycles and registration statuses. By implementing a registration life cycle that adheres to these standards, we avoid compounding an already confusing topic for registrants. In addition, since registrar systems are already designed to manage domain names in a standard way, a standardized registration lifecycle also lowers the barrier to entry for registrars.

The registration lifecycle for our gTLD follows core EPP RFCs including RFC 5730 and RFC 5731 and associated documentation of lifecycle information. To protect registrants, EPP Grace Period Mapping for domain registrations is implemented, which affects the registration lifecycle and domain status. EPP Grace Period Mapping is documented in RFC 3915.

### 3.0. REGISTRATION STATES

For a visual guide to this registration lifecycle discussion, please refer to the attachment, Registration Lifecycle Illustrations. Please note that this text makes many references to the status of a domain. For brevity, we do not distinguish between the domain mapping status `<domain:status>` and the EPP Grace Period Mapping status `<rgp:rgpStatus>` as making this differentiation in every case would make this document more difficult to read and in this context does not improve understanding.

### 4.0. AVAILABILITY

The lifecycle for any domain registration begins with the Available state. This is not necessarily a registration state, per se, but indicates the lack of domain registration implied and provides an entry and terminal point for the state diagram provided. In addition to the state diagram, please refer to Fig. 2 - Availability Check for visual representation of the process flow.

Before a user can register a new domain name, the registry performs an availability check. Possible outcomes of this availability check include:

1. Domain name is available for registration.
2. Domain name is already registered, regardless of the current state and not available for

registration.

3. Domain name has been reserved by the registry.

4. Domain name string has been blocked because of a trademark claim.

#### 5.0. INITIAL REGISTRATION

The first step in domain registration is the availability check as described above and shown in Fig. 2 - Availability Check. A visual guide to the description for domain registration in this section can be found in Fig. 3 - Domain Registration. If the domain is available for registration, a registrar submits a registration request.

With this request, the registrar can include zero or more nameserver hosts for zone delegation. If the registrar includes zero or one nameserver host(s), the domain is registered but the EPP status of the domain is set to inactive. If the registrar includes two or more, the EPP status of the domain is set to ok.

The request may also include a registration period (the number of years the registrar would like the domain registered). If this time period is omitted, the registry may use a default initial registration period. The policy for this aligns with the industry standard of one year as the default period. If the registrar includes a registration period, the value must be between one and ten years as specified in the gTLD Registry Agreement.

Once the registration process is complete within the registry, the domain registration is considered to be in the REGISTERED state but within the Add Grace Period.

#### 6.0. REGISTERED STATE - ADD GRACE PERIOD

The Add Grace Period is a status given to a new domain registration. The EPP status applied in this state is addPeriod. The Add Grace Period is a state in which the registrar is eligible for a refund of the registration price should the registration be deleted while this status is applied. The status is removed and the registration transitions from the Add Grace Period either by an explicit delete request from the registrar or by the lapse of five days. This is illustrated in Fig. 1 and Fig. 3 of the illustrations attachment.

If the registrar deletes the domain during the Add Grace Period, the domain becomes immediately available for registration. The registrar is refunded the original cost of the registration.

If the five-day period lapses without receiving a successful delete command, the addPeriod status is removed from the domain.

#### 7.0. REGISTERED STATE

A domain registration spends most of its time in the REGISTERED state. A domain registration period can initially be between one year and ten years in one-year increments as specified in the new gTLD Registry Agreement. At any time during the registration's term, several things can occur to either affect the registration period or transition the registration to another state. The first three are the auto-renew process, an explicit renew EPP request and a successful completion of the transfer process.

#### 8.0. REGISTRATION PERIOD EXTENSION

The registration period for a domain is extended either through a successful renew request by the registrar, through the successful completion of the transfer process or through the auto-renew process. This section discusses each of these three options.

##### 8.1. EXTENSION VIA RENEW REQUEST

One way that a registrar can extend the registration period is by issuing a renew request. Each renew request includes the number of years desired for extension of the registration up to ten years. Please refer to the flow charts found in both Fig. 4 - Renewal and Fig. 5 - Renewal Grace Period for a visual representation of the following.

Because the registration period cannot extend beyond ten years, any request for a registration

period beyond ten years fails. The domain must not contain the status `renewProhibited`. If this status exists on the domain, the request for a renewal fails.

Upon a successful renew request, the registry adds the `renewPeriod` status to the domain. This status remains on the domain for a period of five days. The number of years in the renew request is added to the total registration period of the domain. The registrar is charged for each year of the additional period.

While the domain has the `renewPeriod` status, if the sponsoring registrar issues a successful delete request, the registrar receives a credit for the renewal. The `renewPeriod` status is removed and the domain enters the Redemption Grace Period (RGP) state. The status `redemptionPeriod` is added to the status of the domain.

## 8.2. EXTENSION VIA TRANSFER PROCESS

The second way to extend the registration is through the Request Transfer process. A registrar may transfer sponsorship of a domain name to another registrar. The exact details of a transfer are explained in the Request Transfer section below. The successful completion of the Request Transfer process automatically extends the registration for one year. The registrar is not charged separately for the addition of the year; it comes automatically with the successful transfer. The `transferPeriod` status is added to the domain.

If the gaining registrar issues a successful delete request during the `transferPeriod`, the gaining registrar receives a credit for the transfer. The status `redemptionPeriod` is added to the status of the domain and `transferPeriod` is removed. The domain then enters the RGP state.

## 8.3. EXTENSION VIA AUTO-RENEW

The last way a registration period can be extended is passive and is the simplest way because it occurs without any action by the Registrar. When the registration period expires, for the convenience of the registrar and registrant, the registration renews automatically for one year. The registrar is charged for the renewal at this time. This begins the Auto Renew Grace Period. The `autoRenewPeriod` status is added to the domain to represent this period.

The Auto Renew Grace Period lasts for 45 days. At any time during this period, the Registrar can do one of four things: 1) passively accept the renewal; 2) actively renew (to adjust renewal options); 3) delete the registration; or 4) transfer the registration.

To passively accept the renewal, the registrar need only allow the 45-day time span to pass for the registration to move out of the Auto Renew Grace Period.

Should the registrar wish to adjust the renewal period in any way, the registrar can submit a renew request via EPP to extend the registration period up to a maximum of ten years. If the renew request is for a single year, the registrar is not charged. If the renew request is for more than a single year, the registrar is charged for the additional years that the registration period was extended. If the command is a success, the `autoRenewPeriod` status is removed from the domain.

Should the registrar wish to delete the registration, the registrar can submit a delete command via EPP. Once a delete request is received, the `autoRenewPeriod` status is removed from the domain and the `redemptionPeriod` status is added. The registrar is credited for the renewal fees. For illustration of this process, please refer to Fig. 6 - Auto Renew Grace Period.

The last way move a domain registration out of the Auto Renew state is by successful completion of the Request Transfer process, as described in the following section. If the transfer completes successfully, the `autoRenewPeriod` status is removed and the `transferPeriod` status is added.

## 9.0. REQUEST TRANSFER

A customer can change the sponsoring registrar of a domain registration through the Request Transfer process. This process is an asynchronous, multi-step process that can take many as

five days but may occur faster, depending on the level of support from participating Registrars.

The initiation of the transfer process is illustrated in Fig. 8 – Request Transfer. The transfer process begins with a registrar submitting a transfer request. To succeed, the request must meet several criteria. First, the domain status must not contain `transferProhibited` or `pendingTransfer`. Second, the initial domain registration must be at least 60 days old or, if transferred prior to the current transfer request, must not have been transferred within the last 60 days. Lastly, the transfer request must contain the correct `authInfo` (authorization information) value. If all of these criteria are met, the transfer request succeeds and the domain moves into the Pending Transfer state and the `pendingTransfer` status is added to the domain.

There are four ways to complete the transfer (and move it out of Pending Transfer status):

1. The transfer is auto-approved.
2. The losing registrar approves the transfer.
3. The losing registrar rejects the transfer.
4. The requesting registrar cancels the transfer.

After a successful transfer request, the domain continues to have the `pendingTransfer` status for up to five days. During this time, if no other action is taken by either registrar, the domain successfully completes the transfer process and the requesting registrar becomes the new sponsor of the domain registration. This is illustrated in Fig. 9 – Auto Approve Transfer.

At any time during the Pending Transfer state, either the gaining or losing registrar can request the status of a transfer provided they have the correct domain `authInfo`. Querying for the status of a transfer is illustrated in Fig. 13 – Query Transfer.

During the five-day Pending Transfer state, the losing registrar can accelerate the process by explicitly accepting or rejecting the transfer. If the losing registrar takes either of these actions, the `pendingTransfer` status is removed. Both of these actions are illustrated in Fig. 10 – Approve Transfer and Fig. 11 – Reject Transfer.

During the five-day Pending Transfer state, the requesting registrar may cancel the transfer request. If the registrar sends a cancel transfer request, the `pendingTransfer` status is removed. This is shown in Fig. 12 – Cancel Transfer.

If the transfer process is a success, the registry adds the `transferPeriod` status and removes the `pendingTransfer` status. If the domain was in the Renew Period state, upon successful completion of the transfer process, this status is removed.

The `transferPeriod` status remains on the domain for five days. This is illustrated in Fig. 14 – Transfer Grace Period. During this period, the gaining Registrar may delete the domain and obtain a credit for the transfer fees. If the gaining registrar issues a successful delete request during the `transferPeriod`, the gaining registrar receives a credit for the transfer. The `statusRedemptionPeriod` is added to the status of the domain and `transferPeriod` is removed. The domain then enters the RGP state.

#### 10.0. REDEMPTION GRACE PERIOD

The Redemption Grace Period (RGP) is a service provided by the registry for the benefit of registrars and registrants. The RGP allows a registrar to recover a deleted domain registration. The only way to enter the RGP is through a delete command sent by the sponsoring registrar. A domain in RGP always contains a status of `redemptionPeriod`. For an illustrated logical flow diagram of this, please refer to Fig. 15 – Redemption Grace Period.

The RGP lasts for 30 days. During this time, the sponsoring registrar may recover the domain through a two-step process. The first step is to send a successful restore command to the registry. The second step is to send a restore report to the registry.

Once the restore command is processed, the registry adds the domain status of `pendingRestore`

to the domain. The domain is now in the Pending Restore state, which lasts for seven days. During this time, the registry waits for the restore report from the Registrar. If the restore report is not received within seven days, the domain transitions back to the RGP state. If the restore report is successfully processed by the registry, the domain registration is restored back to the REGISTERED state. The statuses of pendingRestore and redemptionPeriod are removed from the domain.

After 30 days in RGP, the domain transitions to the Pending Delete state. A status of pendingDelete is applied to the domain and all other statuses are removed. This state lasts for five days and is considered a quiet period for the domain. No commands or other activity can be applied for the domain while it is in this state. Once the five days lapse, the domain is again available for registration.

#### 11.0. DELETE

To delete a domain registration, the sponsoring registrar must send a delete request to the registry. If the domain is in the Add Grace Period, deletion occurs immediately. In all other cases, the deleted domain transitions to the RGP. For a detailed visual diagram of the delete process flow, please refer to Fig. 7 - Delete.

For domain registration deletion to occur successfully, the registry must first ensure the domain is eligible for deletion by conducting two checks. The registry first checks to verify that the requesting registrar is also the sponsoring registrar. If this is not the case, the registrar receives an error message.

The registry then checks the various domain statuses for any restrictions that might prevent deletion. If the domain's status includes either the transferPending or deleteProhibited, the name is not deleted and an error is returned to the registrar.

If the domain is in the Add Grace Period, the domain is immediately deleted and any registration fees paid are credited back to the registrar. The domain is immediately available for registration.

If the domain is in the Renew Grace Period, the Transfer Grace Period or the Auto Renew Grace Period, the respective renewPeriod, transferPeriod or autoRenewPeriod statuses are removed and the corresponding fees are credited to the Registrar. The domain then moves to the RGP as described above.

#### 12.0. ADDITIONAL STATUSES

There are additional statuses that the registry or registrar can apply to a domain registration to limit what actions can be taken on it or to limit its usefulness. This section addresses such statuses that have not already addressed in this response.

Some statuses are applied by the registrar and others are exclusively applied by the registry. Registry-applied statuses cannot be altered by registrars. Status names that registrars can add or remove begin with "client". Status names that only the registry can add or remove begin with "server". These statuses can be applied by a registrar using the EPP domain update request as defined in RFC 5731.

To prevent a domain registration from being deleted, the status values of clientDeleteProhibited or serverDeleteProhibited may be applied by the appropriate party.

To withhold delegation of the domain to the DNS, clientHold or serverHold is applied. This prevents the domain name from being published to the zone file. If it is already published, the domain name is removed from the zone file.

To prevent renewal of the domain registration clientRenewProhibited or serverRenewProhibited is applied by the appropriate party.

To prevent the transfer of sponsorship of a registration, the states clientTransferProhibited or serverTransferProhibited is applied to the domain. When this is done, all requests for transfer are rejected by the registry.

If a domain registration contains no host objects, the registry applies the status of inactive. Since there are no host objects associated with the domain, by definition, it cannot be published to the zone. The inactive status cannot be applied by registrars.

If a domain has no prohibitions, restrictions or pending operations and the domain also contains sufficient host object references for zone publication, the registry assigns the status of ok if there is no other status set.

There are a few statuses defined by the domain mapping RFC 5731 that our registry does not use. These statuses are: pendingCreate, pendingRenew and pendingUpdate. RFC 5731 also defines some status combinations that are invalid. We acknowledge these and our registry system disallows these combinations.

### 13.0. RESOURCING

#### Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

#### Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, 2 Sr. Systems Administrators, 2 Systems Administrators, 2 Sr. Systems Engineers, 2 Systems Engineers
- New Hires: Systems Engineer

#### Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, 2 Network Engineers
- New Hires: Network Engineer

#### Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

#### Network Operations Center:

- Existing Department Personnel: Manager, 2 NOC Supervisors, 12 NOC Analysts
- New Hires: Eight NOC Analysts

## 28. Abuse Prevention and Mitigation

Q28 Standard CHAR: 29543

### 1.0. INTRODUCTION

Donuts will employ strong policies and procedures to prevent and mitigate abuse. Our intention is to ensure the integrity of this top-level domain (TLD) and maintain it as a trusted space on the Internet. We will not tolerate abuse and will use professional, consistent, and fair policies and procedures to identify and address abuse in the legal, operational, and technical realms

Our approach to abuse prevention and mitigation includes the following:

- An Anti-Abuse Policy that clearly defines malicious and abusive behaviors;
- An easy-to-use single abuse point of contact (APOC) that Internet users can use to report the malicious use of domains in our TLD;
- Procedures for investigating and mitigating abuse;
- Procedures for removing orphan glue records used to support malicious activities;
- Dedicated procedures for handling legal requests, such as inquiries from law enforcement bodies, court orders, and subpoenas;
- Measures to deter abuse of the Whois service; and
- Policies and procedures to enhance Whois accuracy, including compliance and monitoring programs.

Our abuse prevention and mitigation solution leverages our extensive domain name industry experience and was developed based on extensive study of existing gTLDs and ccTLDs for best registry practices. This same experience will be leveraged to manage the new TLD.

## 2.0. ANTI-ABUSE POLICY

The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants, registrars, and resellers. This policy will also be posted on the registry web site and accompanied by abuse point-of-contact contact information (see below). Internet users can report suspected abuse to the registry and sponsoring registrar, and report an orphan glue record suspected of use in connection with malicious conduct (see below).

The policy is especially designed to address the malicious use of domain names. Its intent is to:

1. Make clear that certain types of behavior are not tolerated;
2. Deter both criminal and non-criminal but harmful use of domain names; and
3. Provide the registry with clearly stated rights to mitigate several types of abusive behavior when found.

This policy does not take the place of the Uniform Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism.

Below is a policy draft based on the anti-abuse policies of several existing TLD registries with exemplary practices (including .ORG, .CA, and .INFO). We plan to adopt the same, or a substantially similar version, after the conclusion of legal reviews.

## 3.0. TLD ANTI-ABUSE POLICY

The registry reserves the right, at its sole discretion and at any time and without limitation, to deny, suspend, cancel, redirect, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status as it determines necessary for any of the following reasons:

- (1) to protect the integrity and stability of the registry;
- (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process;
- (3) to avoid any liability, civil or criminal, on the part of the registry operator, its affiliates, subsidiaries, officers, directors, or employees;
- (4) to comply with the terms of the registration agreement and the registry's Anti-Abuse Policy;
- (5) registrant fails to keep Whois information accurate and up-to-date;
- (6) domain name use violates the registry's acceptable use policies, or a third party's rights or acceptable use policies, including but not limited to the infringement of any copyright or trademark;
- (7) to correct mistakes made by the registry operator or any registrar in connection with a domain name registration; or
- (8) as needed during resolution of a dispute.

Abusive use of a domain is an illegal, malicious, or fraudulent action and includes, without limitation, the following:

- Distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include computer viruses, worms, keyloggers, trojans, and fake antivirus products;
- Phishing: attempts to acquire sensitive information such as usernames, passwords, and credit card details by masquerading as a trustworthy entity in an electronic communication;
- DNS hijacking or poisoning;
- Spam: The use of electronic messaging systems to send unsolicited bulk messages. This

includes but is not limited to email spam, instant messaging spam, mobile messaging spam, and the spamming of Internet forums;

- Use of botnets, including malicious fast-flux hosting;
- Denial-of-service attacks;
- Child pornography/child sexual abuse images;
- The promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law; and
- Illegal access of computers or networks.

#### 4.0. SINGLE ABUSE POINT OF CONTACT

Our prevention and mitigation plan includes use of a single abuse point of contact (APOC). This contact will be a role-based e-mail address in the form of "abuse@registry.tld". This e-mail address will allow multiple staff members to monitor abuse reports. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered an Internet abuse desk best practice.

The APOC e-mail address will be listed on the registry web site. We also will provide a convenient web form for complaints. This form will prompt complainants to provide relevant information. (For example, complainants who wish to report spam will be prompted to submit the full header of the e-mail.) This will help make their reports more complete and accurate.

Complaints from the APOC e-mail address and web form will go into a ticketing system, and will be routed to our abuse handlers (see below), who will evaluate the tickets and execute on them as needed.

The APOC is mainly for complaints about malicious use of domain names. Special addresses may be set up for other legal needs, such as civil and criminal subpoenas, and for Sunrise issues.

#### 5.0. ABUSE INVESTIGATION AND MITIGATION

Our designated abuse handlers will receive and evaluate complaints received via the APOC. They will decide whether a particular issue merits action, and decide what action is appropriate.

Our designated abuse handlers have domain name industry experience receiving, investigating and resolving abuse reports. Our registry implementation plan will leverage this experience and deploy additional resources in an anti-abuse program tailored to running a registry.

We expect that abuse reports will be received from a wide variety of parties, including ordinary Internet users; security researchers and Internet security companies; institutions, such as banks; and law enforcement agencies.

Some of these parties typically provide good forensic data or supporting evidence of the alleged malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide evidence. It is not unusual, in the Internet industry, that a certain percentage of abuse reports are not actionable because there is insufficient evidence to support the complaint, even after additional investigation.

The abuse handling function will be staffed with personnel who have experience handling abuse complaints. This group will function as an abuse desk to "triage" and investigate reports. Over the past several years, this group has investigated allegations about a variety of problems, including malware, spam, phishing, and child pornography/child sexual abuse images.

#### 6.0. POLICIES, PROCEDURES, AND SERVICE LEVELS

Our abuse prevention and mitigation plan includes development of an internal manual for assessing and acting upon abuse complaints. Our designated abuse handlers will use this to ensure consistent and fair processes. To prevent exploitation of internal procedures by malefactors, these procedures will not be published publicly.

Assessing abuse reports requires great care. The goals are accuracy, a zero false-positive

rate to prevent harm to innocent registrants, and good documentation.

Different types of malicious activities require different methods of investigation and documentation. The procedures we deploy will address all the abuse types listed in our Anti-Abuse Policy (above). This policy will also contain procedures for assessing complaints about orphan nameservers used for malicious activities.

One of the first steps in addressing abusive or harmful activities is to determine the type of domain involved. Two types of domains may be involved: 1) a “compromised domain”; and/or 2) a maliciously registered domain.

A “compromised” domain is one that has been hacked or otherwise compromised by criminals; the registrant is not responsible for the malicious activity taking place on the domain. For example, most domain names that host phishing sites are compromised. The goal in such cases is to inform the registrant of the problem via the registrar. Ideally, such domains are not suspended, since suspension disrupts legitimate activity on the domain.

The second type of potentially harmful domain, the maliciously registered domain, is one registered by a bad actor for the purpose of abuse. Since it has no legitimate use, this type of domain is a candidate for suspension.

In general, we see the registry as the central entity responsible for monitoring abuse of the TLD and passing any complaints received to the domains’ sponsoring registrars. In an alleged (though credible) case of malicious use, the case will be communicated to the domain’s sponsoring registrar requesting that the registrar investigate, act appropriately, and report on it within a defined time period. Our abuse handlers will also provide any evidence they collect to the registrar.

There are several good reasons for passing a case of malicious domain name use on to the registrar. First, the registrar has a direct relationship and contract with the registrant. It is important to respect this relationship as it pertains both to business in general and any legal perspectives involved. Second, the registrar holds a better position to evaluate and act because the registrar typically has vital information the registry operator does not, including domain purchase details and payment method (i.e., credit card, etc.); the identity of a proxy-protected registrant; the IP address from which the domain purchase was made; and whether a reseller is involved. Finally, it is important the registrar know if a registrant is in violation of registry or registrar policies and terms—the registrar may wish to suspend the registrant’s account, or investigate other domains the registrar has registered in this TLD or others.

The registrar is also often best for determining if questionable registrant activity violates the registrar’s legal terms of service or the registry Anti-Abuse Policy, and deciding whether to take any action. Registrars will be required to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action and allows the registrar to suspend or cancel a domain name.

If a registrar does not take action within the time indicated by us in the report (i.e., 24 hours), we may take action ourselves. In some cases, we may suspend the domain name(s), and we reserve the right to act directly and immediately. We plan to take action directly if time is of the essence, such as with a malware attack that may cause significant harm to Internet users.

It is important to note that strict service level agreements (SLAs) for abuse response and mitigation are not always appropriate, additional tailoring of any SLAs may be required, depending on the problem. For example, suspending a domain within 24 hours may not be the best course of action when working with law enforcement or a national clearinghouse to address reports of child pornography. Officials may need more than 24 hours to investigate and gather evidence.

## 7.0. ABUSE MONITORING AND METRICS

In addition to addressing abuse complaints, we will actively monitor the overall abuse status of the TLD, gather intelligence and track abuse metrics to address criminal use of domains in the TLD.

To enable active reporting of problems to the sponsoring registrars, our plan includes proactive monitoring for malicious use of the domains in the TLD. Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors such as LegitScript ([www.legitscript.com](http://www.legitscript.com)) may be used to identify and close down illegal “rogue” Internet pharmacies.

Our approach also incorporates recordkeeping and metrics regarding abuse and abuse reports. These may include:

- The number of abuse reports received by the registry’s abuse point of contact described above and the domains involved;
- The number of cases and domains referred to registrars for resolution;
- The number of cases and domains for which the registry took direct action;
- Resolution times (when possible or relevant, as resolution times for compromised domains are difficult to measure).

We expect law enforcement to be involved in only a small percentage of abuse cases and will call upon relevant law enforcement as needed.

#### 8.0. HANDLING REPORTS FROM LAW ENFORCEMENT, COURT ORDERS

The new gTLD Registry Agreement contains this requirement: “Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law.” (Article 2.8)

We will be responsive as required by Article 2.8. Our abuse handling team will comply with legal processes and leverage both experience and best practices to work effectively with law enforcement and other government agencies. The registry will post a Criminal Subpoena Policy and Procedure page, which will detail how law enforcement and government agencies may submit criminal and civil subpoenas. When we receive valid court orders or seizure warrants from courts or law enforcement agencies of relevant jurisdiction, we will expeditiously review and comply with them.

#### 9.0. PROHIBITING DOMAIN HIJACKINGS AND UNAPPROVED UPDATES

Our abuse prevention and mitigation plan also incorporates registrars that offer domain protection services and high-security access and authentication controls. These include services designed to prevent domain hijackings and inhibit unapproved updates (such as malicious changes to nameserver settings). Registrants will then have the opportunity to obtain these services should they so elect.

#### 10.0. ABUSE POLICY: ADDRESSING INTELLECTUAL PROPERTY INFRINGEMENT

Intellectual property infringement involves three distinct but sometimes intertwined problems: cybersquatting, piracy, and trademark infringement:

- Cybersquatting is about the presence of a trademark in the domain string itself.
- Trademark infringement is the misuse or misappropriation of trademarks – the violation of the exclusive rights attached to a trademark without the authorization of the trademark owner or any licensees. Trademark infringement sometimes overlaps with piracy.
- Piracy involves the use of a domain name to sell unauthorized goods, such as copyrighted music, or trademarked physical items, such as fake brand-name handbags. Some cases of piracy involve trademark infringement.

The Uniform Dispute Resolution Process (UDRP) and the new Uniform Rapid Suspension System (URS) are anti-cybersquatting policies. They are mandatory and all registrants in the new TLD will be legally bound to them. Please refer to our response to Question #29 for details on our plans to respond to URS orders.

The Anti-Abuse Policy for our gTLD will be used to address phishing cases that involve trademarked strings in the domain name. The Anti-Abuse Policy prohibits violation of copyright or trademark; such complaints will be routed to the sponsoring Registrar.

#### 11.0. PROPOSED MEASURES FOR REMOVAL OF ORPHAN GLUE RECORDS

Below are the policies and procedures to be used for our registry in handling orphan glue records. The anti-abuse documentation for our gTLD will reflect these procedures.

By definition, a glue record becomes an "orphan" when the delegation point Name Server (NS) record referencing it is removed without also removing the corresponding glue record. The delegation point NS record is sometimes referred to as the parent NS record.

As ICANN's SSAC noted in its Advisory SAC048 "SSAC Comment on Orphan Glue Records in the Draft Applicant Guidebook" (<http://www.icann.org/en/committees/security/sac048.pdf>), "Orphaned glue can be used for abusive purposes; however, the dominant use of orphaned glue supports the correct and ordinary operation of the Domain Name System (DNS)." For example, orphan glue records may be created when a domain (example.tld) is placed on Extensible Provisioning Protocol (EPP) ServerHold or ClientHold status. This use of Hold status is an essential tool for suspending malicious domains. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve.

We will use the following procedure—used by several existing registries and considered a generally accepted DNS practice—to manage orphan glue records.. When a registrar submits a request to delete a domain, the registry first checks for the existence of glue records. If glue records exist, the registry checks to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records, then registrar EPP requests to delete the domain will fail until no other domains are using the glue records. (This functionality is currently in place for the .ORG registry.) However, if a registrar submits a complaint that orphan glue is being used maliciously and the malicious conduct is confirmed, the registry operator will remove the orphan glue record from the zone file via an exceptional process.

#### 12.0. METHODS TO PROMOTE WHOIS ACCURACY

##### 12.1. ENFORCING REQUIRED CONTACT DATA FIELDS

We will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows for better access to domain data and provides uniformity in storing the information.

As per the EPP specification, certain contact data fields are mandatory. Our registry will enforce those, plus certain other fields as necessary. This ensures that registrars are providing required domain registration data. The following fields (indicated as "MANDATORY") will be mandatory at a minimum:

Contact Name [MANDATORY]  
Street1 [MANDATORY]  
City [MANDATORY]  
State/Province [optional]  
Country [MANDATORY]  
Postal Code [optional]  
Registrar Phone [MANDATORY]

Phone Ext [optional]  
Fax [optional]  
Fax Ext [optional]  
Email [MANDATORY]

In addition, our registry will verify formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers) and will reject any improperly formatted submissions. Only valid country codes will be allowed, as defined by the ISO 3166 code list.

We will reject entries that are clearly invalid. For example, a contact that contains phone numbers such as 555.5555, or registrant names that consist only of hyphens, will be rejected.

## 12.2. POLICIES AND PROCEDURES TO ENHANCE WHOIS ACCURACY COMPLIANCE

We generally will rely on registrars to enforce WHOIS accuracy measures, but will also rely on review and audit procedures to enhance compliance.

As part of our RRA (Registry-Registrar Agreement), we will require each registrar to be responsible for ensuring the input of accurate Whois data by its registrants. The Registrar/Registered Name Holder Agreement will include specific clauses to ensure accuracy of Whois data, as per ICANN requirements, and to give the registrar the right to cancel or suspend registrations if the registered name holder fails to respond to the registrar's query regarding accuracy of data. In addition, the Anti-Abuse Policy for our registry will give the registry the right to suspend, cancel, etc., domains that have invalid Whois data.

As part of our RRA (Registry-Registrar Agreement), we will include a policy similar to the one below, currently used by the Canadian Internet Registration Authority (CIRA), the operator of the .CA registry. It will require the registrar to help us verify contact data.

“CIRA is entitled at any time and from time to time during the Term...to verify: (a) the truth, accuracy and completeness of any information provided by the Registrant to CIRA, whether directly, through any of the Registrars of Record or otherwise; and (b) the compliance by the Registrant with the provisions of the Agreement and the Registry PRP. The Registrant shall fully and promptly cooperate with CIRA in connection with such verification and shall give to CIRA, either directly or through the Registrar of Record such assistance, access to and copies of, such information and documents as CIRA may reasonably require to complete such verification. CIRA and the Registrant shall each be responsible for their own expenses incurred in connection with such verification.”

<http://www.cira.ca/assets/Documents/Legal/Registrants/registratoragreement.pdf>

On a periodic basis, we will perform spot audits of the accuracy of Whois data in the registry. Questionable data will be sent to the sponsoring registrars as per the above policy.

All accredited registrars have agreed with ICANN to obtain contact information from registrants, and to take reasonable steps to investigate and correct any reported inaccuracies in contact information for domain names registered through them. As part of our RRA (Registry-Registrar Agreement), we will include a policy that allows us to de-accredit any registrar who a) does not respond to our Whois accuracy requests, or b) fails to update Whois data or delete the name within 15 days of our report of invalid WHOIS data. In order to allow for inadvertent and unintentional mistakes by a registrar, this policy may include a “three strikes” rule under which a registrar may be de-accredited after three failures to comply.

## 12.3. PROXY/PRIVACY SERVICE POLICY TO CURB ABUSE

In our TLD, we will allow the use of proxy/privacy services. We believe that there are important, legitimate uses for such services. (For example, to protect free speech rights and avoid receiving spam.)

However, we will limit how proxy/privacy services are offered. The goal of this policy is to make proxy/privacy services unattractive to abusers, namely the spammers and e-criminals who use such services to hide their identities. We believe the policy below will enhance WHOIS

accuracy, will help deter the malicious use of domain names in our TLD, and will aid in the investigation and mitigation of abuse complaints.

Registry policy will require the following, and all registrars and their registrants and resellers will be bound to it contractually:

- a. Registrants must provide complete and accurate contact information to their registrar (or reseller, if applicable).. Domains that do not meet this policy may be suspended.
- b. Registrars and resellers must provide the underlying registrant information to the registry operator, upon written request, during an abuse investigation. This information will be held in confidence by the registry operator.
- c. The registrar or reseller must publish the underlying registrant information in the Whois if it is determined by the registry operator or the registrar that the registrant has breached any terms of service, such as the TLD Anti-Abuse Policy.

The purpose of the above policy is to ensure that, in case of an abuse investigation, the sponsoring registrar has access to the registrant's true identity, and can provide that data to the registry. If it is clear the registrant has violated the TLD's Anti-Abuse Policy or other terms of service, the registrant's identity will be published publicly via the Whois, where it can be seen by the public and by law enforcement.

### 13.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO ABUSE

Donuts does not currently intend to become a registrar for this TLD. Donuts and our back-end technical operator will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. For abuse issues, we will comply by establishing an adequate "firewall" between our registry operations and the operations of any affiliated registrar. As the Code requires, the registry will not "directly or indirectly show any preference or provide any special consideration to any Registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps to be taken to enforce this:

- Abuse complaints and cases will be evaluated and executed upon using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Registry personnel will not discuss abuse cases with non-registry personnel or personnel from separate entities operating under the company. This policy is designed to both enhance security and prevent conflict of interest.
- If a compliance function is involved, the compliance staff will have responsibilities to the registry only, and not to a registrar we may be "affiliated" with at any point in the future. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that person will have no duty to any registrar business we may be operating at the time. The person will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry impartially and effectively.

### 14.0. CONTROLS TO ENSURE PROPER ACCESS TO DOMAIN FUNCTIONS

Our registry incorporates several measures to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, SSL certificates, and proper authentication will be used to control registrar access to the registry system. Registrars will be given access only to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code as per EPP RFCs. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. (It is the "password" to the domain name.) Registrars must use the domain's password to initiate a Registrar-to-Registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are undertaken by the proper registrant, and that this

registrant is adequately notified of domain update activity. Only the sponsoring Registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Our Registry-Registrar contract will require that each registrar assign a unique AUTH-INFO code to every domain it creates. Due to security risk, registrars should not assign the same AUTH-INFO code to multiple domains.

Information about other registry security measures such as encryption and security of Registrar channels are confidential to ensure the security of the registry system. Details can be found in our response to Question #30(b).

#### 15.0. RESOURCING PLAN

Our back-end registry operator will perform the majority of Abuse Prevention and Mitigation services for this TLD, as required by our agreement with them. Donuts staff will supervise the activity of the provider. In some cases Donuts staff will play a direct role in the handling of abuse cases.

The compliance department of our registry operator has two full time staff members who are trained in DNS, the investigation of abuse complaints, and related specialties. The volume of abuse activity will be gauged and additional staff hired by our back-end registry operator as required to meet their SLA commitments. In addition to the two full-time members, they expect to retain the services of one or more outside contractors to provide additional security and anti-abuse expertise - including advice on the effectiveness of our policies and procedures.

Finally, Donuts' Legal Department will have one attorney whose role includes the oversight of legal issues related to abuse, and interaction with courts and law enforcement.

## 29. Rights Protection Mechanisms

Q29 Standard CHAR: 25023

### 1.0. INTRODUCTION

To minimize abusive registrations and other activities that affect the legal rights of others, our approach includes well-developed policies for rights protection, both during our TLD's rollout period and on an ongoing basis. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods, we will use the Trademark Clearinghouse, and we will implement Uniform Rapid Suspension (URS) on an ongoing basis. In addition to these newly mandated ICANN protections, we will implement two other trademark protections that were developed specifically for the new TLD program. These additional protections are: (i) a Domain Protected Marks List (DPML) for the blocking of trademarked strings across multiple TLDs; and (ii) a Claims Plus product to alert registrars to registrations that potentially infringe existing marks.

Below we detail how we will fulfill these requirements and further meet or exceed ICANN's requirements. We also describe how we will provide additional measures specific to rights protection above ICANN's minimum, including abusive use policies, takedown procedures, and other covenants.

Our RPM approach leverages staff with extensive experience in a large number of gTLD and ccTLD rollouts, including the Sunrises for .CO, .MOBI, .ASIA, .EU, .BIZ, .US., .TRAVEL, TEL, .ME, and .XXX. This staff will utilize their first-hand, practical experience and will effectively manage all aspects of Sunrise, including domain application and domain dispute processes.

The legal regime for our gTLD will include all of the ICANN-mandated protections, as well as some independently developed RPMs proactively included in our Registry-Registrar Agreement. Our RPMs exceed the ICANN-required baseline. They are:

- Reserved names: to protect names specified by ICANN, including the necessary geographic names.
- A Sunrise Period: adhering to ICANN requirements, and featuring trademark validation via the Trademark Clearinghouse.
- A Trademark Claims Service: offered as per ICANN requirements, and active after the Sunrise period and for the required time during wider availability of the TLD.
- Universal Rapid Suspension (URS)
- Uniform Dispute Resolution Process (UDRP)
- Domain Protected Marks List (DPML)
- Claims Plus
- Abusive Use and Takedown Policies

## 2.0. NARRATIVE FOR Q29 FIGURE 1 OF 1

Attachment A, Figure 1, shows Rollout Phases and the RPMs that will be used in each. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods. In addition, we will use the Trademark Clearinghouse to implement URS on an ongoing basis.

## 3.0. PRE-SUNRISE: RESERVED AND PREMIUM NAMES

Our Pre-sunrise phase will include a number of key practices and procedures. First, we will reserve the names noted in the gTLD Registry Agreement Specification 5. These domains will not be available in Sunrise or subsequent registration periods. As per Specification 5, Section 5, we will provide national governments the opportunity to request the release of their country and territory names for their use. Please also see our response to Question 22, "Protection of Geographic Names."

We also will designate certain domains as "premium" domains. These will include domains based on generic words and one-character domains. These domains will not be available in Sunrise, and the registry may offer them via special means such as auctions and RFPs.

As an additional measure, if a trademark owner objects to a name on the premium name list, the trademark owner may petition to have the name removed from the list and made available during Sunrise. The trademark must meet the Sunrise eligibility rules (see below), and be an exact match for the domain in question. Determinations of whether such domains will be moved to Sunrise will be at the registry's sole discretion.

## 4.0. SUNRISE

### 4.1. SUNRISE OVERVIEW

Sunrise registration services will be offered for a minimum of 30 days during the pre-launch phase. We will notify all relevant trademark holders in the Trademark Clearinghouse if any party is seeking a Sunrise registration that is an identical match to the name to be registered during Sunrise.

As per the Sunrise terms, affirmed via the Registry-Registrar Agreement and the Registrar-Registrant Agreement, the domain applicant will assert that it is qualified to hold the domain applied for as per the Sunrise Policy and Rules.

We will use the Trademark Clearinghouse to validate trademarks in the Sunrise.

If there are multiple valid Sunrise applications for the same domain name string, that string

will be subject to auction between only the validated applicants. After receipt of payment from the auction winning bidder, that party will become the registrant of the domain name. (note: in the event one of the identical, contending marks is in a trademark classification reflective of the TLD precedence to that mark may be given during Sunrise).

Sunrise applicants may not use proxy services during the application process.

#### 4.2. SUNRISE: ELIGIBLE RIGHTS

Our Sunrise Eligibility Requirements (SERs) are:

##### 1. Ownership of a qualifying mark.

a. We will honor the criteria in ICANN's Trademark Clearinghouse document section 7.2, number (i): The registry will recognize and honor all word marks that are nationally or regionally [see Endnote 1] registered and for which proof of use – which can be a declaration and a single specimen of current use – was submitted to, and validated by, the Trademark Clearinghouse.

b. In addition, we may accept marks that are not found in the Trademark Clearinghouse, but meet other criteria, such as national trademark registrations or common law rights.

##### 2. Representation by the applicant that all provided information is true and correct; and

3. Provision of data sufficient to document rights in the trademark. (See information about required Sunrise fields, below).

#### 4.3. SUNRISE TRADEMARK VALIDATION

Our goal is to award Sunrise names only to applicants who are fully qualified to have them. An applicant will be deemed to be qualified if that applicant has a trademark that meets the Sunrise criteria, and is seeking a domain name that matches that trademark, as per the Sunrise rules.

Accordingly, we will validate applications via the Trademark Clearinghouse. We will compare applications to the Trademark Clearinghouse database, and those that match (as per the Sunrise rules) will be considered valid applications.

An application validated according to Sunrise rules will be marked as “validated,” and will proceed. (See “Contending Applications,” below.) If an application does not qualify, it will be rejected and will not proceed.

To defray the costs of trademark validation and the Trademark Claims Service, we will charge an application and/or validation fee for every application.

In January 2012, the ICANN board was briefed that “An ICANN cross-functional team is continuing work on implementation of the Trademark Clearinghouse according to a project plan providing for a launch of clearinghouse operations in October 2012. This will allow approximately three months for rights holders to begin recording trademark data in the Clearinghouse before any new gTLDs begin accepting registrations (estimated in January 2013).” (<http://www.icann.org/en/minutes/board-briefing-materials-4-05jan12-en.pdf>) The Clearinghouse Implementation Assistance Group (IAG), which Donuts is participating in, is working through a large number of process and technical issues as of this writing. We will follow the progress of this work, and plan our implementation details based on the final specifications.

Compliant with ICANN policy, our registry software is designed to properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

#### 4.5. CONTENTING APPLICATIONS, SUNRISE AUCTIONS

After conclusion of the Sunrise Period, the registry will finish the validation process. If there is only one valid application for a domain string, the domain will be awarded to that applicant. If there are two or more valid applications for a domain string, only those applicants will be invited to participate in a closed auction for the domain name. The domain will be awarded to the auction winner after payment is received.

After a Sunrise name is awarded to an applicant, it will then remain under a "Sunrise lock" status for a minimum of 60 days in order to allow parties to file Sunrise Challenges (see below). Locked domains cannot be updated, transferred, or deleted.

When a domain is awarded and granted to an applicant, that domain will be available for lookup in the public Whois. Any party may then see what domains have been awarded, and to which registrants. Parties will therefore have the necessary information to consider Sunrise Challenges.

Auctions will be conducted by very specific rules and ethics guidelines. All employees, partners, and contractors of the registry are prohibited from participating in Sunrise auctions.

#### 4.6. SUNRISE DISPUTE RESOLUTION PROCESS (SUNRISE CHALLENGES)

We will retain the services of a well-known dispute resolution provider (such as WIPO) to help formulate the language of our Sunrise Dispute Resolution Process (SDRP, or "Sunrise Challenge") and hear the challenges filed under it. All applicants and registrars will be contractually obligated to follow the decisions handed down by the dispute resolution provider.

Our SDRP will allow challenges based on the following grounds, as required by ICANN. These will be part of the Sunrise eligibility criteria that all registrants (applicants) will be bound to contractually:

- (i) at the time the challenged domain name was registered, the registrant did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty;
- (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration;
- (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or
- (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Our SDRP will be based generally on some SDRPs that have been used successfully in past TLD launches. The Sunrise Challenge Policies and Rules used in the .ASIA and .MOBI TLDs (minus their unique eligibility criteria) are examples.

We expect that that there will be three possible outcomes to a Sunrise Challenge:

1. Original registrant proves his/her right to the domain. In this case the registrant keeps the domain and it is unlocked for his/her use.
2. Original registrant is not eligible or did not respond, and the challenger proved his/her right to the domain. In this case the domains is awarded to the complainant.
3. Neither the original registrant nor the complainant proves rights to the domain. In this case the domain is cancelled and becomes available at a later date via a mechanism to be determined by the registry operator.

After any Sunrise name is awarded to an applicant, it will remain under a "Sunrise Lock" status for at least 60 days so that parties can file Sunrise Challenges. During this Sunrise Lock period, the domain will not resolve and cannot be modified, transferred, or deleted by the sponsoring registrar. A domain name will be unlocked at the end of that lock period only if it is not subject to a Sunrise Challenge. Challenged domains will remain locked until the dispute resolution provider has issued a decision, which the registry will promptly execute.

#### 5.0. TRADEMARK CLAIMS SERVICES

The Trademark Claims Service requirements are well-defined in the Applicant Guidebook, in Section 6 of the "Trademark Clearinghouse" attachment. We will comply with the details therein. We will provide Trademark Claims services for marks in the Trademark Clearinghouse post-Sunrise and then for at least the first 60 days that the registry is open for general registration (i.e. during the first 60 days in the registration period(s) after Sunrise). The Trademark Claims service will provide clear notice to a prospective registrant that another party has a trademark in the Clearinghouse that matches the applied-for domain name—this is a notice to the prospective registrant that it might be infringing upon another party's rights.

The Trademark Clearinghouse database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. We will build, test, and implement an interface to the Trademark Clearinghouse before opening our Sunrise period. As domain name applications come into the registry, those strings will be compared to the contents of the Clearinghouse.

If the domain name is registered in the Clearinghouse, the registry will promptly notify the applicant. We will use the notice form specified in ICANN's Module 4, "Trademark Clearinghouse" document. The specific statement by the prospective registrant will warrant that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

The Trademark Claims Notice will provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice. The notice will be provided in real time (or as soon as possible) without cost to the prospective registrant or to those notified.

"Identical Match" is defined in ICANN's Module 4, "Trademark Clearinghouse" document, paragraph 6.1.5. We will examine the Clearinghouse specifications and protocol carefully when they are published. To comply with ICANN policy, the software for our registry will properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

#### 6.0. GENERAL REGISTRATION

This is the general registration period open to all registrants. No trademark or other qualification will be necessary in order to apply for a domain in this period.

Domain names awarded via the Sunrise process, and domain strings still being contended via the Sunrise process cannot be registered in this period. This will protect the interests of all Sunrise applicants.

#### 7.0. UNIFORM RAPID SUSPENSION (URS)

We will implement decisions rendered under the URS on an ongoing basis. (URS will not apply to Sunrise names while they are in Sunrise Lock period; during that time those domains are subject to Sunrise policy and Sunrise Challenge instead.)

As per URS policy, the registry will receive notice of URS actions from ICANN-approved URS providers. As per ICANN's URS requirements, we will lock the domain within 24 hours of receipt of the Notice of Complaint from the URS Provider. Locking means that the registry restricts

all changes to the registration data, including transfer and deletion of domain names, though names will continue to resolve.

Our registry's compliance team will oversee URS procedures. URS e-mails from URS providers will be directed immediately to the registry's Support staff, which is on duty 24/7/365. Support staff will be responsible for executing the directives from the URS provider, and all support staff will receive training in the proper procedures.

Support staff will notify the URS Provider immediately upon locking the domain name, via e-mail.

Support staff for the registry will retain all copies of e-mails from the URS providers. Each case or order will be assigned a tracking or ticket number. This number will be used to track the status of each opened URS case through to resolution via a database.

Registry staff will then execute further operations upon notice from the URS providers. Each URS provider is required to specify the remedy and required actions of the registry, with notification to the registrant, the complainant, and the sponsoring registrar.

The guidelines provide that if the complainant prevails, the registry "shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration." We will execute the DNS re-pointing required by the URS guidelines, and the domain and its WHOIS data will remain unaltered until the domain expires, as per the ICANN requirements.

#### 8.0. ONGOING RIGHTS PROTECTION MECHANISMS - UDRP

As per ICANN policy, all domains in the TLD will be subject to a Uniform Dispute Resolution Process (UDRP). (Sunrise domains will first be subject to the ICANN-mandated Sunrise SDRP until the Sunrise Challenge period is over, after which those domains will then be subject to UDRP.)

#### 9.0 ADDITIONAL RIGHTS PROTECTION MECHANISMS NOT REQUIRED BY ICANN

All Donuts TLDs have two new trademark protection mechanisms developed specifically for the new TLD program. These mechanisms exceed the extensive protections mandated by ICANN. These new protections are:

9.1 Claims Plus: This service will become available at the conclusion of the Trademark Claims service, and will remain available for at least the first five years of registry operations. Trademark owners who are fully registered in the Trademark Clearinghouse may obtain Claims Plus for their marks. We expect the service will be at low or no cost to trademark owners (contingent on Trademark Clearinghouse costs to registries). Claims Plus operates much like Trademark Claims with the exception that notices of potential trademark infringement are sent by the registry to any registrar whose customer performs a check-command or Whois query for a string subject to Claims Plus. Registrars may then take further implementation steps to advise their customers, or use this data to better improve the customer experience. In addition, the Whois at the registry website will output a full Trademark Claims notice for any query of an unregistered name that is subject to Claims Plus. (Note: The ongoing availability of Claims Plus will be contingent on continued access to a Trademark Clearinghouse. The technical viability of some Claims Plus features will be affected by eventual Trademark Clearinghouse rules on database caching).

9.2 Domain Protected Marks List: The DPML is a rights protection mechanism to assist trademark holders in protecting their intellectual property against undesired registrations of strings containing their marks. The DPML prevents (blocks) registration of second level domains that contain a trademarked term (note: the standard for DPML is "contains"— the

protected string must contain the trademarked term). DPML requests will be validated against the Trademark Clearinghouse and the process will be similar to registering a domain name so the process will not be onerous to trademark holders. An SLD subject to DPML will be protected at the second level across all Donuts TLDs (i.e. all TLDs for which this SLD is available for registration). Donuts may cooperate with other registries to extend DPML to TLDs that are not operated by Donuts. The cost of DPML to trademark owners is expected to be significantly less than the cost of actually registering a name.

#### 10.0 ABUSIVE USE POLICIES AND TAKEDOWN PROCEDURES

In our response to Question #28, we describe our anti-abuse program, which is designed to address malware, phishing, spam, and other forms of abuse that may harm Internet users. This program is designed to actively discover, verify, and mitigate problems without infringing upon the rights of legitimate registrants. This program is designed for use in the open registration period. These procedures include the reporting of compromised websites/domains to registrars for cleanup by the registrants and their hosting providers. It also describes takedown procedures, and the timeframes and circumstances that apply for suspending domain names used improperly. Please see the response to Question #28 for full details.

We will institute a contractual obligation that proxy protection be stripped away if a domain is proven to be used for malicious purposes. For details, please see "Proxy/Privacy Service Policy to Curb Abuse" in the response to Question 28.

#### 11.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO RIGHTS PROTECTION

We will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9. In rights protection matters, we will comply by establishing an adequate "firewall" between the operations of any registrar we establish and the operations of the registry. As the Code requires, we will not "directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps we will take to accomplish this:

- We will evaluate and execute upon all rights protection tasks impartially, using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Any registrar we establish or have established at the time of registry launch will not receive preferential access to any premium names, any auctions, etc. Registry personnel and any registrar personnel that we may employ in the future will be prohibited from participating as bidders in any auctions for Landrush names.
- Any registrar staff we may employ in the future will have access to data and records relating only to the applications and registrations made by any registrar we establish, and will not have special access to data related to the applications and registrations made by other registrars.
- If a compliance function is involved, the compliance staffer will be responsible to the registry only, and not to a registrar we own or are "affiliated" with. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that staffer will not have duties with the registrar business. The staffer will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry effectively and impartially, regardless of the consequences to the registrar.

#### 12.0. RESOURCING PLAN

Overall management of RPMs is the responsibility of Donuts' VP of Business Operations. Our back-end registry operator will perform the majority of operational work associated with RPMs, as required by our agreement with them. Donuts VP of Business Operations will supervise the activity of this vendor.

Resources applied to RPMs include:

##### 1. Legal team

- a. We will have at least one legal counsel who will be dedicated to the registry with previous

experience in domain disputes and Sunrise periods and will oversee the compliance and support teams with regard to the legal issues related to Sunrise and RPM's

b. We have outside counsel with domain and rights protection experience that is available to us as necessary

2. Dispute Resolution Provider (DRP): The DRP will help formulate Sunrise Rules and Policy, Sunrise Dispute Resolution Policy. The DRP will also examine challenges, but the challenger will be required to pay DRP fees directly to the DRP.

3. Compliance Department and Tech Support: There will be three dedicated personnel assigned to these areas. This staff will oversee URS requests and abuse reports on an ongoing basis.

4. Programming and technical operations. There are four dedicated personnel assigned to these functions.

5. Project Manager: There will be one person to coordinate the technical needs of this group with the registry IT department.

### 13.0. ENDNOTES

1 "Regional" is understood to be a trans-national trademark registry, such as the European Union registry or the Benelux Office for Intellectual Property.

## 30(a). Security Policy: Summary of the security policy for the proposed registry

Q30A Standard CHAR: 19646

### 1.0. INTRODUCTION

Our Information Security (IS) Program and associated IS Policy, Standards and Procedures apply to all Company entities, employees, contractors, temps, systems, data, and processes. The Security Program is managed and maintained by the IS Team, supported by Executive Management and the Board of Directors.

Data and systems vary in sensitivity and criticality and do not unilaterally require the same control requirements. Our security policy classifies data and systems types and their applicable control requirements. All registry systems have the same data classification and are all managed to common security control framework. The data classification applied to all registry systems is our highest classification for confidentiality, availability and integrity, and the supporting control framework is consistent with the technical and operational requirements of a registry, and any supporting gTLD string, regardless of its nature or size. We have the experienced staff, robust system architecture and managed security controls to operate a registry and TLD of any size while providing reasonable assurance over the security, availability, and confidentiality of the systems supporting critical registry functions (i.e., registration services, registry databases, zone administration, and provision of domain name resolution services).

This document describes the governance of our IS Program and the control frameworks our security program aligns to (section 1.0), Security Policy requirements (section 2.0); security assessments conducted (see section 3.0), our process for executive oversight and visibility of risks to ensure continuous improvement (section 4.0), and security commitments to registrants (section 5). Details regarding how these control requirements are implemented, security roles and responsibilities and resources supporting these efforts are included in Security Policy B response.

### 2.0. INFORMATION SECURITY PROGRAM

The IS Program for our registry is governed by an IS Policy aligned to the general clauses of

ISO 27001 requirements for an Information Security Management System (ISMS) and follows the control objectives where appropriate, given the data type and resulting security requirements. (ISO 27001 certification for the registry is not planned, however, our DNS/DNSSEC solution is 27001 certified). The IS Program follows a Plan-Do-Check-Act (PDCA) model of continuous improvement to ensure that the security program grows in maturity and that we provide reasonable assurance to our shareholders and Board of Directors that our systems and data are secure.

The High Security Top Level Domain (HSTLD) control framework incorporates ISO 27002, the code of practice for implementing an ISO 27001 ISMS. Therefore, our security program is already closely aligned HSTLD control framework. Furthermore, we agree to abide by the HSTLD Principle 1 and criteria 1.1 - 1.3. (See specifics in Security Policy B response):

Registry systems will be in-scope for Sarbanes-Oxley (SOX) compliance and will follow the SOX control framework governing access control, account management, change management, software development life cycle (SDLC), and job monitoring of all systems. Registry systems will be tested frequently by the IS team for compliance and audited by our internal audit firm, Protiviti, and external audit firm, Price Waterhouse Coopers (PWC), for compliance.

## 2.1. SECURITY PROGRAM GOVERNANCE

Our Information Security Program is governed by IS Policy, supported by standards, and guided by procedures to ensure uniformed compliance to the program. Standards and associated procedures in support of the policy are shown in Attachment A, Figure 1. Security Program documents are updated annually or upon any system or environment change, new legal or regulatory requirements, and/or findings from risk assessments. Any updates to security program are reviewed and approved by the Executive Vice President (EVP) of Information Technology (IT), EVP of Legal & General Counsel, and the EVP of People Operations before dissemination to all employees.

All employees are required to sign the IS Policy upon hire, upon any major changes, and/or annually. By signing the IS Policy, employees agree to abide by the supporting Standards and Procedures applicable to their job roles. To enable signing of the IS Policy, employees must pass a test to ensure competent understanding of the IS Policy and its key requirements.

## 3.0. INFORMATION SECURITY POLICY

### 3.1. INFORMATION ASSET CLASSIFICATION

The following data classification is applied to registry systems: High Business Impact (HBI): Business Confidential in accordance with the integrity, availability and confidentiality requirements of registry operations. All registry systems will follow Security Policy requirements for HBI systems regardless of the nature of the TLD string, financial materiality or size. HBI data if not properly secured, poses a high degree of risk to the Company and includes data pertaining to the Company's adherence to legal, regulatory and compliance requirements, mergers and acquisitions (M&A), and confidential data inclusive of, but is not limited to: Personally Identifiable Information (PII) (credit card data, Social Security Numbers (SSN) and account numbers); materially important financial information (before public disclosure), and information which the Board of Directors/Executive team deems to be a trade secret, which, if compromised, would cause grave harm to the execution of our business model.

HBI safeguards are designed, implemented and measured in alignment with confidentiality, integrity, availability and privacy requirements characterized by legal, regulatory and compliance obligations, or through directives issued by the Board of Directors (BOD) and Executive team. Where guidance is provided, such as the Payment Card Industry (PCI) Data Security Standard (DSS) Internal Audit Risk Control Matrices (RCMs), local, state and federal laws, and other applicable regulations, we put forth the appropriate level of effort and resources to meet those obligations. Where there is a lack of guidance or recommended safeguards, Risk Treatment Plans (RTP's) are designed in alignment with our standard risk management practices.

Other data classifications for Medium Business Impact (MBI): Business Sensitive and Low Business Impact (LBI): Public do not apply to registry systems.

### 3.2. INFORMATION ASSET MANAGEMENT

All registry systems have a designated owner and/or custodian who ensures appropriate security classifications are implemented and maintained throughout the lifecycle of the asset and that a periodic review of that classification is conducted. The system owner is also responsible for approving access and the type of access granted. The IS team, in conjunction with Legal, is responsible for defining the legal, regulatory and compliance requirements for registry system and data.

### 3.3. INFORMATION ASSET HANDLING, STORAGE & DISPOSAL

Media and documents containing HBI data must adhere to their respective legal, regulatory and compliance requirements and follow the HBI Handling Standard and the retention requirements within the Document Retention Policy.

### 3.4. ACCESS CONTROL

User authentication is required to access our network and system resources. We follow a least-privileged role based access model. Users are only provided access to the systems, services or information they have specifically been authorized to use by the system owner based on their job role. Each user is uniquely identified by an ID associated only with that user. User IDs must be disabled promptly upon a user's termination, or job role change.

Visitors must sign-in at the front desk of any company office upon arrival and escorted by an employee at all times. Visitors must wear a badge while on-site and return the badge when signing out at the front desk. Dates and times of all visitors as well as the name of the employee escorting them must be tracked for audit purposes.

Individuals permitted to access registry systems and HBI information must follow the HBI Identity & Access Management Standard. Details of our access controls are described in Part B of Question 30 response including; technical specifications of access management through Active Directory, our ticketing system, physical access controls to systems and environmental conditions at the datacenter.

### 3.5. COMMUNICATIONS & OPERATIONAL SECURITY

#### 3.5.1. MALICIOUS CODE

Controls shall be implemented to protect against malicious code including but not limited to:

- Identification of vulnerabilities and applicable remediation activities, such as patching, operating system & software upgrades and/or remediation of web application code vulnerabilities.
- File-integrity monitoring shall be used, maintained and updated appropriately.
- An Intrusion Detection Solution (IDS) must be implemented on all HBI systems, maintained & updated continuously.
- Anti-virus (AV) software must be installed on HBI classified web & application systems and systems that provide access to HBI systems. AV software and virus definitions are updated on a regular basis and logs are retained for no less than one year.

#### 3.5.2. THREAT ANALYSIS & VULNERABILITY MANAGEMENT

On a regular basis, IS personnel must review newly identified vulnerability advisories from trusted organizations such as the Center for Internet Security, Microsoft, SANS Institute, SecurityFocus, and the CERT at Carnegie-Mellon University. Exposure to such vulnerabilities must be evaluated in a timely manner and appropriate measures taken to communicate vulnerabilities to the system owners, and remediate as required by the Vulnerability Management Standard. Internal and external network vulnerability scans, application & network layer penetration testing must be performed by qualified internal resource or an external

third party at least quarterly or upon any significant network change. Web application vulnerability scanning is to be performed on a continual basis for our primary web properties applicable to their release cycles.

### 3.5.3. CHANGE CONTROL

Changes to HBI systems including operating system upgrades, computing hardware, networks and applications must follow the Change Control Standard and procedures described in Security Policy question 30b.

### 3.5.4. BACKUP & RESTORATION

Data critical to our operations shall be backed up according to our Backup and Restoration Standard. Specifics regarding Backup and Restoration requirements for registry systems are included in questions 37 & 38.

### 3.6. NETWORK CONTROLS

- Appropriate controls must be established for ensuring the network is operated consistently and as planned over its entire lifecycle.
- Network systems must be synchronized with an agreed upon time source to ensure that all logs correctly reflect the same accurate time.
- Networked services will be managed in a manner that ensures connected users or services do not compromise the security of the other applications or services as required in the HBI Network Configuration Standard. Additional details are included in Question 32: Architecture response.

### 3.7. DISASTER RECOVERY & BUSINESS CONTINUITY

The SVP of IT has responsibility for the management of disaster recovery and business continuity. Redundancy and fault-tolerance shall be built into systems whenever possible to minimize outages caused by hardware failures. Risk assessments shall be completed to identify events that may cause an interruption and the probability that an event may occur. Details regarding our registry continuity plan are included in our Question 39 response.

### 3.8 SOFTWARE DEVELOPMENT LIFECYCLE

Advance planning and preparation is required to ensure new or modified systems have adequate security, capacity and resources to meet present and future requirements. Criteria for new information systems or upgrades must be established and acceptance testing carried out to ensure that the system performs as expected. Registry systems must follow the HBI Software Development Lifecycle (SDLC) Standard.

### 3.9. SECURITY MONITORING

Audit logs that record user activities, system errors or faults, exceptions and security events shall be produced and retained according to legal, regulatory, and compliance requirements. Log files must be protected from unauthorized access or manipulation. IS is responsible for monitoring activity and access to HBI systems through regular log reviews.

### 3.10. INVESTIGATION & INCIDENT MANAGEMENT RESPONSE

Potential security incidents must be immediately reported to the IS Team, EVP of IT, the Legal Department and/or the Incident Response. The Incident Response Team (IRT) is required to investigate: any real or suspected event that could impact the security of our network or computer systems; impose significant legal liabilities or financial loss, loss of proprietary data/trade secret, and/or harm to our goodwill. The Director of IS is responsible for the organization and maintenance of the IRT that provides accelerated problem notification, damage control, investigation and incident response services in the event of security incidents. Investigation and response processes follow the requirements of the Investigation and Incident Management Standard and supporting Incident Response Procedure (see Question 30b for details).

### 3.11. LEGAL & REGULATORY COMPLIANCE

All relevant legal, regulatory and contractual requirements are defined, documented and maintained within the IS Policy. Critical records are protected from loss, destruction and falsification, in accordance with legal, contractual and business requirements as described in our Document Retention Policy. Compliance programs implemented that are applicable to Registry Services include:

- Sarbanes Oxley (SOX): All employees managing and accessing SOX systems and/or data are required to follow SOX compliance controls.
- Data Privacy and Disclosure of Personally Identifiable Information (PII): data protection and privacy shall be ensured as required by legal and regulatory requirements, which may include state breach and disclosure laws, US and EU Safe Harbor compliance directives.

Other compliance programs implemented but not applicable to Registry systems include the Payment Card Industry (PCI) Data Security Standard (DSS), Office of Foreign Assets Control (OFAC) requirements, Copyright Infringement & DMCA.

### 4.0. SECURITY ASSESSMENTS

Our IS team conducts frequent security assessments to analyze threats, vulnerabilities and risks associated with our systems and data. Additionally, we contract with several third parties to conduct independent security posture assessments as described below. Details of these assessments are provided in our Security Policy B response.

#### 4.1. THIRD PARTY SECURITY ASSESSMENTS

We outsource the following third party security assessments (scope, vendor, frequency and remediation requirements of any issues found are detailed in our Security Policy B response); Web Application Security Vulnerability testing, quarterly PCI ASV scans, Sarbanes-Oxley (SOX) control design and operating effectiveness testing and Network and System Security Analysis.

#### 4.2. INTERNAL SECURITY ASSESSMENTS

The IS team conducts routine and continual internal testing (scope, frequency, and remediation requirements of any issues found are detailed in our Security Policy B response) including; web application security vulnerability testing, external and internal vulnerability scanning, system and network infrastructure penetration testing, access control appropriateness reviews, wireless access point discovery, network security device configuration analysis and an annual comprehensive enterprise risk analysis.

### 5.0. EXECUTIVE OVERSIGHT & CONTINUOUS IMPROVEMENT

In addition to the responsibility for Information Security residing within the IS team and SVP of IT, risk treatment decisions are also the responsibility of the executive of the business unit responsible for the risk. Any risk with potential to impact the business financially or legally in a material way is overseen by the Incident Response Management team and/or the Audit Committee. See Figure 2 in Attachment A. The Incident Response Management Team or Audit Committee will provide assistance with management action plans and remediation.

#### 5.1. GOVERNANCE RISK & COMPLIANCE

We have deployed RSA's Archer Enterprise Governance Risk and Compliance (eGRC) Tool to provide an independent benchmarking of risk, compliance and security metrics, assist with executive risk reporting and reduce risk treatment decision making time, enforcing continuous improvement. The eGRC provides automated reporting of registry systems compliance with the security program as a whole, SOX Compliance, and our Vulnerability Management Standard. The eGRC dashboard continuously monitors risks and threats (through automated feeds from our vulnerability testing tools and third party data feeds such as Microsoft, CERT, WhiteHat, etc.) that are actionable. See Attachment A for more details on the GRC solutions deployed.

## 6.0. SECURITY COMMITMENTS TO REGISTRANTS

We operate all registry systems in a highly secured environment with appropriate controls for protecting HBI data and ensuring all systems remain confidential, have integrity, and are highly available. Registrants can assume that:

1. We safeguard the confidentiality, integrity and availability of registrant data through access control and change management:
  - Access to data is restricted to personnel based on job role and requires 2 factors of authentication.
  - All system changes follow SOX-compliant controls and adequate testing is performed to ensure production pushes are stable and secure.
2. The network and systems are deployed in high availability with a redundant hot datacenter to ensure maximum availability.
3. Systems are continually assessed for threats and vulnerabilities and remediated as required by the Vulnerability Management Standard to ensure protection from external malicious acts.
  - We conduct continual testing for web code security vulnerabilities (cross-site scripting, SQL Injection, etc.) during the development cycle and in production.
4. All potential security incidents are investigated and remediated as required by our Incident Investigation & Response Standard, any resulting problems are managed to prevent any recurrence throughout the registry.

We believe the security measures detailed in this application are commensurate with the nature of the TLD string being applied for. In addition to the system/ infrastructure security policies and measures described in our response to this Q30, we also provide additional safety and security measures for this string.

These additional measures, which are not required by the applicant guidebook are:

1. Periodic audit of Whois data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

## 7.0 RESPONSIBILITY OF INFORMATION SECURITY

See Question B Response Section 10.

© Internet Corporation For Assigned Names and Numbers.

# EXHIBIT 40



International Chamber of Commerce

The world business organization

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## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or Objections based on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to Contact Information Redacted*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

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ICC International Centre for ADR □ Centre international d’ADR de la CCI

Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

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## Identification of the Parties, their Representatives and related entities

### Objector

Name	International Rugby Board
Contact person	Julie O'Mahony, Senior Legal Counsel
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Objector, file separate Objections.*

### Objector's Representative(s)

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative ((for example external counsel or in-house counsel)*

### Objector's Contact Address

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Objector. The Contact Address can be the Objector's address, the Objector Representative's address or any other address used for correspondence in these proceedings.*

**Applicant**

Name	Atomic Cross, LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Applicant, file separate Objections.*

**Other Related Entities**

Name	Roar Domains, LLC
Contact person	Lara Meisner
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional related entity.*

Name	Minds and Machines, LLC
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Top Level Domains Holdings Limited
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted

Email	Contact Information Redacted
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Name	Rugby Domains, Ltd.
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Donuts Inc. (Parent Applicant
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Covered TLD, LLC (Parent of Applicant)
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

## Disputed gTLD

### gTLD Objector objects to [.example]

Name	.rugby
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*If there is more than one gTLD you wish to object to, file separate Objections.*

### Objection

#### What is the ground for the Objection (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

*Check one of the two boxes as appropriate. If the Objection concerns more than one ground, file a separate Objection.*

#### Objector's Standing to object (Article 3.2.2 of the Guidebook and Article 8 of the Procedure)

*(Statement of the Objector's basis for standing to object, that is, why the Objector believes it meets the requirements to object.)*

The International Rugby Board ("IRB") submits that, as the global governing body for Rugby Union and with the full support of all other major elements of the Rugby Community, we have standing to object to the application of Atomic Cross, LLC, and its parent Donuts Inc. (hereafter collectively "Donuts") expose the Rugby Community and its members to material harm through: (i) direct economic loss and reputational harm from misuse of Rugby intellectual property and interference with core activities (ii) loss of navigability and confidence in the Rugby Community online, and (iii) lack of the critical institutional control necessary to maintain and protect the integrity and independence of the Rugby Community and Rugby competitions.

Under the gTLD Applicant Guidebook, Section 3.2.2.4, to be eligible to file a community-based objection, an entity must show that it is an "established institution" with "an ongoing relationship with a clearly delineated community." We respectfully submit that this is the case here.

#### A. Established Institution

There is no question that IRB is an "established institution" with an "ongoing relationship" with the clearly delineated Rugby Community. For 127 years IRB has been the preeminent institution representing the global Rugby Union elements of the Rugby Community. The International Rugby Board, founded in 1886, is a non-profit organization with headquarters in Dublin, and serves as the world governing and law-making body for the sport of Rugby. IRB has several main functions including:

- “Governance of the Laws and Regulations and their enforcement
- Tournament owners and managers
- Global game development through Member Unions funding via grants and Strategic Investment programmes, and delivery of Education & Development programmes
- Game promotion”

<http://www.irb.com/aboutirb/organisation/index.html>

Most importantly, IRB is dedicated to growing the sport through developing, playing and expanding it on a global basis while maintaining the core values and principles of the IRB Charter. Attachment A. IRB membership currently totals 100 national Rugby Unions or Associations in full membership, 17 Associate Members and six Regional Associations. Attachment B. IRB is charged with the responsibility to:

- “Promote, foster, develop, extend and govern the Game of Rugby Union Football.
- Frame and interpret the Bye-Laws, Regulations and Laws of the Game.
- Decide and/or settle all matters or disputes relating to or arising out of the playing of or the proposed playing of the game or a match.
- Control all matters related to tours of National Representative Teams.”

<http://www.irb.com/aboutirb/constitution/index.html>

Further, the IRB Council meets twice a year and consists of representatives from the eight foundation Unions, Scotland, Ireland, Wales, England, Australia, New Zealand, South Africa and France, four additional nations, and the Regional Associations. An Executive Committee meets on a regular basis in order to formulate and oversee the implementation of the IRB Strategic Plan, monitor performance and implement good corporate governance principles and practices. The full membership meets at a General Meeting convened every two years and regional meetings are held at regular intervals. The day to day business of the Board is conducted by a professional staff of over 50, the majority of whom are based in Dublin.

IRB runs numerous tournaments, including the Women's Rugby World Cup, Rugby World Cup Sevens, HSBC Sevens World Series, IRB Junior World Championship, IRB Junior World Rugby Trophy and IRB Nations Cup. The most well-known is the Rugby World Cup (“RWC”), which is owned and run by Rugby World Cup Limited, a wholly-owned subsidiary of IRB. RWC revenues provide IRB with funds which are distributed to the Member Unions to assist them in the expansion and development of the Rugby game.

Such endeavors are the hallmark of an "established institution" having an "ongoing relationship with a clearly designated community" as set out in Section 3.2.2.4 of the Guidebook.

#### B. Clearly Delineated Community

Rugby is one of the most popular and fastest-growing team sports in the world. IRB, trusted steward of the Rugby Union teams and rules, has more than 5.5 million registered men, women and children actively participating across 118 affiliated IRB member countries in six geographical regions. Thus it is not surprising that the UK government explicitly recognizes our “global community of Rugby players, supporters and stakeholders.” Attachment C, emphasis added.

Rugby, as administered by IRB, includes all denominations of Rugby:

- Rugby Fifteens
- Rugby Sevens
- Rugby Fives
- Rugby Tens
- Rugby Twelves
- Touch, Tip, Tap, Tag & Flag.

Rugby Fifteens was previously featured at four Olympic Games (1900, 1908, 1920, 1924). As the IOC observed: "The IRB is part of the Olympic movement and Rugby Sevens will make its Olympic Games debut at the Rio 2016 Olympic Games..." Attachment D, 19.

Other players of the Rugby Community include:

- The Rugby League International Federation ("RLIF"), derived from Rugby Union in the late 1800s and featuring 13 instead of 15 players per side and a variation of the rules. Rugby League is played in over 30 nations throughout the world.
- Wheelchair Rugby founded in the 1970s is governed by the International Wheelchair Rugby Federation ("IWRF"). It has approximately 2,500 players in 25 countries, with 10 other countries in development. It is featured in the Paralympics every four years.

Moreover, the federations serve billions of fans with their events. The Rugby World Cup is one of the world's most successful quadrennial sporting events. In 2007, the RWC attracted 2.2 million ticket sales, 1.8 million website hits and record television viewing figures through broadcast exposure via 238 channels around the world. In 2011, the cumulative TV audience was estimated at 3.9 billion. Rugby World Cup 2015, to be played in England, is expected to have an attendance and following on television of a cumulative audience of over 4 billion people worldwide.

Through IRB, RLIF, IWRF, millions of people participate in the sport of Rugby. Although the rules may vary in some respects, all of these variations share the key underlying characteristics of the sport. Collectively all of these organizations self-identify as the Rugby Community. Collectively, we provide stewardship of the rules and regulations governing Rugby Union, Rugby League and Wheelchair Rugby and globally support coaches, referees, sponsors, volunteers, medical information, values, anti-doping and anti-corruption campaigns, the promotion of the sport in schools and communities around the world. Thus, there can be no question that this extensive network of rugby organizations, leagues and players under the leadership of IRB, RLIF and IWRF constitute a "clearly-delineated community" – on whose behalf and with whose support IRB now files this objection.

\* \* \*

These objectively verifiable factors clearly satisfy each and every criterion set out in Section 3.2.2.4 of the Guidebook and establish IRB's standing to file this objection.

### **Description of the basis for the Objection (Article 3.3.1 of the Guidebook and Article 8 of the Procedure) - Factual and Legal Grounds**

*(Description of the basis for the Objection, including: a statement giving the specific ground upon which the Objection is being filed, and a detailed explanation of the validity of the Objection and why it should be upheld.)*

The Rugby Community submits that allocation of .RUGBY to Donuts would cause material detriment to the rights and legitimate interests of the members of the Rugby Community. As shown below, IRB's objection satisfies each of the four such criteria for a valid and sustainable Community Objection as set out in the Guidebook, Section 3.5.4.

#### **1. CLEARLY DELINEATED COMMUNITY –**

As discussed under "standing" above, the Rugby Community is a clearly delineated one – defined by IRB, RFIL and IWRF, together with our leagues, competitions, players, coaches, referees, volunteers, fans, sponsors, and all using our regulations and benefitting from our education and outreach. Accordingly, the Rugby Community has met the "clearly delineated community" criteria of Guidebook, Section 3.5.4.

Further, the Government of the United Kingdom in its GAC Early Warning noted the preeminent status of IRB:

“The IRB is recognized as the international federation for Rugby by its 117 member unions across six global regions. It is also recognized internationally through its affiliation with the International Olympic Committee and the Commonwealth Games Federation.” Attachment C.

We should note that, in furtherance of its role to preserve and protect the interests of the Rugby Community, IRB, through its wholly-owned and operated subsidiary IRB Strategic Developments Limited, is itself an applicant for the .RUGBY TLD. In this role, we enjoy enormous support from the Rugby Community. Numerous letters to ICANN bear witness to the immense importance of entrusting the .RUGBY TLD to IRB on behalf of the Rugby Community. These include:

- The South African Rugby Union speaking to the role of Rugby as a “unifying force” in their once fractured society, and the importance of using the .RUGBY domain as a tool to advance their future strategy, and fully supports the IRB application to administer the .RUGBY domain. Attachment D, 20.
- SportAccord: “The IRB’s global prominence and vested interest in promoting the sport of Rugby makes it the rightful steward to the .RUGBY domain name. IRB will ensure the proper usage of the domain name to protect industry trademarks and promote Rugby’s values and ethos and the interests of its core stakeholders.” Attachment D, 21.
- The International Wheelchair Rugby Federation describing IRB as, “the strongest and most stalwart applicant to steward and bring measured, responsible growth to this new gTLD.” Attachment D, 9.

International and national Associations across the world have joined in: IOC, Rugby Football Union, Scottish Rugby Union, Kenya Rugby Union, Japan Rugby Football Union, Federation of Oceania Rugby Unions Incorporated, New Zealand Rugby Union, Australian Rugby Union, ARFC (Asian Rugby Football Union), Tonga Rugby Union, Federazione Italiana Rugby, SANZAR, SROC (Sports Rights Owners Coalition), Rugby League International Federation, Rugby Football League of the UK, ERC (European Rugby Cup) and Fédération Française de Rugby. Attachment D.

In view of this strong community identification and support, a question may arise regarding why IRB chose not to apply as a “community-designated TLD” pursuant to ICANN rules, notwithstanding that IRB and the Rugby Community could unquestionably qualify for that status. In particular, IRB clearly satisfied the criteria of “Community Establishment” (Criterion #1), Nexus between Proposed String and Community (Criterion #2) and “Community Endorsement” (Criterion #4). However, while IRB could easily have met the one remaining criteria – Registration Policies (Criterion #3) – we chose not to. We knowingly and willingly removed our application from eligibility for ICANN’s Community Priority Evaluation by adopting registration policies not “restricted to community members,” a requirement of that criterion.

This is not because IRB will not protect the Rugby Community. We will, with a number of pre-registration mechanisms that not only guard the commercial program of the Rugby Community, including teams, tournaments, and sponsors, but the valued noncommercial names and programs of the Community, including the names of local, provincial and even national leagues, teams and rising young players (often without trademark protection and even ineligible for trademark protection due to noncommercial activity). In addition, we will reserve key identifiers and descriptive terms, also without trademark protection, for those developing the creative tools and indices of navigation for the new TLD and the online Rugby Community of the 21st Century. But after these extensive commercial and noncommercial protections, we will open registration to all with an affinity and interest for the Rugby sport, and use its oversight and control to monitor and protect the integrity of this TLD space for the Rugby Community.

## 2. SUBSTANTIAL OPPOSITION –

Because of our prominent status in the Rugby Community, IRB's objection alone constitutes substantial opposition from the Rugby Community to the Atomic Cross application.

Nevertheless, because of the importance of this issue, many members of the Rugby Community express their strong opposition:

- "I strongly oppose either of the other two applicants as valid stewards of the .RUGBY TLD." (Craig Joubert, 2011 Rugby World Cup Referee)
- "We support the contention that unlike the IRB, the other applicants do 'not represent the global community of rugby players, supporters and stakeholders.'" (Rugby Football Union, the largest national association of IRB, in England)
- "In contrast, allowing applicants with highly divergent interests outside of our sport and a pure monetary interest in its domain names the right to manage .RUGBY undermines and threatens the integrity of the Rugby community and would be detrimental for the future promotion of our sport. I strongly oppose either of the other two applicants as valid stewards of the .RUGBY TLD." (Jonathan Umago, former professional Rugby Union and Rugby League Player, now professional coach).

Attachments D: 2, 1, 3.

They are joined in robust opposition by member unions, associated bodies, high profile players and referees: Australian Rugby Union, Tonga Rugby Union, South African Rugby Union, New Zealand Rugby Union, Fédération Française de Rugby, Federazione Italiana Rugby, Rugby Football Union and Unión Argentina de Rugby, Rugby League International Federation, Rugby Football League, International Wheelchair Rugby Federation, Paul Wallace, Gavin Hastings, John Eales, IRUPA (Players Union), Raphael Ibanez, Francois Pienaar and Agustin Pichot. Attachment D.

Further, the UK Government not only expressed concern, but direction:

"The applicant [Atomic Cross] does not represent the global community of Rugby players, supporters and stakeholders"

and thus:

"should withdraw their application." UK GAC Early Warning, Attachment C.

In addition, the Rugby Community has expended very substantial resources in attempting to protect our interests in the .RUGBY gTLD from AC and its affiliates, including submitting numerous letters to ICANN's general comment period and to the ICC, bringing our concerns to the attention of Governments, and committing substantial internal and external resources in seeking the .RUGBY gTLD and opposing dot Rugby Limited's application.

We have dedicated these valued resources of our non-profit federation because of our deep concern that delegation of .RUGBY to Atomic Cross, under the parent company of Donuts LLC (hereafter "Donuts") will create a certainty of material harm to the Rugby Community.

The foregoing clearly establishes that there is substantial opposition from all levels of the Rugby Community to the AC application.

### 3. TARGETING –

There is more than a clear and “strong association” between the Rugby Community and the .RUGBY gTLD string because “Rugby” defines the community – it is the sport of Rugby, in all of its denominations, and globally organized under the auspices of IRB and the other Rugby federations and associations that represents the common interest and link among all of the members of the community. No other word so distinctly serves this purpose; no other word so clearly identifies the Community itself.

Indeed, a Facebook search of “Rugby” yields Rugby Union and Rugby League, key parts of the Rugby Community to all who search. Attachment E. The association is thus more than “strong;” there is a clear identity between the string and the Community.

### 4. MATERIAL DETRIMENT-

#### A. Management of the .RUGBY String Must Be Lodged With a Trusted Steward for the Rugby Community

In its capacity as trusted steward for the sport, IRB maintains that control and management of the .RUGBY TLD must be lodged with an entity such as IRB that will act for the benefit of the Rugby Community, one that is under control of the Rugby Community and embodies its regulations and ethics. The Internet is a key means to communicate with our fan base, with Social Media used by millions and IRB hash tags reaching into the Twitter “top ten” most popular. Attachment F. In the 21st Century, stewardship of this vital TLD must be in keeping with our integrity and independence.

##### a. The Rugby Community is Deeply Concerned that Donuts is Not Acting and Does Not Intend to Act in Accordance with the Interests of the Rugby Community.

The 307 applications of Donuts and its affiliates are all virtually identical, exhibiting broad promises and policies. Notably, there is not a single mention of “the Rugby Community” in the .RUGBY application or the close identification of the .RUGBY string to it. In fact, the word “rugby” itself is dismissed as a “generic term” without acknowledgement of the federations, Community and 130 years of IRB stewardship described above.

Further, Donuts has no known connection to the Rugby Community. We affirm and submit that Donuts has not reached out to IRB leadership for review or support of its policies and plans for the .RUGBY TLD.

##### b. The Rugby Community Will Suffer Material Economic and Other Concrete Harm from Delegation of .RUGBY to Donuts.

Donuts apparently exists for one purpose: profit. After protection of trademarks in the initial periods, its intentions are clear: Donuts will be “inclusive in its registration policies” and open domain name registrations to the public on a first-come, first-served basis; it will be an “Open TLD.” Question 18a, Atomic Cross application, public portions available at <https://gtldresult.icann.org/application-result/applicationstatus>.

Such a policy will provide inadequate protection of the brands, professional players, officials, sponsors and teams under the Rugby Community’s umbrella, both amateur and professional, and lead to serious adverse consequences, including:

1. Ambush marketing and the bad faith association of products or services in direct competition with those of the official sponsors. Ambush marketers (AMs) have not invested in the sport, and their activity undermines the reasonable expectation of exclusive rights expected by official sponsors. AMs profit from their unauthorized association with the sport and global activities including the Rugby World Cup. Yet make no contribution, financial or otherwise, to the sport and our Community.

Under proposed Donuts rules, the Community will have neither oversight nor control of the domain name registration activities of Ambush Marketers, yet their activities will have apparent authenticity by their registration in the .RUGBY TLD. These activities will erode IRB commercial programs and undermine the value of Rugby World Cup and other tournament sponsorship.

2. Unauthorized re-sale of tickets (“scalping”) and fraudulent sale of fake tickets via the Internet. The unauthorized sale of tickets is one of the most harmful unauthorized activities associated with Rugby tournaments, and the quadrennial Rugby World Cup in particular. Unauthorized sales, frequently online, run in parallel with the authentic ticketing and legitimate commercial programs. Scalping deprives the tournament and Community of legitimate profit and return.

Further, fraudulent sales, often online, create the risk that consumers will pay premium prices for tickets that do not entitle or grant them access to the tournaments themselves. Both create consumer confusion and exploitation and threaten the integrity and values of the commercial programs and the sport. With the use of .RUGBY domain lending apparent authenticity to these scammers, the problem, left unchecked, will be exacerbated.

We further note that .RUGBY TLD will be rolled out just as the upcoming Rugby World Cup 2015 in the UK is being prepared. 2.9 million tickets will be sold for 48 matches over a 44 day global shop window, and the risk for loss of income, confidence and integrity to the sport is clear.

3. The sale of unofficial tournament and team merchandise, especially around tournaments, is a serious problem for the sport. Through a robust rights protection program, IRB spends considerable time and expense in the monitoring of infringing materials on the Internet. Under the Donuts management of the .RUGBY TLD, the Community will have no control over those who register .RUGBY domain names to sell unofficial merchandise and trade illegitimately on the goodwill and reputation of the Rugby Community. Yet, problems arising from the sale of unofficial merchandise in the .RUGBY TLD, so much more closely associated with the Rugby Community than .COM, will be wrongly negatively attributed to IRB and the Rugby Community. Not only will the Rugby Community suffer loss of revenue, but also loss of reputation and credibility.

4. Cybersquatters and Domainers. Sales to those with no interest or connection to the sport, including those who seek to benefit from the sale and turnover of domain names, will deprive those legitimately affiliated with Rugby commercial programs of the domain names in .RUGBY most logically and closely associated with their work.

Economic damage to the RWC and other commercial program losses could range into tens of millions of pounds sterling. As a non-profit, IRB re-invests 100% of our surpluses back into the Community. Thus, funding to develop the sport globally, monies for social responsibility activities and charitable work with UN World Food Programme, Peace & Sport and Kit Aid, investment for research and education on medical issues, and support for education and monitoring of the sport’s Anti-Doping and Anti-Corruption campaigns will all be impacted adversely.

c. Interference with Core Activities (Including Valued Noncommercial Programs)

The operation of .RUGBY pursuant to Donuts plans will significantly harm not only the commercial programs of the Rugby Community, but our non-commercial programs as well. At our core, we are dedicated to the nurturing and growth of the sport at all levels – not only the professional leagues, but the amateur leagues for men, women and youths. IRB develops the regulations and trains our coaches and referees, and promotes the sport globally to attract and foster young players.

Few if any of these activities at the local and provincial levels are associated with trademarks. Although many of our teams, leagues and rising players have names well-known in the Community and well-deserving of protection. The Donuts rules provide no protection for these “non-trademark” identifiers as domain names and, consequently, teams, leagues and individuals will be left to fight for the most logical and most closely-associated domain names within the .RUGBY TLD. Many of these domain names will be registered by those with no affiliation whatsoever to the Rugby Community. Further, Rugby Community members will often lose out to the professional domainers who seek valuable non-trademarked domains to hold and resell at a premium.

Deprived of the most logical and useful identifiers, the Rugby Community will have a difficult time navigating the .RUGBY TLD. The largest websites for education, information, and communication of and among players, teams, leagues, fans and sponsors at the local and provincial level may or may not come from individuals and entities associated with the Rugby Community. The result will be not only a commercial loss, but the loss of the most logical and direct channels in .RUGBY to communicate safety information, educate on anti-doping campaigns, and reach out to the youth who represent the future of Rugby.

d. The Reputation of the Rugby Community and the Sport of Rugby Itself will be Damaged should .RUGBY be Delegated to Donuts by ICANN.

We have no association with Donuts, and Donuts' programs do not allow for the control and oversight of the TLD by IRB and the Rugby Community. The integrity of the sport depends on following our rules and adhering to values of Teamwork, Respect, Enjoyment, Discipline, Sportsmanship and Fair Play, consistent with the well-recognized values of Olympic sport. Whoever is the registry for the .RUGBY TLD must bring these values into its work.

It is our understanding that the founder and CEO of Donuts was formerly President of Demand Media. Demand Media has a well-know track records in the ICANN Community. During Stahura's tenure, the public record shows that Demand Media and its subsidiaries faced numerous allegations of cybersquatting – the registration, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to another. During this time, Demand Media, eNom and other subsidiaries of Demand Media lost twenty-six “UDRP” cases, domain names disputes brought under ICANN's Uniform Dispute Resolution Policy rules. In many of these cases, the Panelists of the World Intellectual Property Forum and National Arbitration Forum delivered a finding of that “the disputed domain name has been registered and used in bad faith.” See e.g., Sharelook Beteiligungs GmbH v. eNom Partner, WIPO Case No. D2005-1001; Paxar Americas, Inc. v. eNom, Inc.; NAF Claim Number: FA0705000980114; Chivas Brothers Limited et al. v. Demand Domains, Inc., WIPO Case No. D2007-1789, Attachment G.

If Donuts were to promote or permit similar practices or principles in connection with the .RUGBY string, our core values would inevitably be compromised.

We bring this Objection from a deep concern for the loss of reputation and integrity .RUGBY will suffer under these conditions. We submit that this TLD must be administered by companies and individuals deeply committed to strict adherence to the rules and values of the Sport and of the Internet.

e. The Rugby Community has a high level of certainty that the outcomes discussed above will occur.

The evidence speaks for itself. IRB and the Rugby Community already must spend tens of millions of pounds sterling annually to protect our commercial programs, and millions more in support of our core activities and growth of the sport. With the introduction of the new TLD, .RUGBY, so closely identified with our mission and sport, our work will become inestimably more difficult. Under the management of Donuts, the Rugby Community will have no control, oversight and enforcement. Under these circumstances, there is no question we will be forced to expend greater time and resources protecting such programs and core activities, thus undermining our mission and threatening the integrity of the IRB, the sport and the Rugby Community we represent.

#### B. Application for Gambling Strings by Donuts Presents Special Concerns

IRB has particular concerns that arise in connection with the sensitive topic of sports gambling. IRB is not opposed to gambling per se and recognizes that gambling is part of our environment. In fact, done well, sports can benefit from gambling and the interest in competitions which gambling stimulates, provided always that the integrity of the game is not threatened. However, as previously highlighted, the IRB has a real and profound belief that the delegation of the .RUGBY gTLD to Donuts will cause economic and reputational harm for IRB and the Rugby Community. These dangers are magnified in

the context of gambling. In contrast to the IRB, Donuts lacks the intent, incentive and ability to protect the legitimate interests of the Rugby Community and the sport of Rugby.

It cannot be disputed that gambling is huge business, and more and more of it is being conducted over the Internet. Thus, it is not surprising that gambling has led to serious issues for numerous sporting leagues, including in soccer, netball, cricket and tennis. Unfortunately, the nexus of gambling and sports is a continuing and growing global phenomenon that presents opportunities for the undermining of legitimate sporting competitions. Accordingly, IRB publications addressing gambling on Rugby stress integrity concerns, and IRB rules regulate and limit the relationship of Rugby participants and associated entities/persons with gambling interests or betting on the sport.

IRB Regulation 6 -- Anti-Corruption and Betting -- recently came into effect to update the prior rules and govern the conduct of persons and entities connected to the sport that could undermine integrity and public confidence in the game. Attachment H. We are currently conducting a player/Member Union focused educational program to ensure that affected parties understand Regulation 6 and implement it appropriately. Connected persons must report and assist in the resolution of any corruption of which they became aware, persons deemed unsuitable may be banned from association with the sport possibly for life.

Similarly, IRB Code of Conduct, Section 1, makes clear that "Unions, Associations, Rugby bodies, clubs, and persons may not engage in conduct that would undermine the integrity of the sport or bring it into disrepute. IRB Bye-Law 10 and the Common Association Constitution make the Code of Conduct expressly binding upon the Associations, Officers, Executive Committee members and Member Unions. Attachment I. Additionally, the Host Union Agreements issued for IRB tournaments and matches prohibit any improper association with gambling-related sponsorships.

IRB fears that Donuts will not share the Community's concerns and will not enforce similar values in its relationships with gambling interests. That fear appears to be well-grounded insofar as Donuts has announced its intent to be directly involved with gambling gTLD strings. In addition to seeking to operate .RUGBY, Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER.

Not only has Donuts not proposed to establish the necessary process and values for protecting the integrity of the Rugby Community in association with gambling interests using its strings, there is no evidence that it has either the willingness or capability to do so. Unfortunately, Donuts has the incentive and opportunity to co-mingle activity in all of the TLDs of its registry portfolio as cross-promotion and cross-registration of domain names in co-owned TLDs is a tried and true marketing feature of Registry sales.

As also shown above, any policy discussions with DVP's selected stakeholders and registrants that might touch on the subject of cross-selling across TLDs would be advisory only. The Rugby Community would have absolutely no meaningful oversight, control, or even the ability to know about activities undertaken by overlapping officers and staff of the Donuts applied-for portfolio of over 300 gTLDs.

Because the worldwide operations of the Rugby Community are heavily dependent upon the DNS for our core activities, failure to institute proper controls in connection with the use of the .RUGBY string could exacerbate the issues already facing the online-related activities of the sport, leading to widespread consumer exploitation and the undermining of confidence in the sport. Particularly with respect to gambling, the damage to the Rugby Community -- were the integrity of the sport to be corrupted by online activity associated with the new .RUGBY gTLD -- would be immeasurable. If not properly managed, the continuing and growing threat this presents to the integrity of the game is undeniable, and the extension of that threat to the new .RUGBY string is virtually certain.

\* \* \*

For all of the foregoing reasons, the Rugby Community will suffer clear and immediate material detriment from assignment of the .RUGBY gTLD string to Donuts and Atomic Cross, LLC.

## **Remedies Requested**

*(Indicate the remedies requested.)*

**The Application should be denied or the Applicant should be required to withdraw it.**

## **Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Objection was transmitted to the Applicant on: 03/13/2013 by email to the following address: Contact Information Redacted .

A copy of this Objection was transmitted to ICANN on: 03/13/2013 by email to the following address: newgtld@icann.org.

## **Filing Fee (Article 1 Appendix III to the Rules and Article 8(c) of the Procedure)**

As required, Euros 5 000 were paid to ICC on 03/11/2013.

Evidence of the payment is attached for information.

## **Description of the Annexes filed with the Objection (Article 8(b) of the Procedure)**

*List and Provide description of any annex filed.*

- A. IRB PLAYING CHARTER
- B. IRB NATIONAL MEMBER UNIONS
- C. ICANN GOVERNMENT ADVISORY COMMITTEE EARLY WARNING FROM UNITED KINGDOM FOR ATOMIC CROSS, LLC
- D. LETTERS OF SUBSTANTIAL OPPOSITION TO APPLICATIONS OF ATOMIC CROSS, LLC, AND DOT RUGBY LIMITED AND COMMUNITY SUPPORT FOR IRB
- E. FACEBOOK SEARCH OF "RUGBY"
- F. IRB SOCIAL MEDIA AND TWITTER PRESENCE
- G. SELECTED DOMAIN NAME DISPUTE CASES INVOLVING DEMAND MEDIA AND SUBSIDIARIES
- H. IRB HANDBOOK REGULATION 6: ANTI-CORRUPTION AND BETTING

- I. IRB BYE-LAW 10 AND COMMON ASSOCIATION CONSTITUTION
- J. PROOF OF FEE PAYMENT BY INTERNATIONAL WIRE FOR THIS FILING

Date: March 13, 2013

Signature: \_\_\_\_\_

# EXHIBIT 41



International Chamber of Commerce

The world business organization

International Centre for Expertise Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### RESPONSE FORM TO BE COMPLETED BY THE APPLICANT

- Applicant responding to several Objections or Objections based on separate grounds must file separate Responses
- Response Form must be filed in English and submitted by email to Contact Information Redacted
- The substantive part is limited to 5000 words or 20 pages, whichever is less

**Disclaimer:** This form is the template to be used by Applicants who wish to file a Response. Applicants must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

**Annex A** defines capitalized terms and abbreviations in addition to or in lieu of the foregoing.

ICC International Centre for ADR Centre international d'ADR de la CCI  
Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

### Identification of the Parties and their Representatives

#### Applicant

Name	Atomic Cross, LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted – NOTE STREET ADDRESS CHANGE
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

#### Objector

Name	International Rugby Board
Contact person	Julie O'Mahony, Senior Legal Counsel
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Copy the information provided by the Objector.*

#### Applicant's Representative(s)

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtdldisputes.com">http://www.newgtdldisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative (for example external counsel or in-house counsel).*

**Applicant's Contact Address**

Name	The IP & Technology Legal Group, P.C. dba New gTLD Disputes <a href="http://www.newgtlddisputes.com">http://www.newgtlddisputes.com</a>
Contact person	John M. Genga, Don C. Moody
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Applicant. The Contact Address can be the Applicant's address, the Applicant's Representative's address or any other address used for correspondence in these proceedings.*

**Other Related Entities**

Name	See related entities identified by Objection
Address	
City, Country	
Telephone	
Email	

*Add separate tables for any additional other related entity.*

## Disputed gTLD

gTLD Applicant has applied to and Objector objects to [.example]

Name	<.RUGBY> – Application ID 1-1612-2805, ICC EXP/519/ICANN/134 (Consolidated with EXP/517/ICANN/132)
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### Objection

The Objector filed its Objection on the following Ground (Article 3.2.1 of the Guidebook and Article 2 of the Procedure)

**Limited Public Interest Objection:** the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

or

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

*Copy the information provided by the Objector.*

**Point-by-Point Response to the claims made by the Objector (Article 3.3.3 of the Guidebook and Article 11 of the Procedure)**

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#### A.

### INTRODUCTION

ICANN invited new gTLDs to enhance choice and competition in the namespace and Internet participation worldwide. AGB Preamble, §1.1.2.3, and Mod. 2 Attmt. at A-1. To these ends, Donuts has applied for <.RUGBY> and 306 other gTLDs, offering more consumer choice and opportunities for expression through domain names on subjects that otherwise may not have their own forums. Nevett Dec. ¶¶4-6 (**Annex B**).

Such generics also bring competition to registries – which have yet to experience it meaningfully in a world that has known little more than <.COM> – further benefitting consumers. *All* consumers. Applicant would make the <.RUGBY> domain open to all legitimate uses regarding that subject. The registry would operate neutrally, without favoring any one constituency. Bloggers, athletes, enthusiasts and even those not specifically identified with “rugby” would have nondiscriminatory access to the TLD. *Id.* ¶¶8-13.

Objector deliberately seeks to choke such competition and control domain-name use of rugby – a popular but also geographically diverse sport, with multiple constituencies that Objector cannot “clearly delineate” or claim as its own “community.” While Objector presents speculation rather than evidence, the facts demonstrate its improper motives in filing the Objection. Specifically, it has demanded the withdrawal of the Application, and threatened a boycott of the TLD if awarded to Applicant. *Id.* ¶19, Ex. 4.

The IRB has also applied for <.RUGBY>, and abuses the community objection process in furtherance of its anticompetitive scheme. It purports to object for a community,

yet deliberately chose not to apply for the TLD as a community. It thus recognized that its application would fail ICANN's community priority evaluation (CPE), yet still wants an objection panel applying essentially the same criteria to eliminate its competitors. ICANN did not create the community objection to allow such tactics.<sup>1</sup>

To the contrary, the "ultimate goal of the community-objection process is to prevent the misappropriation of a community label," as Objector attempts to do here, "and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding." <http://www.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>. Applicant represents a neutral voice that has no stake in rugby or in propping up its entrenched interests.

Objector has no standing to challenge its Application. Even if it did, the Objection falls well short on the merits. ICANN has made clear:

There is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant.

<http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>.

Specifically, Objector must prove *all of four* substantive elements: (i) a clearly delineated community; (ii) substantial opposition from that community; (iii) a strong association between the community and the applied-for string; and (iv) material detriment to the community caused by Applicant's operation of the string. AGB §3.5.4 at 3-24, 25.

Objector fails its burden. It does not and could not represent a clearly delineated "rugby community," and should not be permitted to co-opt that common term for its own restrictive purposes. Nor does it show that any such community, in all its amorphous breadth, has substantial opposition to, or a strong association with, Applicant's string.

Most significantly, Objector demonstrates no material detriment. It speculates as to all manner of improper activity from the open TLD proposed by Applicant, but gives no proof that such acts will occur. In fact, the IRB also has applied for an open registry, but with nothing close to Applicant's array of measures to prevent the types of misconduct unjustifiably complained of. Those procedures – not this Objection – provide the proper means to address issues that have yet to arise.

In essence, Objector contends that harm will result unless it runs the domain. However, ICANN expressly admonishes, "An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment." AGB §3.5.4 at 3-24.

Applicant and those that will utilize the TLD have the same free speech rights as the general public to conduct affairs using ordinary words from the English language. To hold otherwise would negate such rights, impede the growth of and competition on the Internet, and set dangerous precedents that attempt to limit or control content and speech, and take choice away from the many and place control in the hands of a few.

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<sup>1</sup> "If a party considers itself equally or more entitled to speak for a given community, that party may apply for a community-based gTLD – and eventually enter the string contention stage with another applicant, if necessary." <http://www.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf>.

**B.**

**OBJECTOR LACKS STANDING**

ICANN's multiple stakeholders designed the community objection as a vehicle for legitimate, identifiable communities of people (e.g., Navajo, Amish) to block an applicant that would harm that specific community – that is, “to prevent the misappropriation of a string that *uniquely or nearly uniquely* identifies a well-established and *closely connected group* of people or organizations.” <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en-pdf> at 19 (emphases added). This does not describe Objector or what its Objection attempts.

**1. Threshold Considerations**

The standing evaluation begins with two preliminary matters. First, a global sport sponsored by many different organizations, with widely varying sets of rules of play and which covers both amateur and professional levels, does not equate to a clearly delineated community in the sense required by the standard. Second, a co-applicant who has not applied as a community cannot properly object on such grounds.

ICANN defines “community” as having more “cohesion than a mere commonality of interest,” such as a locality, an identifiable group of individuals sharing specific interests or characteristics, or entities that provide a common service. AGB §4.2.3 at 4-11, 12. It did not intend for a “single entity” to use a community objection as “a means ... to eliminate an application.” <http://www.icann.org/en/topiccs/new-gtlds/summary-analysis-agv4-12nov10-en.pdf> at 15. “Simply not wanting another party to ... obtain the name is not sufficient.” *Id.*

Furthermore, the Guidebook provides an applicant such as Objector the means to prevail as a community if one actually exists. The IRB did apply for <.RUGBY>, and could have *elected a community designation*, but did not. See Nevett Dec. Ex. \_\_ at Q19 (**Annex B**). As a community applicant, it would have available to it the different and independently dispositive remedy of a CPE, whereby a group of designated ICANN experts examines its professed community status. AGB 4.2.2. If that uniquely qualified body finds all community elements, an application “will ... prevail” over all non-community applications for the same string. *Id.*

Knowing it does not constitute a community under Guidebook standards, Objector opted not to apply for the TLD as such. Rather, it abuses the community process and takes a low-cost gamble at eliminating competitors by seeking a favorable objection outcome. The Panel should not tolerate such behavior.

**2. Guidebook Elements for Standing**

Beyond the foregoing, Objector must prove it has standing as (i) “an established institution” with (ii) “an ongoing relationship with a clearly delineated community.” AGB §3.2.2.4. Whether an “established institution” or not, Objector must represent a “community ... strongly associated with the applied-for gTLD string.” AGB §3.2.2.4 at 3-7. In other words, the term “rugby” must readily and essentially solely bring the IRB itself, and not the sport of rugby, to mind. Objector proves no such connection.

An objector must describe the “formal boundaries” defining the community. AGB §3.2.2.4 at 3-8. IRB names a “rugby community,” yet fails to state what comprises it or what “boundaries” surround it. Objn at 6-7. To the extent it attempts to do so, Objector simply refers to its own organization and members, as if it constituted the entire community. Objn at 7. Yet, a significant number of people who consider themselves involved in rugby do not necessarily share similar goals, values or interests. The sport at the professional level is divided by differing sets of rules and league objectives. The alleged community cannot be

measured by time of existence, global distribution or number of “members,” and lacks local or global cohesion. Virtually anyone can engage in rugby-related activity, such that no single way exists to define or quantify its membership.

Objector holds itself out as representing a boundlessly wide group while also maintaining unfettered discretion over who in that group may speak. Although it claims to offer such safeguards in the interest of the “community,” its own evidence reveals otherwise. The language of its application directly contradicts the claims of protection in the Objection:

The IRB intends for .rugby names to be registered and used by persons and entities who maintain an affinity towards the sport of rugby. However, .rugby domain registrations *will not be restricted* to such persons and entities – *anyone* can register a .rugby domain name.

Objector Applic. Q 18, 28, Nevett Dec. Ex. 3 (**Annex B**) (emphasis added). The IRB has no right to object to Applicant’s similarly open registry.

Objector either lacks any significant relationship with a substantial portion of the “community” it claims to represent, or that “community” is too broad, diverse and wide-ranging to be “clearly delineated.” It does not object to an application for <.IRB>, <.RFIL> or <.IWRP>, but rather for <.RUGBY>. The notion of a rugby “community,” which would allow a single party to control the use of that dictionary term to the exclusion of all others, defies reason. Such a scenario would contravene the open nature of the Internet.

The Panel should dismiss the Objection on standing alone. It need never consider the substance of the Objection. Nevertheless, we reveal its absence of merit below.

### C.

#### **THE OBJECTION SHOULD BE REJECTED**

A valid community obligates Objector to prove: (i) a clearly delineated community; (ii) substantial opposition to the application by the community; (iii) a strong association between that community and the subject string; and (iv) a “likelihood” that the Application will cause “material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be ... targeted.” AGB at 3-22. “The objector *must meet all four tests* ... for the objection to prevail;” failure on any *one* compels denial. AGB §3.5.4 (emphasis added). Objector here meets none.

##### **1. Objector Fails to Invoke a Clearly Delineated Community.**

Objector necessarily must overcome a more stringent “clearly delineated” test on the merits than it need do for standing. ICANN would have no reason to make that standard a substantive element of the objection if it meant nothing more than the criterion for standing. Rules “should be interpreted so as not to render one part inoperative.” *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). To meet this substantive test, therefore, Objector must show that the string itself describes a clearly delineated community.

Objector cannot do so. The rugby world consists of many parties – fans, players, officials, consumers, retailers, suppliers, venue operators, promoters, critics, journalists, commentators, historians and others. There is a low or no level of formal boundary around the term “rugby” and a large degree of uncertainty as to what persons or entities could conceivably form such a community. These divergent interests hardly describe the “well-established and closely connected group of people or organizations” that ICANN envisioned as “uniquely or nearly uniquely” identified by the term. <http://archive.icann.org/en/topics/new-gtlds/agve-analysis-public-comments-04oct09-en.pdf> at 19. And, because it does not show

that the public recognizes “rugby” as a “community,” Objector cannot establish the duration of such community’s existence, its global distribution, or number of members. AGB 3-22, 23.

Objector has failed to make the requisite showings for a clearly delineated rugby “community.” If it believed it could, Objector would have *applied* for the string as a *community*. Rather than a whole rugby “community,” Objector associates the prescribed factors with its own organization. But, it alone does not make up an entire rugby “community.” Failing to satisfy its burden to prove a clearly delineated “rugby” community, the Objection must fail.

**2. Objector Demonstrates No Substantial Opposition to the Application Within the “Community” It Claims to Represent.**

This element requires proof of: (a) amount of opposition to the Application relative to the asserted community’s composition; (b) the representative nature of those expressing opposition; (c) the stature or weight of sources of opposition; (d) the distribution or diversity of opposition within the invoked community; (e) Objector’s historical defense of the alleged community elsewhere; and (f) Objector’s costs in expressing opposition. AGB §3.5.4 at 3-23. Objector proves no “substantial” opposition to the Application to satisfy its burden.

This aspect of the Objection relies foremost on substantively identical form letters professing “opposition” from individuals and groups sharing an interest in (or perhaps fear of)<sup>2</sup> Objector’s monopolistic entrenched interest. With identical, “vanilla” recitations opposing the Applicant and another of Objector’s competitors,<sup>3</sup> the letters reflect no independent thought showing genuine opposition by each such party itself.<sup>4</sup> Nor do they add up to a meaningful number of oppositions within the larger rugby “community” that Objector claims to represent.

Objector offers no proof that such cookie-cutter “oppositions” fairly represent the views of a “rugby” community, even as defined by Objector. It provides no evidence regarding the stature of those ostensibly voicing opposition, no showing of any historical “defense” it has mounted for the “community” and no mention of the distribution or diversity of such opposition.<sup>5</sup> AGB at 3-23. It thus does not prove “substantial” opposition.

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<sup>2</sup> In a letter to Applicant, Objector demands withdrawal of the Application, portending that “[w]ithout the support of the global rugby community, your commercialization efforts for .RUGBY will be thwarted” – a thinly-veiled, bad-faith threat to influence a boycott of the TLD if it is awarded to Applicant. Nevett Dec. ¶4 (**Annex B**).

<sup>3</sup> Only a fraction of the putative letters of opposition even mention Applicant, and those that do merely parrot identical language from the UK’s November 20, 2012 GAC Early Warning – *i.e.*, that Applicant “does not represent the global community of rugby players, supporters and stakeholders.” Objn at 9, Attmt D14-D18. Applicant has no obligation to “represent” any specific community and, indeed, would welcome users more inclusively.

<sup>4</sup> For example, certain letters indicate a desire to “have access to .RUGBY without the potential restrictions that could [be] imposed by entities with no connection to our sport.” Objn at 9, Attmt D6-D8. Yet the Application proposes limitations based only on trademark protection and abuse mitigation, whereas Objector intends to apply its own discretion in protecting its non-trademark interests.

<sup>5</sup> As to the “cost” element of “substantial opposition,” Objector provides only a statement unsubstantiated by evidence, specificity or even an estimate. Objector fails to state any costs material to its Objection, referring instead to tasks related to filing its own application, learning about the new gTLD process, communicating with “affiliates” and allocating resources incidental to preparing and submitting its own application.

**3. Objector Demonstrates No “Strong Association” Between the “Community” and the Applied-For String.**

Objector bears the burden of proving a “strong association” between the applied-for string and the community it invokes. It may do so by showing (a) statements made in the Application, (b) other public statements by Applicant, and (c) public associations between the string and the objecting “community.” AGB §3.5.4 at 3-24.

Objector offers *no* evidence whatsoever on any of these items. It cites no statements in the Application, because none “targets” *any* “community,” let alone any identified by Objector. Instead, the Application states:

.RUGBY will be attractive to the millions of enthusiasts that play, enjoy or are involved otherwise with this worldwide activity. There are many variations of the game—professional and amateur leagues, tag rugby, touch rugby, flag rugby, wheelchair rugby—all of which involve players, officials, organizations, suppliers, arena operators, promoters, and others who make the activity so widely available and appealing.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8-9). The TLD has an open purpose and is not tied to a specific community. That is the whole point of the generically worded TLD. Nevett Dec. ¶7 (**Annex B**). If Objector were attacking <.IRB>, it could more readily show a tie between it and some “community,” but not to the broader string.

Indeed, the concept of “targeting” runs directly *contrary* to Donuts’ stated purpose for this TLD and its philosophy behind the operation of registries generally:

Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN’s objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1 at 8-9). Applicant expressly does not “target” the string toward *any* particular community, let alone that which Objector claims to represent.

Nor has Objector submitted *any* evidence to support a “strong association” by the *public* between the string and the posited community. Rather, it offers indiscernible results of a Facebook search along with self-serving and unsubstantiated promotional material, both of which hardly support public association, let alone the *strong association* required. This should come as no surprise, given the wide range of interests associated with the term apart from those for which Objector lobbies.

**4. Objector Has Not Shown That Granting the Application Likely Would Cause Material Detriment to Its “Community.”**

Most importantly, Objector fails to meet its burden to prove that granting the application would cause material detriment to the purported community. Applicant has planned a well-operated TLD with extensive safeguards – *not* proposed by Objector in its *own* application – that will serve the public and their associations with the term “rugby.” Nothing in the Application shows likelihood of harm to any individuals or groups. Objector’s “parade of horrors” that *could* happen has no evidentiary support showing that they likely

will happen. To the contrary, the evidence shows that Applicant is doing everything that ICANN requires *and much more* to prevent such occurrences as much as possible, and more than any gTLD ever has before.

One establishes “material detriment” by proving elements that include: (a) the nature and extent of potential damage to the invoked “community” or its reputation from Applicant’s operation of the string; (b) evidence that Applicant does not intend to act consistent with the interests of the invoked community; (c) interference with the core activities of the invoked community by Applicant’s operation of the string; (d) extent the invoked community depends on the DNS for core activities; and (e) the level of certainty that detrimental outcomes will occur. AGB §3.5.4 at 3-24. The speculation put forth in the Objection does not supply proof of these elements sufficient to satisfy Objector’s burden.

*a. Objector shows no “likely” harm to the “community” or its reputation from Applicant’s operation of the subject string.*

Objector does not prove that Applicant’s gTLD poses a *likelihood* of harm to the purported “community” or its “reputation.” Rather, it anti-competitively focuses on protecting its own (non-community) application for the TLD and its own narrow issues (to the exclusion of other rugby-related organizations and interests). Objector complains of such adverse consequences to the “community” as ambush marketing, scalping, sale of unofficial merchandise, cybersquatting and gambling. Yet Objector tenders not a shred of evidence that Applicant’s operation of the string would create any *greater* or *different* harm than takes place under the existing regime of <.COM> and other generics. Nor is Objector able to articulate any meaningful aspects of the Application that distinguish it as more detrimental to the putative community than Objector’s *own* non-community application, which provides that “[t]he .rugby TLD will be open and unrestricted.” Contrary to Objector’s belief, Applicant’s interest in generating profit poses no conflict with operation of the TLD. Moreover, that interest does not differ from the profit incentives incorporated in Objector’s own application. Thus, Objector does not prove that Applicant’s operation of the TLD would *cause* any harm.

Moreover, Applicant has committed to safeguards that surpass ICANN’s requirements for new TLDs and those promised by the Objector’s application. Donuts offers new and robust mechanisms to heighten protection for intellectual property interests and to restrain fraudulent activity. See Application, Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). This set of protections, described further below, far exceeds the already powerful ones ICANN requires for new gTLDs. Applicant will use these measures to curb abuse while preserving consumer choice and TLD competition. Moreover, due to its size and experience in operating domains, it will be much better equipped to address any issues of misconduct. In fact, Applicant has committed to employing a compliance staff whose function will be to address such issues. Nevett Dec. ¶11.

*b. Applicant intends to act in the equal interest of all who may register <.RUGBY> names, including those in Objector’s claimed community.*

Objector provides no evidence supporting the second element – namely, that Applicant “does not intend to act in accordance with the interests of the community or of users more widely,” or “has not proposed or does not intend to institute effective security protection for user interests.” AGB §3.5.4 at 3-24. Again, the actual evidence runs contrary.

Applicant has expressed its affirmative intent to act in the best interests of and to protect *all* users, and to “make this TLD a place for Internet users that is far safer than existing TLDs.” Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). It will do so with the 14 protections that ICANN demands for new gTLDs (but never required for existing gTLDs), and will go beyond that by implementing eight additional measures, including those to address the exact types of concerns raised by Objector. *Id.* Hence, Objector’s lament that Applicant “has not reached out to IRB leadership for review or support of its policies” not only lacks

significance under Guidebook standards but actually enables Applicant to operate the namespace independently and better than if it exercised as much entrenched control over a small segment of the sport as Objector does. Objn at 10. See also Nevett Dec. Ex.3 (**Annex B**)

While Objector states its conclusory belief that the Application offers inadequate protections, it fails to explain how any of the mechanisms proposed by Applicant fall short. Nor does it elaborate on what tools, in its view, a <.RUGBY> domain should employ. Instead of discussing actual detriment it believes the Application poses to the “community,” Objector merely complains that Applicant “has no known connection to the Rugby Community.” Objn at 10.

Objector insists on community oversight of the TLD, as a representative of a *segment* of rugby interests. Applicant vehemently disagrees.

First, ICANN does not require an applicant to run a gTLD as a community. Virtually any generic word could attract some self-proclaimed community to oppose it, as here. That a TLD *could* implicate “community” interests does not replace Objector’s burden to prove detriment. Its contention that the domain should be awarded to it – that IRB serves as the only appropriate steward for a <.RUGBY> gTLD – explicitly does not suffice to show detriment. AGB §3.5.4 at 3-24. ICANN already has provided the proper remedy in that instance – namely, to submit a community application.

Second, imposing registration restrictions as Objector urges here would hinder free speech, competition and innovation in the namespace. As the Application states:

[A]ttempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.

Application Q18A, **Annex B** (Nevett Dec. ¶1, Ex. 1). ICANN supports the same objectives. Indeed, they lie at the heart of the entire new gTLD program. See, e.g., AGB Preamble, §1.1.2.3; Module 2, Attmt at A-1.

The Objection would have the Panel gut these principles in deference to the self-interest of Objector and its theoretical community. This would lead the namespace down a dangerous path. Applicant’s content-neutral approach strikes the proper balance that promotes free speech and the growth of Internet usage, while protecting users more thoroughly than both the current landscape and ICANN’s new gTLD enhancements do. Objector does not and cannot show that Applicant will act against the legitimate interests of the invoked “community.”

*c. Objector fails to show how Applicant’s operation of the string would interfere with the core activities of the alleged community.*

Because it cannot do so, Objector fails to show how Applicant’s operation of the TLD would interfere with the community’s core activities. It simply forecasts the demise of the purported community from Applicant’s control of the TLD – including increases in doping and gambling. Objn at 12-13. How this supposedly would occur, Objector does not say; it has no *evidence* to support such inflammatory speculation. Objector discusses detriment less as a matter of Applicant’s operation of the TLD than of Objector’s own lack of control. Objector’s arguments therefore fail from a logic standpoint. If rugby-related websites were banned from registering names in <.COM>, would doping incidents or gambling dramatically drop? There is no evidence to suggest Applicant’s proposed string would cause the potential interference

that Objector concocts. Quite the opposite, Applicant's new safeguards likely will reduce the extent of bad behavior seen in large registries now. Equally important, 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.

Objector also fears losing to speculators domain names corresponding to non-trademark identifiers such as "teams, leagues and rising players" for which "[t]he Donuts rules provide no protection."<sup>6</sup> Objn at 11. What Objector fears is a reasonable consequence rather than a detriment. A group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection in any TLD. Allowing this would make affiliation with Objector tantamount to trademark protection on the TLD while also restricting legitimate use by all registrants. Applicant believes the policy regulating the TLD must promote rather than stifle growth, free speech, legitimate activity and consumer choice. Nevett Dec. ¶¶8, 10 (**Annex B**).

Though Objector's policies and regulations have their place in regulating a segment of professional rugby activities, a connection to or oversight by it is irrelevant to proving the standards of this objection and unnecessary to administering the TLD. On the contrary, the TLD's administration is best left to an entity like Applicant which has the experience and capability to launch, expand and operate the TLD in a secure manner while appropriately protecting Internet users and rights-holders from potential fraud and abuse. While safeguarding against fraud and abuse, Applicant's policies acknowledge that over-regulating registrant eligibility unnecessarily restricts users by preventing a substantial segment of legitimate registrants from participating in a space to which they are legitimately connected or interested in. Applicants' domain policies, stated in its Application with clarity and in depth, diminishes the risk of abuse while promoting legitimate registrations and safeguarding the reputation of the TLD.

*d. Objector makes no showing that its "community" depends on the DNS for core activities.*

This factor requires that any core activity referenced by an Objector must "depend" on the domain name system. Rugby is played on an athletic field, not on the DNS. Objector provides no evidence supporting this factor, and none exists.

*e. Objector shows no level of certainty that detrimental outcomes would occur, and no reasonable quantification of any such outcomes.*

Objector's bold and bare claim that "there is no question [it] will be forced to expend greater time and resources protecting [its] programs and core activities" is meritless and unsubstantiated by evidence. Objn at 12. Objector's claim of the "time and resources" it would spend if the TLD is awarded to Applicant vis-a-vis Objector itself is irrelevant under the objection standard.<sup>7</sup> Objector claims that the Panel ought to disqualify the Application simply because Objector "will have no control, oversight and enforcement" and its "work will become

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<sup>6</sup> Contrary to Objector's implication otherwise, its own application for the TLD offers no such promise. Indeed, one wonders how Objector's application would "guard" such non-trademark identifiers that correspond to rising players who only come into recognition after open registration has begun on the TLD, by which time that identifier may already be taken. Objector can only live up to such protection by terminating the existing registration in favor of its favored "rising star."

<sup>7</sup> "Simple detriment to the objector alone is not acceptable. Some additional detriment is required in order to block a string." <http://www.icann.org/en/topics/new-qtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>.

inestimably more difficult," *id.*, and intimates that the Objector could be a more suitable operator of the <.RUGBY> TLD.

Both Applicant and Objector must operate within the framework ICANN has provided. That set of rules, carefully planned and developed over years with input from multiple stakeholders that included groups such as Objector, creates a community-based objection previously unknown to the law or the Internet. While granting unprecedented power to organizations that otherwise would have no legal recourse against any top-level domain, the community objection carries with it strict criteria that define specific circumstances in which that power can be used.

This is not one of those situations. Having failed to apply on the basis of a community, Objector brings this community objection improperly. It also falls short of its burden to prove the elements of a community objection, each of which the Guidebook expressly requires.

Objector's alarms regarding economic damage to its claimed community also lack merit. Applicant's enhanced registration safeguards mitigate the potential for cybersquatting and typosquatting. More pertinently, Objector's fear of increased costs from Applicant's operation of the TLD applies as much to its own non-community application.

Finally, founded entirely on its "Appendix G," Objector incorrectly associates Applicant with certain "related entities." Objn at 12. Neither Objector nor any of the domain dispute decisions substantiates the accusations and exaggerations Objector makes. Despite the fact that these claims are irrelevant, Applicant denies their veracity, and points out that they involve third parties who own no interest in Applicant or its parent or sibling companies. Further, Donuts has passed ICANN's background screening process for fitness to operate a registry, as its management has decades of combined experience doing. See Nevett Dec. ¶ 13 (**Annex B**).

Having met the evaluation criteria, Applicant has earned the right to compete for the gTLD at issue. Objector fails in every respect to meet its burden to divest Applicant of that right. The Objection cannot succeed. Applicant therefore respectfully urges the Panel to overrule it and to direct Objector to pay the costs reasonably incurred by Applicant in opposing this meritless Objection.



# EXHIBIT 42



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## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

*International Rugby Board (IRB),*

(Objector)

-v-

*Atomic Cross, LLC,*

(Applicant/Respondent)

ICC Case No. EXP/519/ICANN/134  
(Consolidated with EXP/517/ICANN/132)

In re Community Objection to:  
<.RUGBY>  
Application ID 1-1612-2805

### Applicant’s Objection to Panel Appointment of Richard Henry McLaren

Atomic Cross, LLC (“Applicant”) respectfully objects to the appointment of Richard Henry McLaren as a Panelist in this matter, in response to his disclosure that he serves as an arbitrator for the International Court of Arbitration for Sport (“CAS”). Applicant understands that the Centre will consider this objection with such input as the Objector and Mr. McLaren himself may wish to provide.

#### 1. Introductory Summary of Objection

Applicant has no quarrel with Mr. McLaren personally, and does not doubt his sincerity when he states that she is “impartial and independent and intend[s] to remain so.” However, Applicant respectfully submits that Mr. McLaren’s current function as an arbitrator for CAS, as well as his role as President of the Basketball Arbitral Tribunal, impacts the *appearance* of impartiality for reasons set forth below, regrettably making disqualification appropriate.

“Every expert must be independent of the parties involved in the expertise proceedings ...” Rules, Arts. 7-3, 11-1. To that end, the Centre requires potential Panelists to disclose “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*.” *Id.* Art. 7-4. Mr. McLaren has faithfully adhered to this disclosure obligation by identifying his position as a CAS arbitrator and as President of the Basketball Arbitral Tribunal. That disclosure, however, has called at least the *appearance* of his independence into question in the eyes of Applicant.

**ICC International Centre for ADR □ Centre international d’ADR de la CCI**

Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

2. Facts Affecting the Appearance of Impartiality and Independence

- a. *The IRB helps appoint the CAS governing body and its arbitrators, and has common interests with FIBA, which employs Mr. McLaren as President of its Basketball Arbitral Tribunal.*

The history of the CAS reflects that the International Olympic Committee (“IOC”) created it effective June 30, 1984. <http://www.tas-cas.org/history> (**Annex 1**). The IOC is the “supreme authority” of the “Olympic Movement,” which also consists of National Olympic Committees (“NOCs”) and International Federations (“IFs”) for various sports. <http://www.olympic.org/about-ioc-institution?tab=organisation> (**Annex 2**).

The Objector, IRB, is an IF and a member of the Association of Summer Olympic International Federations (“ASOIF”). <http://www.asoif.com/IFDirectory/Default.aspx> (**Annex 3**). The ASOIF appoints three of the initial 12 members of the International Council of Arbitration for Sport (“ICAS”), and the ICAS appoints all CAS arbitrators. See <http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201320corrections20finales20%28en%29.pdf>, ICAS-CAS Statutes, S4-a and S6-3 (**Annex 4** at 1-2). “The CAS arbitrators are appointed at the proposal of the IOC, the IFs and the NOCs.” <http://www.tas-cas.org/en/infogenerales.asp/4-3-238-1011-4-1-1/5-0-1011-3-0-0/>, ¶3 (**Annex 5**). In other words, the IRB, the Objector in *this* case, has *direct input* into the appointment of both the CAS arbitrators and the ICAS members who ultimately select those arbitrators, including Mr. McLaren.

In addition, Mr. McLaren lists his position as President of the Basketball Arbitral Tribunal (“BAT”). That body was created by the Fédération Internationale de Basketball (“FIBA”). [http://www.fiba.com/downloads/v3\\_expe/bat/110401\\_BAT\\_Arbitration\\_Rules.PDF](http://www.fiba.com/downloads/v3_expe/bat/110401_BAT_Arbitration_Rules.PDF) (**Annex 6** at 2 § 0.1). FIBA administers all BAT proceedings. *Id.* § 6.1. FIBA guarantees BAT funding, appoints its President, Mr. McLaren, and has enforcement authority over its awards. [http://www.fiba.com/downloads/v3\\_expe/bat/FIBA\\_Internal\\_Regulations\\_FAT.PDF](http://www.fiba.com/downloads/v3_expe/bat/FIBA_Internal_Regulations_FAT.PDF), Book 3 §§ 296, 297, 300 (**Annex 7** at 1-2). FIBA, which employs Mr. McLaren as the BAT President, has objected to Donuts’ application for <.BASKETBALL>, and both FIBA and IRB have listed Roar Domains, LLC, the back-end service provider for both, as “related entities” in their respective Objection proceedings. See administrative portions of the IRB and FIBA Objections at **Annexes 8 and 9** hereto, respectively.

Mr. McLaren’s interest in FIBA, the shared interest of Roar Domains in both FIBA and IRB, the Objector here, and the influence of the IRB over his appointment to the CAS panel, create at least the *appearance* of potential impropriety, if not an actual conflict, in this case. For these reasons, it appears necessary to replace him as the panelist in these proceedings.

- b. *The appointment would have an arbitrator of sports-related disputes decide between an international sports federation and a non-sports organization in a case involving Internet domain names.*

The ICAS and CAS were formed expressly “to resolve *sports-related* disputes through arbitration and mediation.” ICAS-CAS Statutes, S1 (**Annex 4** at 1) (emphasis added). The CAS rules “apply whenever the parties have agreed to refer a sports-related dispute to CAS.” *Id.* at 8, R27. “Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests *relating to the practice or the development of sport* ....” *Id.* (emphasis added).

This proceeding, by contrast, does not present a “sports-related” dispute any more than a dispute over <.COOKING> presents a dispute that should be decided by a “Top Chef.” Applicant is an organization of domain-name professionals. The Panel must determine whether Objector can defeat Applicant’s presumptive right to operate the generic <.RUGBY> top-level domain under identified criteria that ICANN has prescribed for its newly

created “community” objection. Specifically, the Panel must decide whether Objector has sustained its burden of proving “substantial opposition” by a “clearly delineated community” to a gTLD string that is “strongly associated” with, and likely to cause “material detriment” to, the “community” alleged by FIBA. Guidebook § 3.5.4.

Mr. McLaren not only comes from a sports background as a CAS arbitrator; he has that position in part due to the influence of the IRB, the Objector in this matter. He also has another position with FIBA – which, like the IRB here, has employed Roar Domains to help operate the registry for which it has applied. Applicant thus has serious concerns regarding the *appearance* of partiality and lack of independence in a domain-name dispute between Applicant, a non-sporting company, and Objector, a sporting insider with which he likely has dealt, in a position that he holds at least in part based on input from the Objector itself and from an organization that has a common interest with Objector.

ICANN’s new gTLD program and the integrity of its dispute resolution mechanisms, including the novel “community objection” process at work here, have been and will continue to be the subject of great scrutiny within the domain-name industry and among its many stakeholders, participants and commentators. Upholding the appearance of impartiality and independence becomes particularly important in this context. Applicant therefore respectfully suggests that Mr. McLaren be replaced to preserve that appearance for all concerned.

### 3. *Laws and Rules Requiring the Appearance of Impartiality and Independence*

The principle of maintaining the appearance of impartiality and independence at all times lies at the heart of the ICC Rules and the ethical precepts of many judicial, arbitral and professional legal bodies. For example, the Ethical Principles for Judges published by the Judicial Council of Canada, where Mr. McLaren works and resides, states that “Judges must be and should appear to be impartial with respect to their decisions and decision making.” Statement 6 (**Annex 10** at 33). “The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.” *Id.*, Principle A.3.

Among the types of conduct that undermine the appearance of impartiality, the Canadian Ethical Principles caution that “Judges should avoid any activity or association that could reflect adversely on their impartiality.” *Id.* at 34, Principle C.1(a). Also, “Judges should avoid involvement in ... organizations that are likely to be engaged in litigation.” *Id.*, Principle C.1(c).

American courts uphold similar judicial values, reflected in an official Code of Conduct for United States Judges published by the Judicial Conference of the United States, created by the legislature to administer all U.S. Federal Courts. Its Canon 2 provides:

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE  
OF IMPROPRIETY IN ALL ACTIVITIES

*Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

<http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (**Annex 11** at 3). The American Bar Association, the leading legal association in the U.S., also has published a Model Code of Judicial Conduct that expresses the concept consistently:

Canon 1 – A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011\\_mcjc\\_table\\_of\\_contents.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_table_of_contents.authcheckdam.pdf) (**Annex 12**).

Switzerland, where the CAS is based, has a long-standing reputation for arbitration of international disputes. The arbitration provisions of its Federal Statute on Private International Law allow for challenges to an arbitrator “if circumstances exist that give rise to justifiable doubts as to his independence.” **Annex 13** at 1-2. The objective perception of independence is paramount.

Alternative dispute resolution providers similarly espouse avoiding the appearance of impropriety among their neutrals. The American Arbitration Association and its International Centre for Dispute Resolution, another DRSP in ICANN’s new gTLD program, has published a Code of Ethics for Arbitrators. It provides that “an arbitrator should avoid impropriety or the appearance of impropriety,” Canon III, and counsels withdrawal in the event of a “relationship likely to affect impartiality or which might create an appearance of partiality,” Canon II §G. [http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG\\_003867&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased) (**Annex 14** at 4-5).

This tribunal likewise requires independence and impartiality of its experts. Rules, Arts. 7-3, 7-4, 11-1. It further provides:

If any party objects that the expert does not ... fulfill[ ] the expert’s functions in accordance with these Rules [e.g., independence and impartiality] ..., the Centre may replace the expert after having considered the observations of the expert and the other party or parties.

Rules, Art. 11-4. Mr. McLaren has provided his disclosures, and Applicant makes its observations by way of this objection. Applicant believes that an appointee with such close ties to international federations of sport would have difficulty putting that history aside when rendering a decision that could affect such an organization in its non-sports dispute against a party not involved in sports.

#### 4. Conclusion

For the many reasons such as those discussed above, consistent with prevailing ethical rules, Applicant respectfully objects to the appointment of Richard Henry McLaren as Panelist in this matter. To maintain the appearance of expert impartiality and independence in, and protect the perceived integrity of, these closely-watched proceedings, the Centre should honor this objection and, regrettably, appoint a replacement Panelist.

**Communication (Article 6(a) of the Procedure and Article 1 of the ICC Practice Note)**

A copy of this Response is/was transmitted to the Objector on July 23, 2013 by email to the following addresses: Contact Information Redacted

A copy of this Response is/was transmitted to the applicant/respondent in the consolidated proceeding on July 23, 2013 by email to the following address:

[pyoung@famousfourmedia.com](mailto:pyoung@famousfourmedia.com)

A copy of this Response is/was transmitted to ICANN on July 23, 2013 by e-mail to the following address: [DRfiling@icann.org](mailto:DRfiling@icann.org)

DATED: July 23, 2013

Respectfully submitted,  
THE IP & TECHNOLOGY LEGAL GROUP, P.C.  
dba New gTLD Disputes

By: \_\_\_\_\_/jmg/\_\_\_\_\_  
John M. Genga  
Contact Information Redacted

By: \_\_\_\_\_/dcm/\_\_\_\_\_  
Don C. Moody  
Contact Information Redacted

Attorneys for Applicant/Respondent  
**ATOMIC CROSS, LLC**

**Description of the Annexes filed with the Response (Article 11(e) of the Procedure)**

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*List and Provide description of any annex filed.*

- Annex 1** – CAS history from CAS website
- Annex 2** – IOC organization description from IOC website
- Annex 3** – IF Directory from ASOIF website
- Annex 4** – ICAS-CAS Statutes and Rules
- Annex 5** – ICAS-CAS organization description from CAS website
- Annex 6** – BAT Arbitration Rules
- Annex 7** – FIBA Internal Regulations re BAT
- Annex 8** – Administrative portion of IRB Objection
- Annex 9** – Administrative portion of FIBA Objection
- Annex 10** – Ethical Principles for Judges, Canadian Judicial Council
- Annex 11** – Code of Conduct for United States Judges
- Annex 12** – American Bar Association Model Code of Judicial Conduct
- Annex 13** – Federal Statute on Private International Law, Switzerland
- Annex 14** – AAA-ICDR Code of Ethics for Arbitrators

## Annex 1

[CAS history from CAS website]



**TAS / CAS**

TRIBUNAL ARBITRAL DU SPORT  
COURT OF ARBITRATION FOR SPORT

FRANCAIS / ENGLISH  
CONTACT / SITEMAP / PRINT



[GENERAL INFORMATION](#)

[LISTS ICAS/CAS](#)

[ARBITRATION](#)

[MEDIATION](#)

[JURISPRUDENCE](#)

[MEDIA](#)

**GENERAL INFORMATION**

**HISTORY OF THE CAS**

[home](#) / [General Information](#) / [History of the CAS](#)

## ORIGINS

At the beginning of the 1980s, the regular increase in the number of international sports-related disputes and the absence of any independent authority specialising in sports-related problems and authorised to pronounce binding decisions led the top sports organisations to reflect on the question of sports dispute resolution.

In 1981, soon after his election as IOC President, H.E. Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. The following year at the IOC Session held in Rome, IOC member H.E. Judge Kéba Mbaye, who was then a judge at the International Court of Justice in The Hague, chaired a working group tasked with preparing the statutes of what would quickly become the "Court of Arbitration for Sport".

The idea of creating an arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport had thus firmly been launched. Another reason for setting up such an arbitral institution was the need to create a specialised authority capable of settling international disputes and offering a flexible, quick and inexpensive procedure.

The initial outlines for the concept contained provision for the arbitration procedure to include an attempt to reach a settlement beforehand. It was also intended that the IOC should bear all the operating costs of the court. Right from the outset, it was established that the jurisdiction of the CAS should in no way be imposed on athletes or federations, but remain freely available to the parties.

In 1983, the IOC officially ratified the statutes of the CAS, which came into force on 30 June 1984. The Court of Arbitration for Sport became operational as of that time, under the leadership of President Mbaye and the Secretary General, Mr Gilbert Schwaar.

## ORIGINS

**ORGANISATION OF THE CAS FROM ITS CREATION UNTIL 1994**

**THE 1994 REFORM**

**THE PARIS AGREEMENT**

**ORGANISATION AND STRUCTURE OF THE ICAS AND CAS**

**TYPES OF DISPUTES SUBMITTED TO THE CAS**

**THE DECENTRALISED CAS OFFICES AND THE AD HOC DIVISIONS**



Contact Information Redacted

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## Annex 2

[IOC organization description from IOC website]



# THE ORGANISATION

[MISSION](#)
[ORGANISATION](#)
[MEMBERS](#)
[PRESIDENTS](#)
[EXECUTIVE BOARD](#)
[ADMINISTRATION](#)


When he announced in Paris, on a winter's evening in 1892, the forthcoming re-establishment of the Olympic Games, Pierre de Coubertin was applauded, but nobody at the time imagined the scale of the project entailed by reviving the ancient Olympic Games, appointing a committee in charge of organising them and creating an international movement. The IOC was created on 23 June 1894; the 1st Olympic Games of the modern era opened in Athens on 6 April 1896; and the Olympic Movement has not stopped growing ever since. The Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the principles of the Olympic Charter. Its composition and general organisation are governed by Chapter 1 of the Charter. The Movement comprises three main constituents:

## THE IOC

### THE ORGANISATION

#### GOVERNANCE OF THE OLYMPIC MOVEMENT

- ▶ Introduction
- ▶ National Olympic Committees (NOCs)
- ▶ International Sports Federations (IFs)
- ▶ Organising Committees for the Olympic Games (OCOGs)
- ▶ Recognised Organisations

#### FINANCING

- ▶ Revenue Sources and Distribution

#### BROADCASTERS

- ▶ Olympic Broadcasting

#### SPONSORS

- ▶ The Olympic Partner (TOP) programme
- ▶ 100 Years of Olympic Marketing
- ▶ Local Sponsorship Programmes

#### OTHER COMMERCIAL PROGRAMMES

- ▶ Ticketing
- ▶ Licensing
- ▶ Philatelic and Numismatic programmes
- ▶ Suppliers

#### OLYMPIC CONGRESSES

The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport and promoting the values of Olympism.

The Olympic Movement is defined also by the numerous activities in which it engages:

- Promoting and organising competitions through the jurisdiction of national and international sport organisations worldwide;
- Encouraging voluntary and civic participation especially of the young in sport;
- Assisting and advising especially AOs;
- Arrangement of Olympic and Paralympic Games and events, which would promote peace, mutual understanding and friendly co-operation of all people;
- Organising all forms of sport, especially Olympic and Paralympic.

- The fight against doping.
- Promoting sports ethics and fair play.
- Raising awareness of environmental problems.
- Financial and educational support for developing countries through the IOC institution Olympic Solidarity.



The Olympic Charter is the codification of the Fundamental Principles, Rules and Bye-laws adopted by the International Olympic Committee (IOC). It governs the organisation and running of the Olympic Movement and sets the conditions for the celebration of the Olympic Games.

 [Full text of the Olympic Charter](#)



*"Olympism is a philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy found in effort, the educational value of good example and respect for universal fundamental ethical principles."*

Olympic Charter, Fundamental principles, paragraph 2

- ▶ XIII Olympic Congress - Copenhagen 2009
- ▶ XII Olympic Congress - Paris 1994
- ▶ XI Olympic Congress - Baden-Baden 1981
- ▶ X Olympic Congress - Varna 1973
- ▶ IX Olympic Congress - Berlin 1930
- ▶ VIII Olympic Congress - Prague 1925
- ▶ VII Olympic Congress - Lausanne 1921
- ▶ VI Olympic Congress - Paris 1914
- ▶ V Olympic Congress - Lausanne 1913
- ▶ IV Olympic Congress - Paris 1906
- ▶ III Olympic Congress - Brussels 1905
- ▶ II Olympic Congress - Le Havre 1897
- ▶ I Olympic Congress - Paris 1894

#### IDENTITY CARD

Address **Contact Information Redacted** 

Phone

Fax

#### OLYMPIC MOVEMENT DIRECTORY

- OC Members
- Commissions
- Organising Committees
- National Olympic Committees
- International Federations
- Recognised and Affiliate Organisations

#### SEARCH THE MEDIA SECTION

Enter Keywords

**GO**

#### OLYMPIC NEWS IOC CALENDAR

30 MAY 2013

▶ **IOC Executive Board discusses NOC matters**  
 NOC of India The EB took note of the progress made following fruitful meetings between the IOC

and the Indian Sports Minister and representatives of national sports federations belonging to the suspe...

18 JANUARY 2013

▶ **IOC Statement on Lance Armstrong**

17 JANUARY 2013

▶ **IOC Statement on Lance Armstrong**

08 JANUARY 2013

▶ **OSC Newsletter Number 19**

05 DECEMBER 2012

▶ **IOC President honours HH Sheikha Fatima bint Mubarak, Mother of United Arab Emirates Nation**

▶ **All News**



## Annex 3

[IF directory from ASOIF website]

[Home](#)[News](#)[Sports Calendar](#)[About ASOIF](#)[ASOIF Members](#)[Summer and Youth Olympics](#)[ASOIF Calendar](#)[Portal](#)

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## ASOIF MEMBERS

- [Aquatics](#) - Federation Internationale de Natation

---

- [Archery](#) - World Archery Federation

---

- [Athletics](#) - International Association of Athletics Federations

---

- [Badminton](#) - Badminton World Federation

---

- [Basketball](#) - Federation Internationale de Basketball

---

- [Boxing](#) - Association Internationale de Boxe

---

- [Canoeing](#) - International Canoe Federation

---

- [Cycling](#) - Union Cycliste Internationale

---

- [Equestrian](#) - Federation Equestre Internationale

---

- [Fencing](#) - Federation Internationale d'Esclime

---

- [Field Hockey](#) - Federation Internationale de Hockey

---

- [Football](#) - Federation Internationale de Football Association

---

- [Golf](#) - International Golf Federation

---

- [Gymnastics](#) - Federation Internationale de Gymnastique

---

- [Handball](#) - International Handball Federation

---

- [Judo](#) - International Judo Federation

---

- [Modern Pentathlon](#) - Union Internationale de Pentathlon Moderne

---

- [Rowing](#) - Federation Internationale des Societes D'Aviron

---

- [Rugby Union](#) - International Rugby Board

## SUMMER AND YOUTH OLYMPICS



1109 days to go

## ASOIF ANNOUNCEMENTS

**ASOIF agreement with Mohammed Bin Rashid Al Maktoum Creative Sports Award - Information to Members**  
05 Jul 2013

**Mexico City Laboratory Latest to be Accredited by WADA**  
01 Jul 2013

**WADA publishes 2012 Annual Report**  
01 Jul 2013

**Publication of Third Draft of 2015 Code**  
24 Jun 2013

**ASOIF Celebrates 30 Years in St. Petersburg**  
29 May 2013

## ASOIF MEMBERS





Huguenot House  
Contact Information Redacted

Contact Information Redacted

[www.irb.com](http://www.irb.com)

Founded :  
Member Since :  
President :  
Gen Sec\Exec Dir :

1886  
2010  
Bernard Lapasset  
Brett Gosper

**Sailing** - International Sailing Federation

**Shooting** - International Shooting Sport Federat on

**Table Tennis** - Internat onal Table Tennis Federation

**Taekwondo** - World Taekwondo Federation

**Tennis** - International Tennis Federat on

**Triathlon** - Internat onal Triathlon Union

**Volleyball** - Federation Internationale de Volleyball

**Weightlifting** - International Weightlifting Federat on

**Wrestling** - Federation Internationale des Luttes Associees

## ASOIF CALENDAR

**Rio 2016 CoCom**  
28 Aug 2013 - 30 Aug 2013

**IOC Executive Board Meeting**  
04 Sep 2013 - 05 Sep 2013

**ASOIF Council Meeting**  
06 Sep 2013

**125th IOC Session**  
07 Sep 2013 - 10 Sep 2013

**2020 Olympic Games - Election of Host City**  
07 Sep 2013

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## Annex 4

[ICAS-CAS Statutes and Rules]

# **Statutes of the Bodies Working for the Settlement of Sports-Related Disputes\***

## **A Joint Dispositions**

S1 In order to resolve sports-related disputes through arbitration and mediation, two bodies are hereby created:

- **the International Council of Arbitration for Sport (ICAS)**
- **the Court of Arbitration for Sport (CAS).**

The disputes to which a federation, association or other sports-related body is a party are a matter for arbitration pursuant to this Code, only insofar as the statutes or regulations of the bodies or a specific agreement so provide.

The seat of both ICAS and CAS is Lausanne, Switzerland.

S2 The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.

S3 CAS maintains a list of arbitrators and provides for the arbitral resolution of sports-related disputes through arbitration conducted by Panels composed of one or three arbitrators.

CAS comprises of an Ordinary Arbitration Division and an Appeals Arbitration Division.

CAS maintains a list of mediators and provides for the resolution of sports-related disputes through mediation. The mediation procedure is governed by the CAS Mediation Rules.

## **B The International Council of Arbitration for Sport (ICAS)**

### **1 Composition**

S4 ICAS is composed of twenty members, experienced jurists appointed in the following manner:

\* NOTE : In this Code, the masculine gender used in relation to any physical person shall, unless there is a specific provision to the contrary, be understood as including the feminine gender.

- a. four members are appointed by the International Sports Federations ( IFs), viz. three by the Association of Summer Olympic IFs (ASOIF) and one by the Association of Winter Olympic IFs (AIOWF), chosen from within or outside their membership;
- b. four members are appointed by the Association of the National Olympic Committees (ANOC), chosen from within or outside its membership;
- c. four members are appointed by the International Olympic Committee (IOC), chosen from within or outside its membership;
- d. four members are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
- e. four members are appointed by the sixteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.

S5 The members of ICAS are appointed for one or several renewable period(s) of four years. Such nominations shall take place during the last year of each four-year cycle.

Upon their appointment, the members of ICAS sign a declaration undertaking to exercise their function personally, with total objectivity and independence, in conformity with this Code. They are, in particular, bound by the confidentiality obligation provided in Article R43.

Members of the ICAS may not appear on the list of CAS arbitrators or mediators nor act as counsel to any party in proceedings before the CAS.

If a member of the ICAS resigns, dies or is prevented from carrying out his functions for any other reason, he is replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.

ICAS may grant the title of Honorary Member to any former ICAS member who has made an exceptional contribution to the development of ICAS or CAS. The title of Honorary Member may be granted posthumously.

## **2 Attributions**

S6 ICAS exercises the following functions:

1. It adopts and amends this Code;
2. It elects from among its members for one or several renewable period(s) of four years:
  - the President;
  - two Vice-Presidents who shall replace the President if necessary, by order of seniority in age; if the office of President becomes vacant, the senior Vice-President shall exercise the functions and responsibilities of the President until the election of a new President;
  - the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS;

- the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions.

The election of the President and of the Vice-Presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The election of the President, Vice-Presidents, Division Presidents and their deputies shall take place at the ICAS meeting following the appointment of the ICAS members for the forthcoming period of four years.

3. It appoints the arbitrators who constitute the list of CAS arbitrators and the mediators who constitute the list of CAS mediators; it can also remove them from those lists;
4. It resolves challenges to and removals of arbitrators, and performs any other functions identified in the Procedural Rules;
5. It is responsible for the financing of CAS. For such purpose, *inter alia*:
  - 5.1 it receives and manages the funds allocated to its operations;
  - 5.2 it approves the ICAS budget prepared by the CAS Court Office;
  - 5.3 it approves the annual accounts of CAS prepared by the CAS Court Office;
6. It appoints the CAS Secretary General and may terminate his duties upon proposal of the President;
7. It supervises the activities of the CAS Court Office;
8. It provides for regional or local, permanent or *ad hoc* arbitration;
9. It may create a legal aid fund to facilitate access to CAS arbitration for individuals without sufficient financial means and may create CAS legal aid guidelines for the operation of the fund;
10. It may take any other action which it deems necessary to protect the rights of the parties and to promote the settlement of sports-related disputes through arbitration and mediation.

S7 ICAS exercises its functions itself, or through its Board, consisting of the President, the two Vice-Presidents of the ICAS, the President of the Ordinary Arbitration Division and the President of the CAS Appeals Arbitration Division.

The ICAS may not delegate to the Board the functions listed under Article S6, paragraphs 1, 2, 5.2 and 5.3.

### **3 Operation**

- S8 1. ICAS meets whenever the activity of CAS so requires, but at least once a year.
- A quorum at meetings of the ICAS consists of at least half its members. Decisions are taken during meetings or by correspondence by a majority of the votes cast. Abstentions and blank or spoiled votes are not taken into consideration in the calculation of the required majority. Voting by proxy is not allowed. Voting is held by secret ballot if the President so decides or upon the request of at least a quarter of the members present. The President has a casting vote in the event of a tie.
2. Any modification of this Code requires a majority of two-thirds of the ICAS members. Furthermore, the provisions of Article S8.1 apply.

3. Any ICAS member is eligible to be a candidate for the ICAS Presidency. Registration as a candidate shall be made in writing and filed with the Secretary General no later than four months prior to the election meeting.

The election of the ICAS President shall take place at the ICAS meeting following the appointment of the ICAS members for a period of four years. The quorum for such election is three-quarters of the ICAS members. The President is elected by an absolute majority of the members present. If there is more than one candidate for the position of President, successive rounds of voting shall be organized. If no absolute majority is attained, the candidate having the least number of votes in each round shall be eliminated. In the case of a tie among two or more candidates, a vote between those candidates shall be organized and the candidate having the least number of votes shall be eliminated. If following this subsequent vote, there is still a tie, the candidate(s) senior in age is (are) selected.

If a quorum is not present or if the last candidate in the voting rounds, or the only candidate, does not obtain an absolute majority in the last round of voting, the current president shall remain in his position until a new election can be held. The new election shall be held within four months of the unsuccessful election and in accordance with the above rules, with the exception that the President is elected by a simple majority when two candidates or less remain in competition.

The election is held by secret ballot. An election by correspondence is not permitted.

4. The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to ICAS.

S9 The President of ICAS is also President of CAS. He is responsible for the ordinary administrative tasks pertaining to the ICAS.

S10 The Board of ICAS meets at the invitation of the ICAS President.

The CAS Secretary General takes part in the decision-making with a consultative voice and acts as Secretary to the Board.

A quorum of the Board consists of three of its members. Decisions are taken during meetings or by correspondence by a simple majority of those voting; the President has a casting vote in the event of a tie.

S11 A member of ICAS or the Board may be challenged when circumstances allow legitimate doubt to be cast on his independence *vis-à-vis* a party to an arbitration which must be the subject of a decision by ICAS or the Board pursuant to Article S6, paragraph 4. He shall pre-emptively disqualify himself when the subject of a decision is an arbitration procedure in which a sports-related body to which he belongs appears

as a party or in which a member of the law firm to which he belongs is an arbitrator or counsel.

ICAS, with the exception of the challenged member, shall determine the process with respect to the procedure for challenge.

The disqualified member shall not take part in any deliberations concerning the arbitration in question and shall not receive any information on the activities of ICAS and the Board concerning such arbitration.

## **C The Court of Arbitration for Sport (CAS)**

### **1 Mission**

S12 CAS constitutes Panels which have the responsibility of resolving disputes arising in the context of sport by arbitration and/or mediation pursuant to the Procedural Rules (Articles R27 *et seq.*).

For such purpose, CAS provides the necessary infrastructure, effects the constitution of Panels and oversees the efficient conduct of the proceedings.

The responsibilities of Panels are, *inter alia*:

- a. to resolve the disputes referred to them through ordinary arbitration ;
- b. to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide
- c. to resolve the disputes that are referred to them through mediation.

### **2 Arbitrators and mediators**

S13 The personalities designated by ICAS, pursuant to Article S6, paragraph 3, appear on the CAS list for one or several renewable period(s) of four years. ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment.

There shall be not less than one hundred fifty arbitrators and fifty mediators.

S14 In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes.

In establishing the list of CAS mediators, the ICAS shall appoint personalities with experience in mediation and a good knowledge of sport in general.

- S15 ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof.
- S16 When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures.
- S17 Subject to the provisions of the Procedural Rules (Articles R27 *et seq.*), if a CAS arbitrator resigns, dies or is unable to carry out his functions for any other reason, he may be replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.
- S18 Arbitrators who appear on the CAS list may serve on Panels constituted by either of the CAS Divisions.

Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

- S19 CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if he violates any rule of this Code or if his action affects the reputation of ICAS and/or CAS.

### **3 Organisation of the CAS**

- S20 The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.
- a. **The Ordinary Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*).

- b. **The Appeals Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*).

Arbitration proceedings submitted to CAS are assigned by the CAS Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity. In the event of a change of circumstances during the proceedings, the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division. Such re-assignment shall not affect the constitution of the Panel nor the validity of any proceedings, decisions or orders prior to such re-assignment.

The CAS mediation system operates pursuant to the CAS Mediation Rules.

- S21 The President of either Division may be challenged if circumstances exist that give rise to legitimate doubts with regard to his independence *vis-à-vis* one of the parties to an arbitration assigned to his Division. He shall pre-emptively disqualify himself if, in arbitration proceedings assigned to his Division, one of the parties is a sports-related body to which he belongs, or if a member of the law firm to which he belongs is acting as arbitrator or counsel.

ICAS shall determine the procedure with respect to any challenge. The challenged President shall not participate in such determination.

If the President of a Division is challenged, the functions relating to the efficient running of the proceedings conferred upon him by the Procedural Rules (Articles R27 *et seq.*), shall be performed by his deputy or by the CAS President, if the deputy is also challenged. No disqualified person shall receive any information concerning the activities of CAS regarding the arbitration proceedings giving rise to his disqualification.

- S22 CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required.

The CAS Court Office performs the functions assigned to it by this Code.

## **D Miscellaneous Provisions**

- S23 These Statutes are supplemented by the Procedural Rules adopted by ICAS.

- S24 The English text and the French text are authentic. In the event of any divergence, the French text shall prevail.

S25 These Statutes may be amended by decision of the ICAS pursuant to Article S8.

S26 These Statutes and Procedural Rules come into force by the decision of ICAS, taken by a two-thirds majority.

## **Procedural Rules**

### **A General Provisions**

#### **R27 Application of the Rules**

These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

Such disputes may involve matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and may include, more generally, any activity or matter related or connected to sport.

#### **R28 Seat**

The seat of CAS and of each Arbitration Panel (Panel) is Lausanne, Switzerland. However, should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing.

#### **R29 Language**

The CAS working languages are French and English. In the absence of agreement between the parties, the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, shall select one of these two languages as the language of the arbitration at the outset of the procedure, taking into account all relevant circumstances. Thereafter, the proceedings shall be conducted exclusively in that language, unless the parties and the Panel agree otherwise.

The parties may request that a language other than French or English be selected, provided that the Panel and the CAS Court Office agree. If agreed, the CAS Court

Office determines with the Panel the conditions related to the choice of the language; the Panel may order that the parties bear all or part of the costs of translation and interpretation.

The Panel or, prior to the constitution of the Panel, the Division President may order that all documents submitted in languages other than that of the proceedings be filed together with a certified translation in the language of the proceedings.

#### R30 Representation and Assistance

The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office.

#### R31 Notifications and Communications

All notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office. The notifications and communications shall be sent to the address shown in the arbitration request or the statement of appeal, or to any other address specified at a later date.

All arbitration awards, orders, and other decisions made by CAS and the Panel shall be notified by courier and/or by facsimile and/or by electronic mail but at least in a form permitting proof of receipt.

The request for arbitration, the statement of appeal and any other written submissions, printed or saved on digital medium, must be filed by courier delivery to the CAS Court Office by the parties in as many copies as there are other parties and arbitrators, together with one additional copy for the CAS itself, failing which the CAS shall not proceed. If they are transmitted by facsimile in advance, the filing is valid upon receipt of the facsimile by the CAS Court Office provided that the written submission is also filed by courier within the relevant time limit, as mentioned above.

Filing of the above-mentioned submissions by electronic mail is permitted under the conditions set out in the CAS guidelines on electronic filing.

The exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified; the CAS Court Office may then forward them by the same means. Any other communications from the parties intended for the CAS Court Office or the Panel shall be sent by courier, facsimile or electronic mail to the CAS Court Office.

### R32 Time limits

The time limits fixed under this Code shall begin from the day after that on which notification by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification is to be made, the time limit shall expire at the end of the first subsequent business day.

Upon application on justified grounds and after consultation with the other party (or parties), either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant and provided that the initial time limit has not already expired. With the exception of the time limit for the statement of appeal, any request for a first extension of time of a maximum of five days can be decided by the CAS Secretary General without consultation with the other party or parties.

The Panel or, if it has not yet been constituted, the President of the relevant Division may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.

### R33 Independence and Qualifications of Arbitrators

Every arbitrator shall be and remain impartial and independent of the parties and shall immediately disclose any circumstances which may affect his independence with respect to any of the parties.

Every arbitrator shall appear on the list drawn up by the ICAS in accordance with the Statutes which are part of this Code, shall have a good command of the language of the arbitration and shall be available as required to complete the arbitration expeditiously.

### R34 Challenge

An arbitrator may be challenged if the circumstances give rise to legitimate doubts over his independence or over his impartiality. The challenge shall be brought within seven days after the ground for the challenge has become known.

Challenges shall be determined by the ICAS Board, which has the discretion to refer a case to ICAS. The challenge of an arbitrator shall be lodged by the party raising it, in the form of a petition setting forth the facts giving rise to the challenge, which shall be sent to the CAS Court Office. The ICAS Board or ICAS shall rule on the challenge after the other party (or parties), the challenged arbitrator and the other arbitrators, if any, have been invited to submit written comments. Such comments shall be communicated by the CAS Court Office to the parties and to the other arbitrators, if

any. The ICAS Board or ICAS shall give brief reasons for its decision and may decide to publish it.

#### R35 Removal

An arbitrator may be removed by the ICAS if he refuses to or is prevented from carrying out his duties or if he fails to fulfil his duties pursuant to this Code within a reasonable time. ICAS may exercise such power through its Board. The Board shall invite the parties, the arbitrator in question and the other arbitrators, if any, to submit written comments and shall give brief reasons for its decision. Removal of an arbitrator cannot be requested by a party.

#### R36 Replacement

In the event of resignation, death, removal or successful challenge of an arbitrator, such arbitrator shall be replaced in accordance with the provisions applicable to his appointment. Unless otherwise agreed by the parties or otherwise decided by the Panel, the proceedings shall continue without repetition of any aspect thereof prior to the replacement.

#### R37 Provisional and Conservatory Measures

No party may apply for provisional or conservatory measures under these Procedural Rules before all internal legal remedies provided for in the rules of the federation or sports-body concerned have been exhausted.

Upon filing of the request for provisional measures, the Applicant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—, without which CAS shall not proceed. The CAS Court Office fee shall not be paid again upon filing of the request for arbitration or of the statement of appeal in the same procedure.

The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter, the Panel may, upon application by a party, make an order for provisional or conservatory measures. In agreeing to submit any dispute subject to the ordinary arbitration procedure or to the appeal arbitration procedure to these Procedural Rules, the parties expressly waive their rights to request any such measures from state authorities or tribunals.

Should an application for provisional measures be filed, the President of the relevant Division or the Panel shall invite the other party (or parties) to express a position within ten days or a shorter time limit if circumstances so require. The President of the relevant Division or the Panel shall issue an order on an expedited basis and shall first rule on the *prima facie* CAS jurisdiction. The Division President may terminate the arbitration procedure if he rules that the CAS clearly has no jurisdiction. In cases of utmost urgency, the President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the President of the Panel may issue an order upon mere presentation of the application, provided that the opponent is subsequently heard.

When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s).

The procedure for provisional measures and the provisional measures already granted, if any, are automatically annulled if the party requesting them does not file a related request for arbitration within 10 days following the filing of the request for provisional measures (ordinary procedure) or any statement of appeal within the time limit provided by Article R49 of the Code (appeals procedure). Such time limits cannot be extended.

Provisional and conservatory measures may be made conditional upon the provision of security.

## **B Special Provisions Applicable to the Ordinary Arbitration Procedure**

### **R38 Request for Arbitration**

The party intending to submit a matter to arbitration under these Procedural Rules (Claimant) shall file a request with the CAS Court Office containing:

- the name and full address of the Respondent(s);
- a brief statement of the facts and legal argument, including a statement of the issue to be submitted to the CAS for determination;
- its request for relief;
- a copy of the contract containing the arbitration agreement or of any document providing for arbitration in accordance with these Procedural Rules;
- any relevant information about the number and choice of the arbitrator(s); if the relevant arbitration agreement provides for three arbitrators, the name of the arbitrator from the CAS list of arbitrators chosen by the Claimant.

Upon filing its request, the Claimant shall pay the Court Office fee provided in Article R64.1.

If the above-mentioned requirements are not fulfilled when the request for arbitration is filed, the CAS Court Office may grant a single short deadline to the Claimant to complete the request, failing which the CAS Court Office shall not proceed.

### **R39 Initiation of the Arbitration by CAS and Answer – CAS Jurisdiction**

Unless it is clear from the outset that there is no arbitration agreement referring to CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. It shall communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s) from the CAS list, as well as to file an answer to the request for arbitration.

The answer shall contain:

- a brief statement of defence;
- any defence of lack of jurisdiction;
- any counterclaim.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant of his share of the advance of costs provided by Article R64.2 of this Code.

The Panel shall rule on its own jurisdiction, irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Where a party files a request for arbitration related to an arbitration agreement and facts similar to those which are the subject of a pending ordinary procedure before CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may, after consulting the parties, decide to consolidate the two procedures.

## R40 Formation of the Panel

### R40.1 Number of Arbitrators

The Panel is composed of one or three arbitrators. If the arbitration agreement does not specify the number of arbitrators, the President of the Division shall determine the number, taking into account the circumstances of the case. The Division President may choose to appoint a Sole arbitrator when the Claimant so requests and the Respondent does not pay its share of the advance of costs within the time limit fixed by the CAS Court Office.

### R40.2 Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

If, by virtue of the arbitration agreement or a decision of the President of the Division, a sole arbitrator is to be appointed, the parties may select him by mutual agreement within a time limit of fifteen days set by the CAS Court Office upon receipt of the request. In the absence of agreement within that time limit, the President of the Division shall proceed with the appointment.

If, by virtue of the arbitration agreement, or a decision of the President of the Division, three arbitrators are to be appointed, the Claimant shall nominate its arbitrator in the request or within the time limit set in the decision on the number of arbitrators, failing which the request for arbitration is deemed to have been withdrawn. The Respondent shall nominate its arbitrator within the time limit set by the CAS Court Office upon receipt of the request. In the absence of such appointment, the President of the Division shall proceed with the appointment in lieu of the Respondent. The two arbitrators so appointed shall select the President of the Panel by mutual agreement within a time limit set by the CAS Court Office. Failing agreement within that time limit, the President of the Division shall appoint the President of the Panel.

#### R40.3 Confirmation of the Arbitrators and Transfer of the File

An arbitrator nominated by the parties or by other arbitrators shall only be deemed appointed after confirmation by the President of the Division, who shall ascertain that each arbitrator complies with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs provided by Article R64.2 of the Code.

An *ad hoc* clerk independent of the parties may be appointed to assist the Panel. His fees shall be included in the arbitration costs.

#### R41 Multiparty Arbitration

##### R41.1 Plurality of Claimants / Respondents

If the request for arbitration names several Claimants and/or Respondents, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1.

If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed and there are several Claimants, the Claimants shall jointly nominate an arbitrator. If three arbitrators are to be appointed and there are several Respondents, the Respondents shall jointly nominate an arbitrator. In the absence of such a joint nomination, the President of the Division shall proceed with the particular appointment.

If there are three or more parties with divergent interests, both arbitrators shall be appointed in accordance with the agreement between the parties. In the absence of agreement, the arbitrators shall be appointed by the President of the Division in accordance with Article R40.2.

In all cases, the arbitrators shall select the President of the Panel in accordance with Article R40.2.

#### R41.2 Joinder

If a Respondent intends to cause a third party to participate in the arbitration, it shall so state in its answer, together with the reasons therefor, and file an additional copy of its answer. The CAS Court Office shall communicate this copy to the person whose participation is requested and fix a time limit for such person to state its position on its participation and to submit a response pursuant to Article R39. It shall also fix a time limit for the Claimant to express its position on the participation of the third party.

#### R41.3 Intervention

If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the CAS Court Office, together with the reasons therefor within 10 days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The CAS Court Office shall communicate a copy of this application to the parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to Article R39.

#### R41.4 Joint Provisions on Joinder and Intervention

A third party may only participate in the arbitration if it is bound by the arbitration agreement or if it and the other parties agree in writing.

Upon expiration of the time limit set in Articles R41.2 and R41.3, the President of the Division or the Panel, if it has already been appointed, shall decide on the participation of the third party, taking into account, in particular, the *prima facie* existence of an arbitration agreement as contemplated in Article R39. The decision of the President of the Division shall be without prejudice to the decision of the Panel on the same matter.

If the President of the Division accepts the participation of the third party, CAS shall proceed with the formation of the Panel in accordance with the number of arbitrators and the method of appointment agreed by all parties. In the absence of agreement between the parties, the President of the Division shall decide on the number of arbitrators in accordance with Article R40.1. If a sole arbitrator is to be appointed, Article R40.2 shall apply. If three arbitrators are to be appointed, the arbitrators shall be appointed by the President of the Division and shall nominate the President of the Panel in accordance with Article R40.2.

Regardless of the decision of the Panel on the participation of the third party, the formation of the Panel cannot be challenged. In the event that the Panel accepts the participation, it shall, if required, issue related procedural directions.

After consideration of submissions by all parties concerned, the Panel shall determine the status of the third party and its rights in the procedure.

After consideration of submissions by all parties concerned, the Panel may allow the filing of *amicus curiae* briefs, on such terms and conditions as it may fix.

R42 Conciliation

The President of the Division, before the transfer of the file to the Panel, and thereafter the Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

R43 Confidentiality

Proceedings under these Procedural Rules are confidential. The parties, the arbitrators and CAS undertake not to disclose to any third party any facts or other information relating to the dispute or the proceedings without the permission of CAS. Awards shall not be made public unless all parties agree or the Division President so decides.

R44 Procedure before the Panel

R44.1 Written Submissions

The proceedings before the Panel comprise written submissions and, if the Panel deems it appropriate, an oral hearing. Upon receipt of the file and if necessary, the President of the Panel shall issue directions in connection with the written submissions. As a general rule, there shall be one statement of claim, one response and, if the circumstances so require, one reply and one second response. The parties may, in the statement of claim and in the response, raise claims not contained in the request for arbitration and in the answer to the request. Thereafter, no party may raise any new claim without the consent of the other party.

Together with their written submissions, the parties shall produce all written evidence upon which they intend to rely. After the exchange of the written submissions, the parties shall not be authorized to produce further written evidence, except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.

In their written submissions, the parties shall list the name(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, and shall state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions, unless the President of the Panel decides otherwise.

If a counterclaim and/or jurisdictional objection is filed, the CAS Court Office shall fix a time limit for the Claimant to file an answer to the counterclaim and/or jurisdictional objection.

## R44.2 Hearing

If a hearing is to be held, the President of the Panel shall issue directions with respect to the hearing as soon as possible and set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, any witnesses and any experts, as well as the parties' final oral arguments, for which the Respondent is heard last.

The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant. Unless the parties agree otherwise, the hearings are not public. Minutes of the hearing may be taken. Any person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person.

The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called.

The President of the Panel may decide to conduct a hearing by video-conference or to hear some parties, witnesses and experts via tele-conference or video-conference. With the agreement of the parties, he may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a statement.

The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance.

Before hearing any witness, expert or interpreter, the Panel shall solemnly invite such person to tell the truth, subject to the sanctions of perjury.

Once the hearing is closed, the parties shall not be authorized to produce further written pleadings, unless the Panel so orders.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing.

## R44.3 Evidentiary Proceedings Ordered by the Panel

A party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that such documents are likely to exist and to be relevant.

If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step. The Panel may order the parties to contribute to any additional costs related to the hearing of witnesses and experts.

The Panel shall consult the parties with respect to the appointment and terms of reference of any expert. The expert shall be independent of the parties. Before

appointing him, the Panel shall invite him to immediately disclose any circumstances likely to affect his independence with respect to any of the parties.

#### R44.4 Expedited Procedure

With the consent of the parties, the Division President or the Panel may proceed in an expedited manner and may issue appropriate directions therefor.

#### R44.5 Default

If the Claimant fails to submit its statement of claim in accordance with Article R44.1 of the Code, the request for arbitration shall be deemed to have been withdrawn.

If the Respondent fails to submit its response in accordance with Article R44.1 of the Code, the Panel may nevertheless proceed with the arbitration and deliver an award.

If any of the parties, or its witnesses, has been duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing and deliver an award.

#### R45 Law Applicable to the Merits

The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*.

#### R46 Award

The award shall be made by a majority decision, or, in the absence of a majority, by the President alone. The award shall be written, dated and signed. Unless the parties agree otherwise, it shall briefly state reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice. Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to delivery of the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award notified by the CAS Court Office shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in a subsequent agreement, in particular at the outset of the arbitration.

## **C Special Provisions Applicable to the Appeal Arbitration Procedure**

### **R47 Appeal**

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

### **R48 Statement of Appeal**

The Appellant shall submit to CAS a statement of appeal containing:

- the name and full address of the Respondent(s);
- a copy of the decision appealed against;
- the Appellant's request for relief;
- the nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;
- if applicable, an application to stay the execution of the decision appealed against, together with reasons;
- a copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS.

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.2.

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed.

### **R49 Time limit for Appeal**

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of

appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

R50 Number of Arbitrators

The appeal shall be submitted to a Panel of three arbitrators, unless the parties have agreed to a Panel composed of a sole arbitrator or, in the absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent has paid its share of the advance of costs within the time limit fixed by the CAS Court Office.

When two or more cases clearly involve the same issues, the President of the Appeals Arbitration Division may invite the parties to agree to refer these cases to the same Panel; failing any agreement between the parties, the President of the Division shall decide.

R51 Appeal Brief

Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit.

In his written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

R52 Initiation of the Arbitration by the CAS

Unless it appears from the outset that there is clearly no arbitration agreement referring to CAS or that the agreement is clearly not related to the dispute at stake, CAS shall take all appropriate actions to set the arbitration in motion. The CAS Court Office shall communicate the statement of appeal to the Respondent, and the President of the Division shall proceed with the formation of the Panel in accordance with Articles R53 and R54. If applicable, he shall also decide promptly on any application for a stay or for interim measures.

The CAS Court Office shall send a copy of the statement of appeal and appeal brief to the authority which issued the challenged decision, for information .

With the agreement of the parties, the Panel or, if it has not yet been appointed, the President of the Division may proceed in an expedited manner and shall issue appropriate directions for such procedure.

Where a party files a statement of appeal in connection with a decision which is the subject of a pending appeal before CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may decide, after inviting submissions from the parties, to consolidate the two procedures.

#### R53 Nomination of Arbitrator by the Respondent

Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall make the appointment.

#### R54 Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by CAS

If, by virtue of the parties' agreement or of a decision of the President of the Division, a sole arbitrator is to be appointed, the President of the Division shall appoint the sole arbitrator upon receipt of the motion for appeal or as soon as a decision on the number of arbitrators has been rendered.

If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel following nomination of the arbitrator by the Respondent and after having consulted the arbitrators. The arbitrators nominated by the parties shall only be deemed appointed after confirmation by the President of the Division. Before proceeding with such confirmation, the President of the Division shall ensure that the arbitrators comply with the requirements of Article R33.

Once the Panel is formed, the CAS Court Office takes notice of the formation of the Panel and transfers the file to the arbitrators, unless none of the parties has paid an advance of costs in accordance with Article R64.2 of the Code.

An *ad hoc* clerk, independent of the parties, may be appointed to assist the Panel. His fees shall be included in the arbitration costs.

Article R41 applies *mutatis mutandis* to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division.

#### R55 Answer of the Respondent – CAS Jurisdiction

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing:

- a statement of defence;

- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts he intends to call, stating their area of expertise, and state any other evidentiary measure which he requests.

If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of his share of the advance of costs in accordance with Art. R64.2.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the opposing party (parties) to file written submissions on the matter of CAS jurisdiction. The Panel may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

#### R56 Appeal and answer complete – Conciliation

Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer.

The Panel may at any time seek to resolve the dispute by conciliation. Any settlement may be embodied in an arbitral award rendered by consent of the parties.

#### R57 Scope of Panel’s Review – Hearing

The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. The President of the Panel may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal. Upon transfer of the CAS file to the Panel, the President of the Panel shall issue directions in connection with the hearing for the examination of the parties, the witnesses and the experts, as well as for the oral arguments.

After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing. At the hearing, the proceedings take place in camera, unless the parties agree otherwise.

The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. Articles R44.2 and R44.3 shall also apply.

If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award.

R58 Law Applicable to the merits

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

R59 Award

The award shall be rendered by a majority decision, or in the absence of a majority, by the President alone. It shall be written, dated and signed. The award shall state brief reasons. The sole signature of the President of the Panel or the signatures of the two co-arbitrators, if the President does not sign, shall suffice.

Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by CAS and are not notified.

The Panel may decide to communicate the operative part of the award to the parties, prior to the reasons. The award shall be enforceable from such notification of the operative part by courier, facsimile and/or electronic mail.

The award, notified by the CAS Court Office, shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The operative part of the award shall be communicated to the parties within three months after the transfer of the file to the Panel. Such time limit may be extended by the President of the Appeals Arbitration Division upon a reasoned request from the President of the Panel.

The award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential. In any event, the other elements of the case record shall remain confidential.

## **D Special Provisions Applicable to the Consultation Proceedings**

R60 [abrogated]

R61 [abrogated]

R62 [abrogated]

## **E Interpretation**

R63 A party may, not later than 45 days following the notification of the award, apply to CAS for the interpretation of an award issued in an ordinary or appeals arbitration, if the operative part of the award is unclear, incomplete, ambiguous, if its components are self-contradictory or contrary to the reasons, or if the award contains clerical mistakes or mathematical miscalculations.

When an application for interpretation is filed, the President of the relevant Division shall review whether there are grounds for interpretation. If so, he shall submit the request for interpretation to the Panel which rendered the award. Any Panel members who are unable to act at such time shall be replaced in accordance with Article R36. The Panel shall rule on the request within one month following the submission of the request for interpretation to the Panel.

## **F Costs of the Arbitration Proceedings**

R64 General

R64.1 Upon filing of the request/statement of appeal, the Claimant/Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.—, without which the CAS shall not proceed. The Panel shall take such fee into account when assessing the final amount of costs.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the

payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R64.2 Upon formation of the Panel, the CAS Court Office shall fix, subject to later changes, the amount, the method and the time limits for the payment of the advance of costs. The filing of a counterclaim or a new claim may result in the calculation of additional advances.

To determine the amount to be paid in advance, the CAS Court Office shall fix an estimate of the costs of arbitration, which shall be borne by the parties in accordance with Article R64.4. The advance shall be paid in equal shares by the Claimant(s)/Appellant(s) and the Respondent(s). If a party fails to pay its share, another may substitute for it; in case of non-payment of the entire advance of costs within the time limit fixed by the CAS, the request/appeal shall be deemed withdrawn and the CAS shall terminate the arbitration; this provision applies *mutatis mutandis* to any counterclaim.

R64.3 Each party shall pay for the costs of its own witnesses, experts and interpreters.

If the Panel appoints an expert or an interpreter, or orders the examination of a witness, it shall issue directions with respect to an advance of costs, if appropriate.

R64.4 At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:

- the CAS Court Office fee,
- the administrative costs of the CAS calculated in accordance with the CAS scale,
- the costs and fees of the arbitrators,
- the fees of the *ad hoc* clerk, if any, calculated in accordance with the CAS fee scale,
- a contribution towards the expenses of the CAS, and
- the costs of witnesses, experts and interpreters.

The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

R64.5 In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.

R65 Appeals against decisions issued by international federations in disciplinary matters

R65.1 This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration costs be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue.

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.

Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000.— without which CAS shall not proceed and the appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R65.3 Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties.

R65.4 If the circumstances so warrant, including the predominant economic nature of a disciplinary case or whether the federation which has rendered the challenged decision is not a signatory to the Agreement constituting ICAS, the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration, either *ex officio* or upon request of the President of the Panel.

R66 Consultation Proceedings

[abrogated]

**G Miscellaneous Provisions**

R67 These Rules are applicable to all procedures initiated by the CAS as from 1 March 2013. The procedures which are pending on 1 March 2013 remain subject to the Rules

in force before 1 March 2013, unless both parties request the application of these Rules.

R68 CAS arbitrators, CAS mediators, ICAS and its members, CAS and its employees are not liable to any person for any act or omission in connection with any CAS proceeding.

R69 The French text and the English text are authentic. In the event of any discrepancy, the French text shall prevail.

R70 The Procedural Rules may be amended pursuant to Article S8.

## Annex 5

[ICAS-CAS organization description from CAS website]



## GENERAL INFORMATION

## HISTORY OF THE CAS

[home](#) / [General Information](#) / [History of the CAS](#)

### ORGANISATION AND STRUCTURE OF THE ICAS AND CAS

#### 1. The Code of Sports-related Arbitration of 22 November 1994

Since 22 November 1994, the Code of Sports-related Arbitration (hereinafter: the Code) has governed the organisation and arbitration procedures of the CAS. The Code was revised in 2003 in order to incorporate certain long-established principles of CAS case-law or practices consistently followed by the arbitrators and the Court Office. The latest version of the Code of Sports-related Arbitration entered into force on 1 January 2010. The 70-article Code is divided into two parts: the Statutes of bodies working for the settlement of sports-related disputes (articles S1 to S26), and the Procedural Rules (articles R27 to R70). Since 1999, the Code has also contained a set of mediation rules instituting a non-binding, informal procedure which offers parties the option of negotiating, with the help of a mediator, an agreement to settle their dispute.

The Code thus establishes rules for four distinct procedures:

- the ordinary arbitration procedure;
- the appeals arbitration procedure;
- the advisory procedure, which is non-contentious and allows certain sports bodies to seek advisory opinions from the CAS;
- the mediation procedure.

There are two classic phases to arbitration proceedings: written proceedings, with an exchange of statements of case, and oral proceedings, where the parties are heard by the arbitrators, generally at the seat of the CAS in Lausanne.

The mediation procedure follows the pattern decided by the parties. Failing agreement on this, the CAS mediator decides the procedure to be followed.

#### 2. The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.

The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law.

Upon their appointment, the ICAS members must sign a declaration undertaking to exercise their function in a personal capacity, with total objectivity and independence. This obviously means that in no circumstances can a member play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party.

The ICAS exercises several functions which are listed under article S6 of the Code. It does so either itself, or through the intermediary of its Board, made up of the ICAS President and two vice-presidents, plus the two presidents of the CAS Divisions. There are, however, certain functions which the ICAS may not delegate. Any changes to the Code of Sports-related Arbitration can be decided only by a full meeting of the ICAS and, more specifically, a majority of two-thirds of its members. In other cases, a simple majority is sufficient, provided that at least half the ICAS members are present when the decision is taken. The ICAS

#### ORIGINS

##### ORGANISATION OF THE CAS FROM ITS CREATION UNTIL 1994

##### THE 1994 REFORM

##### THE PARIS AGREEMENT

##### ORGANISATION AND STRUCTURE OF THE ICAS AND CAS

##### TYPES OF DISPUTES SUBMITTED TO THE CAS

##### THE DECENTRALISED CAS OFFICES AND THE AD HOC DIVISIONS

elects its own President, who is also the CAS President, plus its two Vice-presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division and the deputies of these divisions. It also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

### 3. The Court of Arbitration for Sport (CAS)

The CAS performs its functions through the intermediary of arbitrators, of whom there are at least 150, with the aid of its court office, which is headed by the Secretary General. One of the major new features following the reform of the CAS was the creation of two divisions: an "Ordinary Arbitration Division", for sole-instance disputes submitted to the CAS, and an "Appeals Arbitration Division", for disputes resulting from final-instance decisions taken by sports organisations. Each division is headed by a president.

The role of the division presidents is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitrators are appointed. The presidents are often called upon to issue orders on requests for interim relief or for suspensive effect, and intervene in the framework of constituting the panels of arbitrators. Once nominated, the arbitrators subsequently take charge of the procedure.

The 275 CAS arbitrators (2007 figure) are appointed by the ICAS for a renewable term of four years. The Code stipulates that the ICAS must call upon "personalities with a legal training and who possess recognised competence with regard to sport". The appointment of arbitrators follows more-or-less the same pattern as for the ICAS members. The CAS arbitrators are appointed at the proposal of the IOC, the IFs and the NOCs. The ICAS also appoints arbitrators "with a view to safeguarding the interests of the athletes" (article S14 of the Code), as well as arbitrators chosen from among personalities independent of sports organisations.

Even when the CAS arbitrators are proposed by sports organisations, the fact remains that they must carry out their functions with total objectivity and independence. When they are appointed, they have to sign a declaration to this effect.

The arbitrators are not attached to a particular CAS division, and can sit on panels called upon to rule under the ordinary procedure as well as those ruling under the appeals procedure. CAS panels are composed either of a single arbitrator or of three. All arbitrators are bound by the duty of confidentiality and may not reveal any information connected with the parties, the dispute or the proceedings themselves.



## Annex 6

[BAT Arbitration Rules]



# **BASKETBALL ARBITRAL TRIBUNAL (BAT)**

## **Arbitration Rules**

1 April 2011  
Version



## **BASKETBALL ARBITRAL TRIBUNAL**

### **ARBITRATION RULES**

#### **0. Preamble**

- 0.1 The Basketball Arbitral Tribunal (hereinafter the "BAT") has been created by Fédération Internationale de Basketball (hereinafter "FIBA") with a view to provide parties involved in disputes arising in the world of basketball with an efficient and effective means of resolving these disputes.
- 0.2 Parties wishing to have their disputes decided by the BAT recognise that the BAT Arbitration Rules are designed to provide for a simple, quick and inexpensive means to resolve these disputes. As a consequence, the BAT Arbitration Rules require cooperation by the parties, in particular with respect to the limited number of written submissions (as a rule one submission per party) and the short time limits to be strictly observed. In the interest of speed, the parties recognise that BAT arbitration proceedings are conducted before a single arbitrator appointed by the BAT President, that the BAT arbitrators decide *ex aequo et bono* (see Article 15.1 below) and that hearings will be held only upon request by one of the parties and/or upon a decision by the Arbitrator.
- 0.3 It is recommended that parties wishing to refer their possible disputes to the BAT use the following arbitration clause:

*"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."*

## **1. Jurisdiction**

- 1.1 These BAT Arbitration Rules shall apply whenever the parties to a dispute have agreed in writing to submit the same to the BAT – including by reference to its former name "FIBA Arbitral Tribunal (FAT)" –, provided that FIBA, its Zones or their respective divisions are not directly involved in the dispute.
- 1.2 A BAT Arbitrator (hereinafter the "Arbitrator") is entitled to refuse to proceed with the arbitration at any time if he/she considers that arbitration under these Rules is not appropriate to resolve the dispute.
- 1.3 The Arbitrator shall have the power to rule on his/her own jurisdiction, including on any objection with respect to the existence, scope or validity of the arbitration agreement.

## **2. Seat**

- 2.1 The seat of the BAT and of each arbitral proceeding before the Arbitrator shall be Geneva, Switzerland, even if, upon decision by the Arbitrator and after consultation with the parties, hearings, if any, are held in another place.
- 2.2 Arbitration proceedings before the BAT are governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile.

## **3. Procedure before the Arbitrator, Waiver**

- 3.1 To the extent not provided otherwise herein the Arbitrator shall determine in his/her sole discretion the procedure in the proceedings before him/her.
- 3.2 Any party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or any other rules applicable to the proceedings, any direction given by the Arbitrator, or to the conduct of the proceedings, shall be deemed to have waived its right to object.

## **4. Language**

- 4.1 The working language of the BAT shall be English.

- 4.2 Documents provided to BAT in a language other than English must be accompanied by a certified translation unless the Arbitrator decides otherwise.
- 4.3 The Arbitrator may decide, after consultation with the parties, to hold the proceedings in another language.

## **5. Representation of the Parties**

The parties may be assisted by counsel or by any other person of their choice.

## **6. Filing Address, Notifications and Communications**

- 6.1 Requests for Arbitration shall be filed by e-mail to the BAT Secretariat (see [www.fiba.com](http://www.fiba.com)) or with

Fédération Internationale de Basketball  
Contact Information Redacted

Telephone: Contact Information Redacted  
Telefax: Contact Information Redacted

- 6.2 Upon receipt of the Request for Arbitration, all further notifications and communications to and from the BAT shall be made through the BAT Secretariat, the contact details of which will be communicated to the parties by the Arbitrator.
- 6.3 Notifications and communications to the parties or their counsel shall be made in writing, including telefax and e-mail, to the addresses indicated in the Request for Arbitration and the Answer or any other address specified in writing at a later point in time.

The Arbitrator is entitled to request the parties to submit electronic copies by e-mail of their submissions.

## **7. Time Limits**

- 7.1 Time limits for the filing of written submissions or other procedural acts shall be determined by the Arbitrator by reference to a specific date.
- 7.2 The Arbitrator may extend the time limits in exceptional circumstances.

## **8. Arbitrators, Limitation of Liability**

- 8.1 All disputes before the BAT will be decided by a single Arbitrator appointed by the BAT President on a rotational basis from the published list of BAT arbitrators applicable at the time when the Request for Arbitration is received by FIBA. In the event that the Arbitrator so appointed is unavailable or declines the appointment, the BAT President shall appoint the next available Arbitrator.
- 8.2 Before proceeding with the arbitration, the Arbitrator shall sign a declaration of acceptance and independence provided by the BAT Secretariat. A copy of the signed declaration shall be sent to the parties.
- 8.3 An Arbitrator may be challenged if the circumstances give rise to legitimate doubts regarding his independence. The challenge shall be brought in writing within seven days after the ground for the challenge has become known to the party making the challenge. Challenges are to be determined exclusively by the BAT President who shall rule on the challenge after having given to all parties and the Arbitrator an opportunity to state their position.
- 8.4 FIBA, the BAT President, BAT Arbitrators and all personnel involved in BAT Arbitration cannot be held liable for any act or omission in connection with arbitration proceedings hereunder except in cases of grossly negligent or wilful acts or omissions.

## **9. Requests for Arbitration, Advance on Costs**

- 9.1 A BAT arbitration shall commence on the date of receipt by FIBA of a Request for Arbitration, which shall contain the following:
- The names, postal addresses, telephone, facsimile numbers and e-mail addresses of the Claimant and the Respondent and their respective counsel.
  - A statement of all the facts and the legal arguments.
  - The Claimant's request for relief.
  - A copy of the contract containing the agreement to have the dispute resolved by arbitration before BAT (see also Article 1.1).
  - All written evidence on which the Claimant intends to rely.
  - Any request for a hearing and for the examination of (a) witness(es).

- 9.2 The arbitration will not proceed until the non-reimbursable handling fee provided in Article 17.1 below is received in the BAT bank account.
- 9.3 The BAT Secretariat shall fix an advance on costs (and may adjust the same in the course of the proceedings) to be paid in equal shares by both parties (unless decided otherwise by the Arbitrator) into the BAT bank account (Article 17.1 below); in fixing the amount of the advance on costs the BAT Secretariat shall take into account inter alia the monetary value of the dispute and the complexity of the case. Where the monetary value of the dispute is below EUR 30,000 the advance on costs fixed for an award without reasons (Article 16.2 below) shall not exceed EUR 5,000 unless decided otherwise by the Arbitrator.

If a party fails to pay its share, the other party may substitute for it.

The Arbitrator will not proceed with the arbitration until the full amount of the advance on costs is received. He/she may fix a final date for the payment of the advance on costs failing which the Request for Arbitration shall be deemed withdrawn.

## **10. Provisional and Conservatory Measures**

- 10.1 Upon request, the Arbitrator may make an order for provisional and conservatory measures. In cases of extreme urgency such orders can be made ex parte.
- 10.2 Orders for provisional and conservatory measures can be made conditional upon the posting of a security.
- 10.3 Requests for provisional or conservatory measures can only be brought together with or after the filing of a Request for Arbitration.
- 10.4 In agreeing to submit their dispute to these Rules, the parties expressly waive any right to request provisional or conservatory measures from any state court.

## **11. Initiation of the Arbitral Proceedings, Answer**

- 11.1 After filing, the Request for Arbitration shall be forwarded to the BAT President for a prima facie determination whether the arbitration can proceed, in particular, whether the Request complies with the requirements of Article 9.1 above and whether an arbitration agreement exists providing for the dispute to be adjudicated under these Rules.

11.2 If the BAT President determines that the arbitration can proceed, he/she shall appoint the Arbitrator (Article 8.1 above). The BAT Secretariat shall inform the parties thereof and shall communicate the Request for Arbitration and the time limit for an Answer. The Answer shall contain:

- Any defence of lack of jurisdiction.
- A statement of defence, including a statement of all the facts and legal arguments.
- Names and addresses of the Respondent and counsel, unless this has already been set out in the Request.
- Any counter claim and details of the relief sought.
- All written evidence on which the Respondent intends to rely.
- Any request for the holding of a hearing and for the examination of (a) witness(es).

## **12. Further Submissions, Procedural Orders, Settlement**

12.1 After the filing of the Request for Arbitration and the Answer, the Arbitrator shall determine in his/her sole discretion whether a further exchange of submissions is necessary. Unless he/she decides that it is necessary, further submissions will not be taken into account.

12.2 The Arbitrator may also issue any Order of Procedure. In particular, he/she may order the production of (additional) evidence or the parties' responses to specific questions, or give directions for the further proceedings.

12.3 The Arbitrator is authorized to attempt to bring about a settlement to the dispute.

## **13. Hearing**

13.1 No hearings are held in arbitration proceedings under these Rules unless one of the parties requests a hearing and/or the Arbitrator decides to hold a hearing. Hearings before the BAT shall be in private.

13.2 The Arbitrator shall determine in his/her sole discretion whether a hearing is to be held by telephone or video conference or whether and where a hearing in person is to be held.

- 13.3 The Arbitrator may make the holding of a hearing dependent on the payment of an additional advance on costs by one or both parties.
- 13.4 If witnesses are heard, the Arbitrator shall invite them to tell the truth and draw their attention to the fact that false testimony may lead to criminal sanctions.
- 13.5 The parties are responsible for the availability and the costs of their witnesses.

#### **14. Withdrawal of the Request, Default of Respondent**

- 14.1 If the Claimant fails to submit his Request for Arbitration in accordance with Article 9.1 above despite having been requested to submit any missing elements, the BAT President may decide that the Request is deemed withdrawn.
- 14.2 If the Respondent fails to submit an Answer or fails to submit his Answer in accordance with Article 11.2 above, the Arbitrator may nevertheless proceed with the arbitration and deliver an award. The same applies if any party fails to abide by an Order of Procedure or by directions given by the Arbitrator or fails to appear at a hearing.

#### **15. Law Applicable to the Merits**

- 15.1 Unless the parties have agreed otherwise the Arbitrator shall decide the dispute ex aequo et bono, applying general considerations of justice and fairness without reference to any particular national or international law.
- 15.2 If according to the arbitration clause the Arbitrator is not authorised to decide ex aequo et bono, he/she shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to such rules of law he/she deems appropriate.

#### **16. Award**

- 16.1 Subject to Article 16.2, the Arbitrator shall give a written, dated and signed award with summary reasons. Before signing the award the Arbitrator shall transmit a draft to the BAT President who may make suggestions as to the form of the award and, without affecting the Arbitrator's liberty of decision, may also draw his/her attention to points of substance.

In the interest of the development of consistent BAT case law, the BAT President may consult with other BAT Arbitrators on issues of principle raised by the award.

- 16.2 By agreeing to submit their dispute to arbitration under these Rules, the Parties agree that, where the value of the dispute does not exceed EUR 30,000, the Arbitrator will issue an award without reasons. The Arbitrator shall deliver reasons only in the case where a party
- a) files a request to that effect at any stage from when the Request for Arbitration is filed until no later than ten (10) days after the notification of the award without reasons; and
  - b) pays the respective advance on costs as determined and within the time limit set by the BAT Secretariat.
- 16.3 The Arbitrator shall endeavour to render the final award no later than six (6) weeks after the completion of the arbitral proceedings or the payment of the advance on costs referred to at Article 16.2(b), whichever comes last.
- 16.4 BAT awards are not confidential unless ordered otherwise by the Arbitrator.
- 16.5 BAT awards shall be deemed to have been made at the seat of the BAT and shall be final and binding upon communication to the parties.
- 16.6 If the parties reach a settlement after the Arbitrator has been appointed, the settlement shall be recorded in the form of a Consent Award if so requested by the parties and if the Arbitrator agrees to do so.
- 16.7 After notification of the BAT award, the Tribunal can, upon request by a party or on its own motion, correct any clerical, typographical or computational error contained in the award.

## **17. Costs of Arbitration**

- 17.1 Along with the filing of the Request for Arbitration the Claimant shall pay to the following bank account:

Beneficiary:	FIBA (Basketball Arbitral Tribunal)
Bank:	UBS Lausanne, Switzerland
Account No.:	Contact Information Redacted
IBAN:	Contact Information Redacted
Swift:	Contact Information Redacted

a non reimbursable handling fee in accordance with the scale set forth below:

Sum in Dispute <i>(in Euros)</i>	Handling Fee <i>(in Euros)</i>
up to 30,000	1,500
from 30,001 to 100,000	2,000
from 100,001 to 200,000	3,000
from 200,001 to 500,000	4,000
from 500,001 to 1,000,000	5,000
over 1,000,000	7,000

If no value is specified in the Request for Arbitration, the BAT President shall determine the applicable handling fee.

This handling fee shall be taken into account when granting the prevailing party a contribution towards its legal fees and other expenses (Article 17.3 below).

- 17.2 At the end of the proceedings, the BAT President shall determine the final amount of the costs of the arbitration which shall include the administrative and other costs of BAT and the fees and costs of the BAT President and the Arbitrator. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.

The fees of the Arbitrator shall be calculated on the basis of time spent at a rate to be determined by the BAT President from time to time.

- 17.3 The award shall determine which party shall bear the arbitration costs and in which proportion. As a general rule, the award shall grant the prevailing party a contribution towards its reasonable legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When deciding on such contribution, the Arbitrator shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.

**18. Miscellaneous**

- 18.1 These Rules enter into force on 1 April 2011 and are applicable to Requests for Arbitration received by the BAT Secretariat or by FIBA on or after such date.
- 18.2 Any reference to BAT's former name "FIBA Arbitral Tribunal (FAT)" shall be understood as referring to the BAT.

## Annex 7

[FIBA Internal Regulations re BAT]

## **CHAPTER VII. - BASKETBALL ARBITRAL TRIBUNAL (BAT)**

### **GENERAL PRINCIPLES**

289. FIBA establishes an independent Basketball Arbitral Tribunal (BAT) for the simple, quick and inexpensive resolution of disputes arising within the world of basketball in which FIBA, its Zones, or their respective divisions are not directly involved and with respect to which the parties to the dispute have agreed in writing to submit the same to the BAT.
290. BAT awards shall be final and binding upon communication to the parties.
291. The BAT is primarily designed to resolve disputes between clubs, players and agents.
292. It is recommended that parties wishing to refer their possible disputes to the BAT use the following arbitration clause in their contracts:  
"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President.  
The seat of the arbitration shall be Geneva, Switzerland.  
The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law (PILA), irrespective of parties' domicile. The language of arbitration shall be English. The arbitrator shall decide the dispute ex aequo et bono."

### **THE BAT ARBITRATION RULES**

293. Arbitration proceedings before BAT will be conducted in accordance with the BAT Arbitration Rules which are available from the FIBA Secretariat on request and which are available also on the FIBA website.
294. Any proposed changes to the BAT Arbitration Rules shall be prepared by the FIBA Legal Commission and shall be submitted to the FIBA Central Board for approval.

### **SEAT OF THE BAT**

295. The BAT has its seat in Geneva, Switzerland.

### **FINANCING**

296. The financing of the BAT is guaranteed by FIBA, it being understood that the BAT is designed to be self-financing.



**FIBA**

We Are Basketball

### **THE BAT PRESIDENT / THE BAT VICE PRESIDENT**

297. The BAT President and the BAT Vice President shall be appointed by the FIBA Central Board for a renewable term of four (4) years between the ordinary sessions of the FIBA elective Congress. They shall have legal training.
298. The BAT Vice-President shall substitute for the BAT President in case of the latter's inability to exercise the functions assigned to him under the BAT Arbitration Rules, including instances where the BAT President is prevented from exercising his functions due to a conflict of interest.

### **THE DUTIES OF THE BAT PRESIDENT**

299. The BAT President shall have the following duties:
  - a. To ensure the proper functioning of the BAT, inter alia, by establishing administrative guidelines for the tribunal.
  - b. To establish a list of at least three (3) BAT arbitrators for a renewable term of four (4) years between the ordinary sessions of the FIBA elective Congress. The BAT arbitrators shall have legal training and shall have experience with regard to sport.
  - c. To appoint, on a rotational basis, a BAT arbitrator to the individual arbitration proceedings before the BAT.
  - d. To establish a system of remuneration for the BAT arbitrators.
  - e. To exercise those functions assigned to him under the BAT Arbitration Rules.

### **HONOURING OF BAT AWARDS**

300. In the event that a party to a BAT Arbitration fails to honour a final award or any provisional or conservatory measures (the "first party") of BAT or CAS, the party seeking enforcement of such award (the "second party") shall have the right to request that FIBA sanction the first party. The sanctions can be imposed by FIBA:
  - a. A monetary fine of up to CHF 150,000 (see article 3-303); this fine can be applied more than once; and/or
  - b. Withdrawal of FIBA-license if the first party is a player's agent; and/or
  - c. A ban on international transfers if the first party is a player; and/or
  - d. A ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club.The above sanctions can be applied more than once.
301. The second party shall send to FIBA with his request a complete file of the BAT proceedings. The decision on the sanction is taken by the Secretary General. Before taking his decision he shall give the first party an opportunity to state his position.
302. The decision to sanction the first party shall be subject to appeal to the FIBA Appeals' Panel according to the FIBA Internal Regulations governing Appeals (see Book 1, Chapter VII).

## Annex 8

[Administrative portion of IRB Objection]



International Chamber of Commerce

The world business organization

International Centre for Expertise □ Centre international d'expertise

## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or Objections based on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to Contact Information Redacted*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

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ICC International Centre for ADR □ Centre international d’ADR de la CCI

Contact Information Redacted

Website [www.iccexpertise.org](http://www.iccexpertise.org)

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### Identification of the Parties, their Representatives and related entities

#### Objector

Name	International Rugby Board
Contact person	Julie O'Mahony, Senior Legal Counsel
Address	First Floor, Huguenot House, 35-38 St. Stephen's Green
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Objector, file separate Objections.*

#### Objector's Representative(s)

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative ((for example external counsel or in-house counsel)*

#### Objector's Contact Address

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Objector. The Contact Address can be the Objector's address, the Objector Representative's address or any other address used for correspondence in these proceedings.*

**Applicant**

Name	Atomic Cross, LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Applicant, file separate Objections.*

**Other Related Entities**

Name	Roar Domains, LLC
Contact person	Lara Meisner
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional related entity.*

Name	Minds and Machines, LLC
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Top Level Domains Holdings Limited
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted

Email	Contact Information Redacted
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Name	Rugby Domains, Ltd.
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Donuts Inc. (Parent Applicant
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Covered TLD, LLC (Parent of Applicant)
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

## Annex 9

[Administrative portion of FIBA Objection]



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## NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”) DISPUTE RESOLUTION PROCEDURE

### OBJECTION FORM TO BE COMPLETED BY THE OBJECTOR

- *Objections to several Applications or Objections based on more than one ground must be filed separately*
- *Form must be filed in English and submitted by email to Contact Information Redacted*
- *The substantive part is limited to 5000 words or 20 pages, whichever is less*

**Disclaimer:** This form is the template to be used by Objectors who wish to file an Objection. Objectors must review carefully the Procedural Documents listed below. This form may not be published or used for any purpose other than the proceedings pursuant to the New GTLD Dispute Resolution Procedure from ICANN administered by the ICC International Centre for Expertise (“Centre”).

#### References to use for the Procedural Documents

Name	Abbreviation
Rules for Expertise of the ICC	“Rules”
Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure	“Appendix III”
ICC Practice Note on the Administration of Cases	“ICC Practice Note”
Attachment to Module 3 - New gTLD Dispute Resolution Procedure	“Procedure”
Module 3 of the gTLD Applicant Guidebook	“Guidebook”

{Final FIBA v Donuts (00504807)-1 }

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**Identification of the Parties, their Representatives and related entities**

**Objector**

Name	Fédération Internationale de Basketball (FIBA)
Contact person	Patrick Koller, Communications Director
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Objector, file separate Objections.*

**Objector's Representative(s)**

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional representative ((for example external counsel or in-house counsel)*

**Objector's Contact Address**

Name	Fletcher, Heald & Hildreth, PLC
Contact person	Kathryn A. Kleiman and Robert J. Butler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*This address shall be used for all communication and notifications in the present proceedings. Accordingly, notification to this address shall be deemed as notification to the Objector. The Contact Address can be the Objector's address, the Objector Representative's address or any other address used for correspondence in these proceedings.*

**Applicant**

Name	Little Hollow, LLC
Contact person	Daniel Schindler
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*If there is more than one Applicant, file separate Objections.*

**Other Related Entities**

Name	Roar Domains, LLC
Contact person	Lara Meisner
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional related entity.*

Name	Minds and Machines, LLC
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Top Level Domains Holdings Limited
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted

Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Basketball Domains, Ltd.
Contact person	Antony Van Couvering
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Donuts Inc. (Parent of Applicant)
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

Name	Covered TLD, LLC (Parent of Applicant)
Contact person	
Address	Contact Information Redacted
City, Country	Contact Information Redacted
Telephone	Contact Information Redacted
Email	Contact Information Redacted

*Add separate tables for any additional related entity.*

## Annex 10

[Ethical Principles for Judges, Canadian Judicial Council]



# ETHICAL PRINCIPLES FOR JUDGES

CANADIAN  
JUDICIAL  
COUNCIL



# ETHICAL PRINCIPLES FOR JUDGES

© Canadian Judicial Council  
Catalogue Number JU11-4/2004E-PDF  
ISBN 0-662-38118-1

Available from:  
Canadian Judicial Council  
Ottawa, Ontario  
K1A 0W8

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and at: [www.cjc-ccm.gc.ca](http://www.cjc-ccm.gc.ca)

# FOREWORD

The ability of Canada's legal system to function effectively and to deliver the kind of justice that Canadians need and deserve depends in large part on the ethical standards of our judges.

The Canadian Judicial Council has a central concern in this matter. The adoption of a widely accepted ethical frame of reference helps the Council fulfill its responsibilities and ensures that judges and the public alike are aware of the principles by which judges should be guided in their personal and professional lives.

Since its creation in 1971, the Council has supported the judiciary in a positive way with tools that will help to improve the delivery of justice in this country. The publication in 1998 of Ethical Principles for Judges constitutes a valuable achievement in this regard.

We owe a continuing debt of gratitude to the working committee that the Council established in 1994 and to the many experts who collaborated to give Canadian judges an essential tool for the delivery of justice in this country. The Canadian Judicial Council is pleased to renew its endorsement of the high standards of conduct that are expressed in these principles.

The Right Honourable Beverley McLachlin  
Chief Justice of Canada

**i**  
**v**

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# 1. PURPOSE

**Statement** | *The purpose of this document is to provide ethical guidance for federally appointed judges.*

## **Principles:**

**1.** The Statements, Principles and Commentaries describe the very high standards toward which all judges strive. They are principles of reason to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. Setting out the very best in these Statements, Principles and Commentaries does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval.

**2.** The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.

**3.** An independent judiciary is the right of every Canadian. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in these Statements, Principles and Commentaries can, or is intended to limit or restrict judicial independence in any manner. To do so would be to deny the very thing this document seeks to further: the rights of everyone to equal and impartial justice administered by fair and independent judges. As indicated in the chapter on Judicial Independence, judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided by impartial judges.

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### **Commentary:**

**1.** These Statements, Principles and Commentaries are the latest in a series of Canadian efforts to provide guidance to judges on ethical and professional questions and to better inform the public about the high ideals which judges embrace and toward which they strive. They build upon the earlier work of the Hon. J.O. Wilson in *A Book for Judges* published in 1980, the Rt. Hon. Gerald Fauteux in *Le livre du magistrat* also published in 1980, the Canadian Judicial Council's *Commentaries on Judicial Conduct* published in 1991 and Professor Beverley Smith's text, *Professional Conduct for Lawyers and Judges* (1998). While drawing heavily on these invaluable resources, the present publication is by far the most comprehensive treatment of the subject to date in Canada. But it cannot provide exhaustive coverage of the myriad issues that arise in practice. The sources just mentioned, as well as those referred to in the next Commentary, will continue to be of assistance to Canadian judges.

**2.** As the references throughout the text indicate, a wide variety of sources have been consulted in the process of preparing this document. These include not only Canadian sources but also the Code of Judicial Conduct applying to the United States Federal judiciary, the American Bar Association's *Model Code of Judicial Conduct* (1990) as well as scholarly writing and rulings concerning judicial conduct in Canada, the United Kingdom, Australia and the United States. Of particular note are J.B. Thomas, *Judicial Ethics in Australia* (2d, 1997), J. Shaman et al, *Judicial Conduct and Ethics* (2d, 1995) and S. Shetreet, *Judges on Trial* (1976). While all of these sources are helpful, this document is uniquely the work of Canadian judges. The process which resulted in these Statements, Principles and Commentaries was carried forward by a Working Committee representative of both the Canadian Judicial Council and the Canadian Judges Conference. An extensive process of consultation within the judiciary and beyond ensured that these Statements, Principles and Commentaries have been the subject of painstaking examination and vigorous debate. The intention is that Canadian judges will accept these Statements, Principles and Commentaries as reflective of their high ethical aspirations and that they will find them worthy of respect and deserving of careful consideration when facing any of the issues addressed in them.

**3.** A document of this nature can never be viewed as the "final word" on such an important and complex subject. Publication of these Statements, Principles and Commentaries coincides with the establishment of an Advisory Committee of Judges to which specific questions may be submitted by judges and which will respond with advisory opinions. This process will contribute to ongoing review and elaboration of the subjects dealt with in the Principles as well as introduce new issues that they do not address. More importantly, the Advisory Committee will ensure that help is readily available to judges looking for guidance.



## 2. JUDICIAL INDEPENDENCE

**Statement:** *An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.*

7

### Principles:

1. Judges must exercise their judicial functions independently and free of extraneous influence.
2. Judges must firmly reject any attempt to influence their decisions in any matter before the Court outside the proper process of the Court.
3. Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.
4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

## Commentary:

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**1.** Judicial independence is not the private right of judges but the foundation of judicial impartiality and a constitutional right of all Canadians. Independence of the judiciary refers to the necessary individual and collective or institutional independence required for impartial decisions and decision making.<sup>1</sup> Judicial independence thus characterizes both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's impartiality in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence and impartiality. The Statement and Principles deal with judges' ethical obligations as regards their individual and collective independence. They do not deal with the many legal issues relating to judicial independence.

**2.** In *Valente v. The Queen*, LeDain, J. noted that "...judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."<sup>2</sup> He concluded that "...judicial independence is a status or relationship resting on objective conditions or guarantees as well as a state of mind or attitude in the actual exercise of judicial functions..."<sup>3</sup> The objective conditions and guarantees include, for example, security of tenure, security of remuneration and immunity from civil liability for judicial acts.

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<sup>1</sup> S. Shetreet, *Judges on Trial*, (1976) (hereafter "*Shetreet*") at 17.

<sup>2</sup> [1985] 2 S.C.R. 673 at 687.

<sup>3</sup> *Ibid.* at 689.

**3.** The first qualification of a judge is the ability to make independent and impartial decisions. The subject of judicial impartiality is treated in detail in chapter 6. However, judicial independence is not only a matter of appropriate external and operational arrangements. It is also a matter of independent and impartial decision making by each and every judge. The judge's duty is to apply the law as he or she understands it without fear or favour and without regard to whether the decision is popular or not. This is a cornerstone of the rule of law. Judges individually and collectively should protect, encourage and defend judicial independence.

**4.** Judges must, of course, reject improper attempts by litigants, politicians, officials or others to influence their decisions. They must also take care that communications with such persons that judges may initiate could not raise reasonable concerns about their independence. As the Honourable J.O. Wilson put it in *A Book for Judges*:

It may be safely assumed that every judge will know that [attempts to influence a court] must only be made publicly in a court room by advocates or litigants. But experience has shown that other persons are unaware of or deliberately disregard this elementary rule, and it is likely that any judge will, in the course of time, be subjected to ex parte efforts by litigants or others to influence his decisions in matters under litigation before him.

...

Regardless of the source, ministerial, journalistic or other, all such efforts must, of course, be firmly rejected. This rule is so elementary that it requires no further exposition.<sup>4</sup>

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<sup>4</sup> J.O. Wilson, *A Book for Judges* (1980) (hereafter "*Wilson*") at 54-55.

**5.** Given the independence accorded judges, they share a collective responsibility to promote high standards of conduct. The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence. As Professor Nolan points out, judicial independence and judicial ethics have a symbiotic relationship.<sup>5</sup> Public acceptance of and support for court decisions depends upon public confidence in the integrity and independence of the bench. This, in turn, depends upon the judiciary upholding high standards of conduct.

[O]nly by maintaining high standards of conduct will the judiciary (1) continue to warrant the public confidence on which deference to judicial rulings depends, and (2) be able to exercise its own independence in its judgements and rulings.<sup>6</sup>

In short, judges should demonstrate and promote high standards of judicial conduct as one element of assuring the independence of the judiciary.

**6.** Judges should be vigilant with respect to any attempts to undermine their institutional or operational independence. While care must be taken not to risk trivializing judicial independence by invoking it indiscriminately in opposition to every proposed change in the institutional arrangements affecting the judiciary, judges should be staunch defenders of their own independence. Although the form and nature of the defence must be carefully considered, the propriety in principle of such defence cannot be questioned.<sup>7</sup>

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<sup>5</sup> B. Nolan, "The Role of Judicial Ethics in the Discipline and Removal of Federal Judges," in *Research Papers of the National Commission on Judicial Discipline & Removal Volume I* (1993), pp. 867-912, at 874.

<sup>6</sup> *Ibid.* at 875.

<sup>7</sup> These issues are addressed further in chapter 6, *infra*.

7. Judges should also recognize that not everyone is familiar with these concepts and their impact on judicial responsibilities. Public education with respect to the judiciary and judicial independence thus becomes an important function, for misunderstanding can undermine public confidence in the judiciary. There is, for example, a danger of misperception about the nature of the relationship between the judiciary and the executive, particularly given the Attorney General's dual roles as the cabinet minister responsible for the administration of justice and as the government's lawyer. The public may not get a completely balanced view of the principle of judicial independence from the media which may portray it incorrectly as protecting judges from review of and public debate concerning their actions. Judges, therefore, should take advantage of appropriate opportunities to help the public understand the fundamental importance of judicial independence, in view of the public's own interest.<sup>8</sup>

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<sup>8</sup> The phrase "appropriate opportunities" should remind judges that the circumstances of such public interventions must be considered carefully given the constraints of the judicial role. Some of the relevant considerations are discussed more fully in chapter 6, "Impartiality"; see also, for example, J.B. Thomas, *Judicial Ethics in Australia* (2d, 1997) (hereafter "*Thomas*") at 106-111.

8. Judges are asked frequently to serve as inquiry commissioners. In considering such a request, a judge should think carefully about the implications for judicial independence of accepting the appointment. There are examples of Judicial Commissioners becoming embroiled in public controversy and being criticized and embarrassed by the very governments which appointed them. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.<sup>9</sup> The Position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry, approved in March 1998, provides useful guidance in this area.

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<sup>9</sup> It is interesting to note that the Australian High Court has ruled that, on separation of powers grounds, there are strict limits in law on the nature of commissions to which judges may be appointed: *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 A.L.J.R. 743; *Kable v. D.P.P.* (1996) 70 A.L.J.R. 814; see also R. MacGregor Dawson, *The Government of Canada* (3d) at 482: “There would seem to be little purpose in taking elaborate care to separate the judge from politics and to render him quite independent of the executive, and then placing him in a position as a Royal Commissioner where his impartiality may be attacked and his findings — no matter how correct and judicial they may be — are liable to be interpreted as favouring one political party at the expense of the other. For many of the inquiries or boards place the judge in a position where he cannot escape controversy: ...It has been proved time and again that in many of these cases the judge loses in dignity and reputation, and his future is appreciably lessened thereby. Moreover, if the judge remains away from his regular duties for very long periods, he is apt to lose his sense of balance and detachment; and he finds that the task of getting back to normal and of adjusting his outlook and habits of mind to purely judicial work is by no means easy.”

# 3. INTEGRITY

**Statement:** *Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.*

## Principles:

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.
2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

## Commentary:

**1.** Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment. The Canadian judiciary has a strong and honourable tradition in this area which serves as a sound foundation for appropriate judicial conduct.

**2.** While the ideal of integrity is easy to state in general terms, it is much more difficult and perhaps even unwise to be more specific. There can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place and time.

**3.** As one commentator put it, the key issue about a judge's conduct must be how it "...reflects upon the central components of the judge's ability to do the job."<sup>10</sup> This requires consideration of first, how particular conduct would be perceived by reasonable, fair minded and informed members of the community and second, whether that perception is likely to lessen respect for the judge or the judiciary as a whole. If conduct is likely to diminish respect in the minds of such persons, the conduct should be avoided. As Shaman put it, "...the ultimate standard for judicial

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<sup>10</sup> J. Shaman et al., *Judicial Conduct and Ethics* (2d, 1995) (hereafter "Shaman") at 335.

conduct must be conduct which constantly reaffirms fitness for the high responsibilities of judicial office.”<sup>11</sup> The judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety.

**4.** Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge’s personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge’s work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, to the extent consistent with their special role, remain closely in touch with the public. These issues are discussed more fully in the “Impartiality” chapter, particularly section C thereof.

**5.** A judge’s conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge’s personal life, development and family.

**6.** In addition to judges’ observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one judge reflects on the judiciary as a whole.

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<sup>11</sup> *Ibid.* at 312.

7. Judges also have opportunities to be aware of the conduct of their judicial colleagues. If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to how best to ensure that appropriate action is taken having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the chief justice or associate chief justice of the court.

# 4. DILIGENCE

**Statement:** | *Judges should be diligent in the performance of their judicial duties.*

## **Principles:**

- 1.** Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court's operation.
- 2.** Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
- 3.** Judges should endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.
- 4.** Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

## Commentary:

**1.** Socrates counselled judges to hear courteously, answer wisely, consider soberly and to decide impartially. These judicial virtues are all aspects of judicial diligence. It is appropriate to add to Socrates' list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

**2.** Section 55 of the *Judges Act* (which applies to federally appointed judges) provides that judges must devote themselves to judicial duties.<sup>12</sup> Subject to the limitations imposed by the *Judges Act* and the judicial role, judges are free to participate in other activities that do not detract from the performance of judicial duties. In short, the work of the judge's court comes first.

**3.** While judges should exhibit diligence in the performance of their judicial duties, their ability to do so will depend on the burden of work, the adequacy of resources including staff, technical assistance and time for research, deliberation, writing and other judicial duties apart from sitting in court. The importance of the judge's responsibility to his or her family is also recognized. Judges should have sufficient vacation and leisure time to permit the maintenance of physical and mental wellness and reasonable opportunities to enhance the skill and knowledge necessary for effective judging.

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<sup>12</sup> *Judges Act*, R.S.C. 1985, c.J-1, s.55. The text of the section is as follows:

55. No judge shall, either directly or indirectly, for himself or others, engage in any occupation or business other than his judicial duties, but every judge shall devote himself exclusively to those judicial duties.

**4.** As mentioned in Commentary 8 of the “Judicial Independence” chapter, judges are sometimes called upon by governments to undertake tasks which take them away from the regular work of their courts. Service on royal commissions of inquiry is one example. A judge should not accept such an appointment without consulting with his or her chief justice to ensure that acceptance of the appointment will not unduly interfere with the effective functioning of the court or unduly burden its other members. The position of the Canadian Judicial Council, approved at its March 1998 mid-year meeting, provides useful guidance in this area.

**5.** As long ago as *Magna Carta*, it was recognized that judges should have a good knowledge of the law.<sup>13</sup> This knowledge extends not only to substantive and procedural law, but to the real life impact of law. As one scholar put it, law is not just what it says; law is what it does.<sup>14</sup> Sustained efforts to maintain and enhance the knowledge, skills and attitudes necessary for effective judging are important elements of judicial diligence. This involves participation in continuing education programs as well as private study.<sup>15</sup>

**6.** It is useful to consider the subject of judicial diligence under three headings: Adjudicative Duties, Administrative and Other Out of Court Duties, and Contributions to the Administration of Justice Generally.

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<sup>13</sup> The reference is to Article 45 of *Magna Carta*: “We will not make any justices, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it” as quoted in D.K. Carrol, *Handbook for Judges* (1961) at 29.

<sup>14</sup> R.A. Samek, “A Case for Social Law Reform” (1977), 55 Can. Bar Rev. 409 at 411.

<sup>15</sup> See for example, Canadian Bar Foundation, *Report of the Canadian Bar Association Committee on the Independence of the Judiciary in Canada* (1985) at 36: “Competence in the discharge of judicial duties is an important factor in the public’s support of an independent judiciary.”; see generally, M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995) at 167 ff.; see also chapter 5, “Equality”; the current goal recommended by the National Judicial Institute is a minimum of 10 days of continuing education per year for each judge although workload does not always allow this goal to be achieved.

## Adjudicative Duties

**7.** Diligence in the performance of adjudicative duties includes striving for impartial and even-handed application of the law, thoroughness, decisiveness, promptness and the prevention of abuse of the process and improper treatment of witnesses. While these are all qualities and skills a judge needs, the variety of cases and the particular conduct of counsel and parties require a judge conducting a hearing to emphasize one or more, sometimes at the expense of some of the others, in order to achieve the proper balance. Striking this balance may be particularly challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent unfair disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.

**8.** The obligation to be patient and treat all before the court with courtesy does not relieve the judge of the equally important duty to be decisive and prompt in the disposition of judicial business. The ultimate test of whether the judge has successfully combined these ingredients into the conduct of the matters before the court is whether the matter has not only been dealt with fairly but in a fashion that is seen to be fair.<sup>16</sup> These issues are addressed in the “Impartiality” chapter, section B.

**9.** Generally speaking, a judge should perform all properly assigned judicial duties, be punctual unless other judicial duties prevent it and be reasonably available to perform all assigned duties.

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<sup>16</sup> See *Brouillard v. The Queen*, [1985] 1 S.C.R. 39 *per* Lamer, J. (as he then was) for the court at 48: “...although the judge may and must intervene for justice to be done, he must none the less do so in such a way that justice is seen to be done.” (emphasis in original). The court also cited with approval the discussion of this subject in G. Fauteux, *Le livre du magistrat* (1980) (hereafter “*Livre*”).

**10.** The proper preparation of judgments is frequently difficult and time consuming. However, the decision and reasons should be produced by the judge as soon as reasonably possible, having due regard to the urgency of the matter and other special circumstances. Special circumstances may include illness, the length or complexity of the case, an unusually heavy workload or other factors making it impossible to give judgment sooner. In 1985, the Canadian Judicial Council resolved that, in its view, reserved judgments should be delivered within six months after hearings, except in special circumstances.<sup>17</sup>

**11.** It is, of course, often necessary for judges to make findings of credibility and to rule on the propriety of others' conduct. However, judges should avoid making comments about persons who are not before the court unless it is necessary for the proper disposition of the case. For example, irrelevant or otherwise unnecessary comments in judgments about a person's conduct or motives ought to be avoided.<sup>18</sup>

## **Administrative and Other Out of Court Duties**

**12.** Today, judicial duties include administrative and other out of court activities. Judges have important responsibilities, for example, in case management and pre-trial conferences as well as on committees of the court. These are all judicial duties and should be undertaken with diligence.

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<sup>17</sup> Canadian Judicial Council Resolution September 1985; Legislation and Rules of Court may establish times within which judgment is to be given: see for example *Code of Civil Procedure* (Qc), article 465; repeated inability to give timely judgment has been the basis of a number of complaints to the Canadian Judicial Council: see Canadian Judicial Council, *Annual Report 1992-93* at 14.

<sup>18</sup> See *Commentaries on Judicial Conduct* (1991) (hereafter "Commentaries") at 82-83; Shetreet at 294-5.

## **Contributions to the Administration of Justice Generally**

**13.** Judges are uniquely placed to make a variety of contributions to the administration of justice. Judges, to the extent that time permits and subject to the limitations imposed by judicial office, may contribute to the administration of justice by, for example, taking part in continuing legal education programs for lawyers and judges and in activities to make the law and the legal process more understandable and accessible to the public. These activities are discussed in the “Impartiality” chapter, particularly sections B and C.

**14.** It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer to the lawyer’s professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge’s view of the lawyer’s conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer’s client. On the other hand, a judge is in a special position to observe lawyers’ conduct before the court. Putting aside any issue of contempt, generally a judge should take, or cause to be taken, appropriate action where the judge has clear and reliable evidence of serious misconduct or gross incompetence by a lawyer. The judge will have to weigh carefully whether the interests of justice require that he or she wait until the end of the proceeding or whether there are circumstances which require earlier action even though the judge, nonetheless, continues to preside.

# 5. EQUALITY

**Statement:** *Judges should conduct themselves and proceedings before them so as to assure equality according to law.*

## Principles:

1. Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.
2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.
3. Judges should avoid membership in any organization that they know currently practices any form of discrimination that contravenes the law.
4. Judges, in the course of proceedings before them, should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.

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## Commentary:

**1.** The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination. This is not a commitment to identical treatment but rather “...to the equal worth and human dignity of all persons” and “...a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society.”<sup>19</sup> Moreover, Canadian law recognizes that discrimination is concerned not only with intent, but with effects.<sup>20</sup> Quite apart from explicit constitutional and statutory guarantees, fair and equal treatment has long been regarded as an essential attribute of justice. While its demands in particular situations are sometimes far from self evident, the law’s strong societal commitment places concern for equality at the core of justice according to law.

**2.** Equality according to law is not only fundamental to justice, but is strongly linked to judicial impartiality. A judge who, for example, reaches a correct result but engages in stereotyping does so at the expense of the judge’s impartiality, actual or perceived.

**3.** Judges should not be influenced by attitudes based on stereotype, myth or prejudice. They should, therefore, make every effort to recognize, demonstrate sensitivity to and correct such attitudes.

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<sup>19</sup> *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 per LaForest, J. for the court at 667.

<sup>20</sup> *Ibid.* at 670–671.

4. As is discussed in more detail in the “Impartiality” chapter, judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge. Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect.

Inappropriate conduct may arise from a judge being unfamiliar with cultural, racial or other traditions or failing to realize that certain conduct is hurtful to others. Judges therefore should attempt by appropriate means to remain informed about changing attitudes and values and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist them to be and appear to be impartial. In doing this, however, it is also necessary to take care that these efforts enhance and do not detract from judges’ perceived impartiality. All forms or vehicles of education are not necessarily appropriate for judges given the demands of independence and impartiality. Care must be taken that exaggerated or unfounded concern in this regard does not undermine efforts to enhance good judging.

Principle 4 deals with the role of the presiding judge in addressing clearly irrelevant comments which are sexist or racist or other such inappropriate conduct in proceedings before them. This does not require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. This advice is consistent with the judge's general duty to listen fairly but, when necessary, to assert firm control over the proceeding and to act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Principle 4 certainly does not counsel perfection. Further, applying it may sometimes be a formidable challenge for the judge. The adversarial system gives the parties and their counsel considerable leeway and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. The judge should always do her or his best to strike the right balance. The fact that, when reconsidered later with the benefit of hindsight and the opportunity for further reflection, the situation might have been handled differently is not, of itself, any indication that the judge failed to deal with inappropriate conduct during the proceeding.

# 6. IMPARTIALITY

**Statement:** *Judges must be and should appear to be impartial with respect to their decisions and decision making.*

## Principles:

### A. General

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
2. Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.
3. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

### B. Judicial Demeanour

1. While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.

## **C. Civic and Charitable Activity**

**1.** Judges are free to participate in civic, charitable and religious activities subject to the following considerations:

(a) Judges should avoid any activity or association that could reflect adversely on their impartiality or interfere with the performance of judicial duties.

(b) Judges should not solicit funds (except from judicial colleagues or for appropriate judicial purposes) or lend the prestige of judicial office to such solicitations.

(c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation.

(d) Judges should not give legal or investment advice.

## **D. Political Activity**

**1.** Judges should refrain from conduct such as membership in groups or organizations or participation in public discussion which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts.

**2.** All partisan political activity must cease upon appointment. Judges should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that the judge is engaged in political activity.

**3.** Judges should refrain from:

(a) membership in political parties and political fund raising;

(b) attendance at political gatherings and political fund raising events;

(c) contributing to political parties or campaigns;

(d) taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice;

(e) signing petitions to influence a political decision.

**4.** Although members of a judge's family have every right to be politically active, judges should recognize that such activities of close family members may, even if erroneously, adversely affect the public perception of a judge's impartiality. In any case before the court in which there could reasonably be such a perception, the judge should not sit.

## **E. Conflicts of Interest**

**1.** Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.

**2.** Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

**3.** Disqualification is not appropriate if: (a) the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice.

## Commentary:

### A. General

**A.1** From at least the time of John Locke in the late seventeenth century, adjudication by impartial and independent judges has been recognized as an essential component of our society.<sup>21</sup>

Impartiality is the fundamental qualification of a judge and the core attribute of the judiciary. The Statement and Principles do not and are not intended to deal with the law relating to judicial disqualification or recusation.

**A.2** While judicial impartiality and independence are distinct concepts, they are closely related. This relationship was explored recently by Gonthier, J. on behalf of the majority of the Supreme Court of Canada in *Ruffo v. Conseil de la Magistrature*.<sup>22</sup> The court noted that the right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by s.7 of the Canadian Charter<sup>23</sup> and reaffirmed the following statement by Le Dain, J. in *R. v. Valente*:

Although there is obviously a close relationship between independence and impartiality, they are never the less separate and distinct values and requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “impartial” ...connotes absence of bias, actual or perceived

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<sup>21</sup> Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (1987) (hereafter “Russell”).

<sup>22</sup> [1995] 4 S.C.R. 267 at 296-299.

<sup>23</sup> *Ibid.*

Both independence and impartiality are fundamental, not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial...<sup>24</sup>

Lamer C.J.C. put it this way in *R. v. Lippé*:

The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a “means” to this “end.” If judges could be perceived as “impartial” without judicial “independence” the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite for judicial impartiality.<sup>25</sup>

**A.3** Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudice. This dual aspect of impartiality is captured in the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpre, J. put it in *Committee for Justice and Liberty v. National Energy Board*,<sup>26</sup> the test is whether “an informed person, viewing the matter realistically and practically — and having thought the matter through —” would apprehend a lack of impartiality in the decision maker. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.

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<sup>24</sup> [1985] 2 S.C.R. 673 at 685 and 689.

<sup>25</sup> [1991] 2 S.C.R. 114 at 139.

<sup>26</sup> [1978] 1 S.C.R. 369, most recently endorsed in *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 *per* Cory, J. at 530 and *per* L’Heureux-Dubé and McLachlin, JJ. at 502.

**A.4** “True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.”<sup>27</sup> The judge’s fundamental obligation is to strive to be and to appear to be as impartial as is possible. This is not a counsel of perfection. Rather it underlines the fundamental nature of the obligation of impartiality which also extends to minimizing any reasonable apprehension of bias.

**A.5** A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to a perception of an absence of impartiality.<sup>28</sup> Everything from his or her associations or business interests to remarks which the judge may consider to be “harmless banter,” may diminish the judge’s perceived impartiality.<sup>29</sup>

**A.6** The expectations of litigants may be very high. Some will be quick to perceive bias quite unjustifiably when a decision is not in their favour. Therefore every effort should be made to ensure that reasonable grounds for such a perception are avoided or minimized. On the other hand, judges have an obligation to treat all parties fairly and evenhandedly; those litigants who perceive bias where no reasonable, fair minded and informed person would find it are not entitled to different or special treatment for that reason. Moreover, as discussed below, the judge also has the obligation to ensure that proceedings are conducted in an orderly and efficient manner. This may well require an appropriate degree of firmness.

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<sup>27</sup> In *R.D.S. v The Queen*, *supra*, note 26, at 504, L’Heureux-Dubé and McLachlin, JJ. (Gonthier and LaForest, JJ., concurring) cited this passage from page 12 of *Commentaries* with approval.

<sup>28</sup> American Bar Association, *Model Code of Judicial Conduct (1990)* (hereafter “*ABA Model Code (1990)*”), Commentary to Canon 3B.

<sup>29</sup> *Canadian Judicial Council Annual Report 1992-93* at 16.

It is helpful to address the question of impartiality under more specific headings.

## **B. Judicial Demeanour**

**B.1** Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court's process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. These issues are more fully discussed in chapters 4 and 5, "Diligence" and "Equality." It bears repeating, however, that any action which, in the mind of a reasonable, fair minded and informed person who has considered the matter, would give rise to reasoned suspicion of a lack of impartiality must be avoided. When such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.<sup>30</sup>

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## **C. Civic and Charitable Activity**

**C.1** A judge is appointed to serve the public. Many persons appointed to the bench have been and wish to continue to be active in other forms of public service. This is good for the community and for the judge, but carries certain risks. For that reason, it is important to address the question of the limits that judicial appointment places upon the judge's community activities.

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<sup>30</sup> See chapter 4, "Diligence" and chapter 5, "Equality."

**C.2** The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgments. The Right Honourable Gerald Fauteux put the matter succinctly and eloquently in *Le livre du magistrat*<sup>31</sup> (translation):

[there is no intention] to place the judiciary in an ivory tower and to require it to cut off all relationship with organizations which serve society. Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach.

**C.3** The precise constraints under which judges should conduct themselves as regards civic and charitable activity are controversial inside and outside the judiciary. This is not surprising given that the question involves balancing competing considerations. On one hand, there are the beneficial aspects, both for the community and the judiciary, of the judge being active in other forms of public service. This needs to be assessed in light of the expectations and circumstances of the particular community. On the other hand, the judge's involvement may, in some cases, jeopardize the perception of impartiality or lead to an undue number of recusals. If this is the case, the judge should (unless the principle of necessity, discussed in section E.17, is implicated) avoid the activity.

**C.4** *The Code of Conduct for United States Judges* applicable to the federally appointed judiciary in the United States, while not completely appropriate for Canadian adoption, provides a useful starting point:

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<sup>31</sup> *Livre* at 17.

*Civic and Charitable Activities.* A judge may participate in civic and charitable activities that do not reflect adversely upon the judge’s impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the judicial office for that purpose, but the judge may be listed as an officer, director, or trustee of such an organization. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

(3) A judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

**C.5** These provisions seek to strike a reasonable balance between community involvement and the preservation of judicial impartiality and, although not specifically adopted in these Principles, nonetheless may provide helpful guidance.

**C.6** Subject to the discussion that follows, judges are at liberty to be members and directors of civic and charitable organizations and, of course, to exercise freedom of religion. In general, however, a judge should not allow the prestige of judicial office to be used in aid of fund raising for particular causes, however worthy. This principle suggests that judges (apart from requests to judicial colleagues) should not personally solicit funds or lend their names to financial campaigns. *Commentaries on Judicial Conduct* notes that when a judge is directly involved in fund raising there may be a temptation for lawyers or litigants who are canvassed to try to curry favour with the judge by contributing. Moreover, such solicitation identifies the judge with the objects of the organization.<sup>32</sup> However, the simple appearance of the judge's name as a director (or similar position) on the organization's general letterhead is not inappropriate.

**C.7** Judges must carefully assess whether to serve on Boards of Directors of organizations other than those serving the professional or educational requirements of judges. It is inappropriate (and prohibited) for a judge to serve on the Board of Directors of a commercial enterprise.<sup>33</sup>

**C.8** What is the position with respect to volunteer service on boards of community, charitable, religious or educational organizations? Many institutions solicit and/or receive money from government. Except for funds required for the proper administration of justice, it is not appropriate for the judge to be directly involved in soliciting funds from government. Boards of Directors are responsible for the conduct of the organization. The organization may become involved in disputes with staff or others, sue or be sued, breach government regulations of all sorts or otherwise be implicated in matters of public controversy.

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<sup>32</sup> *Commentaries* at 18-19.

<sup>33</sup> *Judges Act*, R.S.C. 1985, c.J-1, s.55. (See note 12.)

Any of these situations could be embarrassing for the judge or his or her colleagues and might give rise to reasonable apprehension of a lack of impartiality with respect to certain issues that might arise for judicial consideration. Fellow directors may seek and rely upon the judge's advice on legal matters. But it is inappropriate for the judge to give such advice. The decision to serve must be made after carefully weighing these risks in the particular circumstances.

**C.9** Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

**C.10** Requests for letters of reference may be difficult for a judge. There are certainly factors a judge will want to consider before agreeing to provide such a letter. One is that the judge should avoid being seen as using the prestige of judicial office to advance a person's private interests. The judge must also avoid giving the impression that certain persons stand in a particular position of influence or favour with the judge. These factors combine to suggest that the judge should agree to give a reference only where it is clear, first, that it is the judge's knowledge of the individual that is called for and not simply the status of the judge and, second, where the judge has an important perspective about the individual to contribute such that it would be unfair to the individual and the selection process were the judge to refuse.

*Commentaries* reports that a large majority of the judges who responded to the questionnaire leading to the production of that text approved a judge's giving character references. *Commentaries* also noted however that the practices of judges vary and that a number of respondents professed some reluctance.<sup>34</sup> While this matter is one on which judges differ, the two part test set out in the preceding paragraph is offered as an approach that strikes an acceptable balance between the desirability of obtaining the benefit of the judge's views while minimizing the risk of undermining the judge's neutrality.

*Commentaries* states that judges may properly assist judicial appointment advisory committees on a strictly confidential basis. More generally, the commentary on the *ABA Model Code (1990)* addresses the matter as follows:

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may provide a letter or recommendation based on the judge's personal knowledge. A judge also may permit the use of the judge's name as a reference, and respond to a request for a personal recommendation when solicited by a selection of authorities, such as a prospective employer, Judicial Selection Committee or Law School Admissions Office.<sup>35</sup>

Once again, it is suggested that the two part test proposed for letters of reference generally strikes the right balance in the specific context of judicial appointments even though the result is a somewhat more restrictive approach than that of *ABA Model Code (1990)*.

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<sup>34</sup> *Commentaries* at 33-35.

<sup>35</sup> *ABA Model Code (1990)*, Commentary to Canon 2B.

## D. Political Activity

**D.1** This section deals with out of court activities of judges. In particular, it addresses political activity and other conduct such as memberships in groups or organizations or participation in public debate and comment which, from the perspective of a reasonable, fair minded and informed person could undermine a judge's impartiality as regards issues that could come before the courts.

**D.2** Commentators are unanimous that "all partisan political activity and association must cease absolutely and unequivocally with the assumption of judicial office."<sup>36</sup> Two considerations support this rule. Impartiality, actual and perceived, is essential to the exercise of the judicial function. Partisan political activity or out of court statements concerning issues of public controversy by a judge undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches on the other. Partisan actions and statements by definition involve a judge in publicly choosing one side of a debate over another. The perception of partiality will be reinforced if, as is almost inevitable, the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine judicial independence.<sup>37</sup> In short, a judge who uses the privileged platform of judicial office to enter the political arena puts at risk public confidence in the impartiality and the independence of the judiciary.

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<sup>36</sup> *Commentaries* at 9; see also *Livre* at 28; *Shaman* at 360 ff; *Wilson* at 7; Judges in Canada (as in the U.S. and England) are entitled to vote and there is nothing unethical in doing so.

<sup>37</sup> *Russell* at 87-88.

**D.3** Principles D.3(a) and (b) are widely accepted examples of overt political activity in which judges should not engage after appointment.<sup>38</sup> Judges should also consider whether mere attendance at certain public gatherings might reasonably give rise to a perception of ongoing political involvement or reasonably put in question the judge’s impartiality on an issue that could come before the court.

**D.4** Principle D.3(c) counsels against making contributions to political parties. The rationale of this advice is that the judge should not be identified with the political process or, subject to principle D.3(d), with specific positions on matters of political controversy. The Nova Scotia Judicial Council was confronted with a complaint that a judge had contributed to a political party’s fund to alleviate the financial distress of its former leader who was a friend and classmate of the judge. The judge had also contributed to the political campaigns of close relatives and made three other undesignated contributions to the same political party. The Nova Scotia Judicial Council cautioned the judge, reasoning that:

The public perception, we believe, is that where a judge makes a financial contribution to such highly placed political persons, as the three who benefitted from the gifts of this judge, it is impossible to separate them from the political organizations of which they are a part... Since, in our opinion, donations of money are but one way of participating in a political organization, the making of them is deemed to be political activity in which a judge should not engage.<sup>39</sup>

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<sup>38</sup> See e.g. *Wilson* at 7-9; *Thomas* at 156.

<sup>39</sup> Nova Scotia Judicial Council, *Report Concerning the Conduct of His Honour Paul S. Niedermeyer*, June 17, 1991. (Hereafter “*Niedermeyer Ruling*.”)

**D.5** The application of Principle D.3(d), which counsels avoidance of public participation in controversial political discussions, is more open to debate and problems of application than the other principles in this section. Judges on appointment do not surrender all of the rights to freedom of expression enjoyed by everyone else in Canada. But, the office of judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of involvement of the judiciary in public debate, there are two fundamental considerations. The first is whether the judge's involvement could reasonably undermine confidence in his or her impartiality. The second is whether such involvement may unnecessarily expose the judge to political attack or be inconsistent with the dignity of judicial office. If either is the case the judge should avoid such involvement.

**D.6** Principle D.3(d) recognizes that, while restraint is the watchword, there are limited circumstances in which a judge may properly speak out about a matter that is politically controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary (which may include judicial salaries and benefits), fundamental aspects of the administration of justice, or the personal integrity of the judge. Even with respect to these matters, however, a judge should act with great restraint. Judges must remember that their public comments may be taken as reflective of the views of the judiciary; it is difficult for a judge to express opinions that will be taken as purely personal and not those of the judiciary generally. There are usually alternatives to public discussion. For example, the chief justice of the court may raise the matter formally with the appropriate official or officials. Except for statutory and constitutional duties and matters affecting the operation of the courts or the proper administration of justice, chief justices are in no different position than their colleagues.

The Principle suggests a somewhat larger sphere for such interventions than that described in the 1982 comments of the Canadian Judicial Council in the Berger matter. In dealing with that complaint, the Council stated that judges should not speak on controversial political matters that do not directly affect the operation of the courts. The suggestion here is that, having regard to judges' special knowledge and experience in matters relating to the administration of justice and their obligation to preserve judicial independence, the proper ambit for their out of court interventions may be somewhat wider in appropriate cases. Where the terms of reference require, judges serving on Commissions of Inquiry may exercise greater latitude in commenting on issues relevant to the inquiry. Judges serving in this way, however, must continue to bear in mind that they are judges even while serving for the time being as commissioners.

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**D.7** Nothing in these Principles prevents or indeed discourages judicial participation in law reform or other scholarly or educational activities of a nonpartisan nature directed to the improvement of the law and the administration of justice. Judges seconded to law reform commissions may exercise greater latitude with respect to matters under consideration by the Commission. The Commentary to the *ABA Model Code (1990)* indicates that "...[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system and administration of justice... Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession."<sup>40</sup> However, when engaging in such activities, the judge must not be seen as "lobbying" government or as indicating how he or she would rule if particular situations were to come before the judge in court. This, of course, does not prevent judges from making representations to government concerning judicial independence or, through the appropriate mechanisms, with respect to salaries

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<sup>40</sup> *ABA Model Code (1990)*, Commentary to Canon 4B.

and benefits. Discussion of the law for educational purposes or pointing out weaknesses in the law in appropriate settings is in no way discouraged. For example, in certain special circumstances, judicial commentary on draft legislation may be helpful and appropriate, so long as the judge avoids giving informal interpretations or opinions on constitutionality.<sup>41</sup> Normally, judicial commentary on proposed legislation or on other questions of government policy should relate to practical implications or legislative drafting and should avoid issues of political controversy. In general, such judicial commentary should be made as part of a collective or institutionalized effort by the judiciary, not that of an individual judge.

**D.8** Principle D.3(e) suggests that judges should not sign petitions to influence political decisions. Petitions are an example of a situation in which a judge is likely to be perceived as supporting a particular point of view or as lobbying, albeit rather passively, to bring about change. As the Nova Scotia Judicial Council put it, the requirement of complete severance from all political activities means that “a judge shall not try to influence politicians or political issues.”<sup>42</sup> This is precisely the purpose of petitions.

**D.9** The duties of chief justices and, in some cases, those of other judges having administrative responsibilities will lead to contact and interaction with government officials, particularly the attorneys general, the deputy attorneys general and court services officials. This is necessary and appropriate, provided the occasions of such interactions are not partisan in nature and the subjects discussed relate to the administration of justice and the courts and not to individual cases. Judges, including chief justices, should take care that they are not perceived as being advisors to those holding political office or to members of the executive.

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<sup>41</sup> The Canadian Judicial Council, for example, struck a special committee which reviewed proposals for a new General Part of the *Criminal Code* and facilitated meetings between senior government officials and judges to discuss child support guidelines.

<sup>42</sup> *Nidermeyer Ruling* at 12.

## E. Conflicts of Interest

**E.1** Judges should organize their personal and business affairs to minimize the potential for conflict with their judicial duties. Notwithstanding the judge's best efforts, situations will arise in which the appearance of justice requires the judge to disqualify himself or herself. The issues to be addressed in this section are: (1) what constitutes a conflict of interest? (2) in what circumstances should a judge disclose circumstances which may constitute a conflict of interest? (3) in what circumstances will consent of the parties obviate the need for the judge to be disqualified? and (4) in what circumstances will it be necessary for a judge to preside even though there is an apparent conflict of interest? Each will be addressed in turn.

### E.2 What Constitutes a Conflict of Interest?

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As Perell puts it, "A common or unifying theme for the various classes of conflicts of interest is the theme of divided loyalties and duties."<sup>43</sup> The potential for conflict of interest arises when the personal interest of the judge (or of those close to him or her) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned both with impartiality in fact and impartiality in the perception of a reasonable, fair minded and informed person. In judicial matters, the test for conflict of interest must include both actual conflicts between the judge's self interest and the duty of impartial adjudication and circumstances in which a reasonable fair minded and informed person would reasonably apprehend a conflict.

**E.3** A number of texts and commentaries offer guidance to judges on this subject. The Hon. J.O. Wilson in *A Book for Judges*, for example, says a judge's disqualification would be justified by a pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant.<sup>44</sup>

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<sup>43</sup> Paul M. Perell, *Conflicts of Interest in the Legal Profession* (1995) at 5.

<sup>44</sup> *Wilson* at 23.

**E.4** The *Code of Civil Procedure* of Quebec is unique in Canada in offering authoritative guidance. The subject of disqualification is expressly addressed in articles 234 and 235. Included among the grounds for disqualification are, for example, the judge being related to one of the parties within the degree of first cousin, having acted for one of the parties, having an interest in the outcome, etc.<sup>45</sup>

**E.5** As elsewhere in this area, the concern is with reasonable perception, as well as actual conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially.<sup>46</sup> This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.

**E.6** This broadly formulated rule cannot be strictly applied, however. Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances give rise to conflict or the appearance of conflict unless the outcome of the proceedings before the judge could substantially affect such holdings. Nor should small holdings, such as those contemplated by the *de minimis* provisions of *ABA Model Code (1990)* give rise to any reasonable question concerning the judge's impartiality.<sup>47</sup> However, if the holding is more substantial, the judge should not sit, subject to considerations of necessity discussed in section E.17.

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<sup>45</sup> *Code of Civil Procedure*, art. 234–235.

<sup>46</sup> *Shaman* at 136; the language is modelled on that of Rand, J. in *Szilard v. Szasz*, [1965] S.C.R. 3 at 4.

<sup>47</sup> See note 28; *de minimis* is defined as being “an insignificant interest that could not raise a reasonable question as to the judge's impartiality.”

**E.7** Should interests of members of the judge’s family, close friends or associates be considered as giving rise to a perception of conflict of interest? As a matter of broad general principle, one can imagine circumstances in which the interests of the judge’s family, close friends or associates in matters before the judge could give rise to a reasonable apprehension of conflicting interest and duty. To attempt to define these matters with greater precision, however, is another matter. Article 234(1) and (9) of the *Code of Civil Procedure* define precisely the degree of family relationship with parties or counsel which requires recusal. Article 235 refers to the personal interest of the judge or “his consort” as justifying recusal. *ABA Model Code (1990)* defines the degree of family relationship which should lead to disqualification.<sup>48</sup>

**E.8** While these approaches introduce much needed clarity, it may come at the expense of attention to the general principle that a judge (subject to the discussion in section E.17 below) should disqualify him or herself if aware of any interest or relationship which, to a reasonable, fair minded and informed person would give rise to reasoned suspicion of lack of impartiality. For the purposes of national principles of judicial ethics for Canada, the temptation to become more specific than this should be avoided.

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<sup>48</sup> See for example, Canon 3E(d):

(d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge’s knowledge likely to be a material witness in the proceeding.

“Third degree of relationship.” The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

**E.9** Personal insolvency and bankruptcy give rise to a variety of potential difficulties for judges. Whether, and if so in what circumstances, these difficulties will provide grounds for removal of a judge is not an issue that falls within the range of questions addressed by these Principles. As the *Bankruptcy Act*, section 175, recognizes, bankruptcy may occur by misfortune and without misconduct. For instance, a judge could be held liable for a defalcation of a former law partner or for an accident involving the judge's vehicle driven by his or her spouse or child. Having regard to this fact, no general rule can, or should be formulated.

**E.10** The judge who is in financial difficulty will have to be particularly vigilant for conflicts of interest, both actual and perceived. There will be difficulties in the judge presiding over matters involving any of his or her creditors or, perhaps, other matters raising similar issues. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious. In this event, the possibility of the judge appearing before a judicial colleague as a party or a witness would arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances and the size of the jurisdiction. Circumstances which might cause very minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Once again, however, it seems impossible and unwise to try to deal with the scores of possibilities other than through application of the general principle that, where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge will not be impartial, the judge should not sit. In certain circumstances, the principles relating to diligence might also be relevant if the judge's conflicts were so extensive that they effectively prevented the judge from carrying out his or her duties. A judge's bankruptcy may raise many of these issues in acute form. When judges become aware of financial or other similar circumstances likely to affect public perception of their impartiality, they should draw them to the attention of their chief justices.

### **E.11 Disclosure**

The absence in Canada of a general statutory requirement for financial disclosure does not resolve the ethical question of when a judge should disclose to the parties a matter which might be considered as giving rise to a potential conflict of interest. The position in England and Australia appears to be that the judge should disclose any interest or factor which might suggest that the judge should be disqualified.<sup>49</sup> This approach, however, is premised on the view that the disclosure is made with a view to seeking the consent of the parties for the judge to hear the case.

**E.12** Whether there are circumstances in which the consent of the parties is essential to permit the judge to hear the case is the subject of the next section. However, the issues of disclosure and consent are not necessarily linked. For now, it can be concluded that a judge should disclose on the record anything which might support a plausible argument in favour of disqualification.

### **E.13 Consent of the Parties**

*Commentaries on Judicial Conduct* acknowledges the practical difficulty of attempting to cure a concern about disqualification by disclosure to and consent of the parties. The main concern is that such an approach puts counsel in an unfair position — as one respondent put it, to either consent or to risk being seen as a trouble maker.<sup>50</sup>

**E.14** It is not suggested that consent of the parties would justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. The issue of consent, therefore, arises only in those cases in which the judge believes that there is an arguable point about disqualification but in which the judge believes, at the end of the day, a reasonable person would not apprehend a lack of impartiality. Putting the matter this way perhaps highlights the difficult position in which counsel

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<sup>49</sup> See for example, *Shetreet* at 305; *Thomas* at 53–55; *Commentaries* at 72; *Wilson* at 30–31.

<sup>50</sup> *Commentaries* at 74.

is placed. By disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to consent, counsel (or their clients) may appear to be taking an unreasonable position. A partial answer to this concern may be to adopt the English practice in which the judge is told that an objection was made by one of the parties without being told which side objected.<sup>51</sup>

**E.15** The better approach is for the judge to make the decision without inviting consent, perhaps in consultation with his or her chief justice or other colleague. If the judge concludes that no reasonable, fair minded and informed person, considering the matter, would have a reasoned suspicion of a lack of impartiality, the matter should proceed before the judge. If the conclusion is the opposite, the judge should not sit.

**E.16** The judge should make disclosure on the record and invite submissions from the parties in two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.

### **E.17 Necessity**

Extraordinary circumstances may require departure from the approaches discussed above. The principle of necessity holds that a judge who would otherwise be disqualified may hear and decide a case where failure to do so could result in an injustice. This might arise where an adjournment or mistrial would work undue hardship or where there is no other judge reasonably available who would not be similarly disqualified.<sup>52</sup>

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<sup>51</sup> See *Shetreet* at 305.

<sup>52</sup> See, for example, *Wilson* at 29; *Shaman* at 99-101 and *Shetreet* at 304.

## E.18 Acting as Executor

There is a range of views as to whether a judge should serve as an executor. Shetreet describes the English practice in which judges may serve as executors of estates of friends or relatives, provided there is no remuneration, the judge is not involved in the day-to-day administration of the estate and the required work does not interfere with his or her judicial duties.<sup>53</sup> In the United States, the *ABA Model Code (1990)* deals with this point as follows:

### 4E. Fiduciary Activities

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.<sup>54</sup>

In Canada, *A Book for Judges, Le livre du magistrat*<sup>55</sup> and *Commentaries on Judicial Conduct*<sup>56</sup> agree that, as a general rule, the judge should not act but that it is permissible to do so if the estate is of a

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<sup>53</sup> *Shetreet* at 331.

<sup>54</sup> *ABA Model Code (1990)*, Canon 4E.

<sup>55</sup> *Livre* at 24.

<sup>56</sup> *Commentaries* at 35-6.

relative or close friend and it appears to be simple and not contentious. Should these predictions prove wrong, these authorities all advise the judge to retire from the executorship.

In summary, it is suggested that a sound approach to the question is as follows:

1. As a general rule, a judge should not act as an executor.
2. It is not improper for a judge to so act if:
  - (a) he or she does so without fee;
  - (b) the estate is of a close friend or relative;
  - (c) it is unlikely to be contentious; and,
  - (d) performance of the obligations will not interfere with judicial duties.
3. Having embarked on the executorship, the judge should retire from it if the estate becomes contentious or if the executorship interferes with the performance of judicial duties.

### **E.19 Former Clients**

Judges will face the issue of whether they should hear cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practised before appointment. There are three main factors to be considered. First, the judge should not deal with cases concerning which the judge actually has a conflict of interest, for example, as a result of having had confidential information concerning the matter prior to appointment. Second, circumstances must be avoided in which a reasonable, fair minded and informed person would have a reasoned suspicion that the judge is not impartial. Third, the judge should not withdraw unnecessarily as to do so adds to the burden of his or her colleagues and contributes to delay in the courts.

The following are some general guidelines which may be helpful:

(a) A judge who was in private practice should not sit on any case in which the judge or the judge's former firm was directly involved as either counsel of record or in any other capacity before the judge's appointment.

(b) Where the judge practised for government or legal aid, guideline (a) cannot be applied strictly. One sensible approach is not to sit on cases commenced in the particular local office prior to the judge's appointment.

(c) With respect to the judge's former law partners, or associates and former clients, the traditional approach is to use a "cooling off period," often established by local tradition at 2, 3 or 5 years and in any event at least as long as there is any indebtedness between the firm and the judge and subject to guideline (a) above concerning former clients.

(d) With respect to friends or relatives who are lawyers, the general rule relating to conflicts of interest applies, i.e., that the judge should not sit where a reasonable, fair minded and informed person would have a reasoned suspicion that the judge would not be impartial.

Related issues, requiring similar approaches, may arise in relation to overtures to the judge while still on the bench for post-judicial employment. Such overtures may come from law firms or prospective employers. There is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable, fair minded and informed person considering the matter. A judge should examine such overtures in this light. It should also be remembered that the conduct of former judges may affect public perception of the judiciary.





## Annex 11

[Code of Conduct for United States Judges]

# Guide to Judiciary Policy

Vol 2: Ethics and Judicial Conduct  
Pt A: Codes of Conduct

## Ch 2: Code of Conduct for United States Judges

### Introduction

Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary

Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

Canon 4: A Judge May Engage in Extrajudicial Activities That Are Consistent with the Obligations of Judicial Office

Canon 5: A Judge Should Refrain from Political Activity

### Compliance with the Code of Conduct

### Applicable Date of Compliance

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### Introduction

The Code of Conduct for United States Judges was initially adopted by the Judicial Conference on April 5, 1973, and was known as the "Code of Judicial Conduct for United States Judges." **See:** [JCUS-APR 73](#), pp. 9-11. Since then, the Judicial Conference has made the following changes to the Code:

- March 1987: deleted the word "Judicial" from the name of the Code;
- September 1992: adopted substantial revisions to the Code;
- March 1996: revised part C of the Compliance section, immediately following the Code;
- September 1996: revised Canons 3C(3)(a) and 5C(4);
- September 1999: revised Canon 3C(1)(c);
- September 2000: clarified the Compliance section;
- March 2009: adopted substantial revisions to the Code.

*Last substantive revision (Transmittal GR-2) June 30, 2009  
Last revised (minor technical changes) June 2, 2011*

This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners as indicated in the “Compliance” section. The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code.

The Judicial Conference has authorized its Committee on Codes of Conduct to render advisory opinions about this Code only when requested by a judge to whom this Code applies. Requests for opinions and other questions concerning this Code and its applicability should be addressed to the Chair of the Committee on Codes of Conduct by email or as follows:

Chair, Committee on Codes of Conduct  
c/o General Counsel  
Contact Information Redacted

Procedural questions may be addressed to:

Office of the General Counsel  
Contact Information Redacted

## **CANON 1: A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

### **COMMENTARY**

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code.

Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

The Canons are rules of reason. They should be applied consistently with constitutional requirements, statutes, other court rules and decisional law, and in the context of all relevant circumstances. The Code is to be construed so it does not impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and nominees for judicial office. It may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351-364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the Code is not intended to be used for tactical advantage.

## **CANON 2: A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES**

- A. *Respect for Law.* A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. *Outside Influence.* A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.
- C. *Nondiscriminatory Membership.* A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

### COMMENTARY

**Canon 2A.** An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to

serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

**Canon 2B.** Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.

A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.

A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

**Canon 2C.** Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See *New York State Club Ass'n. Inc. v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse

membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

Although Canon 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any invidiously discriminatory membership practices prohibited by applicable law violates Canons 2 and 2A and gives the appearance of impropriety. In addition, it would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or national origin in its membership or other policies, or for the judge to use such a club regularly. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A.

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

### **CANON 3: A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE FAIRLY, IMPARTIALLY AND DILIGENTLY**

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

#### **A. *Adjudicative Responsibilities.***

- (1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

- (3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.
- (4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:
  - (a) initiate, permit, or consider ex parte communications as authorized by law;
  - (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;
  - (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or
  - (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's

official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

**B. *Administrative Responsibilities.***

- (1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.
- (2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.
- (3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.
- (4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.
- (5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

**C. *Disqualification.***

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
  - (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;
  - (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in

controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

- (i) ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;
  - (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;
  - (iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
  - (iv) ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;
- (d) “proceeding” includes pretrial, trial, appellate review, or other stages of litigation.
- (4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge’s spouse or minor child) divests the interest that provides the grounds for disqualification.

D. *Remittal of Disqualification.* Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

## COMMENTARY

**Canon 3A(3).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

**Canon 3A(4).** The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

**Canon 3A(5).** In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

**Canon 3A(6).** The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

**Canon 3B(3).** A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

**Canon 3B(5).** Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by

drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

**Canon 3C.** Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

**Canon 3C(1)(c).** In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

**Canon 3C(1)(d)(ii).** The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

#### **CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE**

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

##### **A. *Law-related Activities.***

- (1) ***Speaking, Writing, and Teaching.*** A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- (2) ***Consultation.*** A judge may consult with or appear at a public hearing before an executive or legislative body or official:

- (a) on matters concerning the law, the legal system, or the administration of justice;
    - (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or
    - (c) when the judge is acting pro se in a matter involving the judge or the judge's interest.
  - (3) *Organizations.* A judge may participate in and serve as a member, officer, director, trustee, or nonlegal advisor of a nonprofit organization devoted to the law, the legal system, or the administration of justice and may assist such an organization in the management and investment of funds. A judge may make recommendations to public and private fund-granting agencies about projects and programs concerning the law, the legal system, and the administration of justice.
  - (4) *Arbitration and Mediation.* A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law.
  - (5) *Practice of Law.* A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.
- B. *Civic and Charitable Activities.* A judge may participate in and serve as an officer, director, trustee, or nonlegal advisor of a nonprofit civic, charitable, educational, religious, or social organization, subject to the following limitations:
- (1) A judge should not serve if it is likely that the organization will either be engaged in proceedings that would ordinarily come before the judge or be regularly engaged in adversary proceedings in any court.
  - (2) A judge should not give investment advice to such an organization but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.
- C. *Fund Raising.* A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge

may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.

D. *Financial Activities.*

- (1) A judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.
- (2) A judge may serve as an officer, director, active partner, manager, advisor, or employee of a business only if the business is closely held and controlled by members of the judge's family. For this purpose, "members of the judge's family" means persons related to the judge or the judge's spouse within the third degree of relationship as defined in Canon 3C(3)(a), any other relative with whom the judge or the judge's spouse maintains a close familial relationship, and the spouse of any of the foregoing.
- (3) As soon as the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.
- (4) A judge should comply with the restrictions on acceptance of gifts and the prohibition on solicitation of gifts set forth in the Judicial Conference Gift Regulations. A judge should endeavor to prevent any member of the judge's family residing in the household from soliciting or accepting a gift except to the extent that a judge would be permitted to do so by the Judicial Conference Gift Regulations. A "member of the judge's family" means any relative of a judge by blood, adoption, or marriage, or any person treated by a judge as a member of the judge's family.
- (5) A judge should not disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's official duties.

E. *Fiduciary Activities.* A judge may serve as the executor, administrator, trustee, guardian, or other fiduciary only for the estate, trust, or person of

a member of the judge's family as defined in Canon 4D(4). As a family fiduciary a judge is subject to the following restrictions:

- (1) The judge should not serve if it is likely that as a fiduciary the judge would be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.
- (2) While acting as a fiduciary, a judge is subject to the same restrictions on financial activities that apply to the judge in a personal capacity.

- F. *Governmental Appointments.* A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary. A judge may represent the judge's country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.
- G. *Chambers, Resources, and Staff.* A judge should not to any substantial degree use judicial chambers, resources, or staff to engage in extrajudicial activities permitted by this Canon.
- H. *Compensation, Reimbursement, and Financial Reporting.* A judge may accept compensation and reimbursement of expenses for the law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:
- (1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
  - (2) Expense reimbursement should be limited to the actual costs of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or relative. Any additional payment is compensation.
  - (3) A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.

## COMMENTARY

**Canon 4.** Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.

Within the boundaries of applicable law (*see, e.g.*, 18 U.S.C. § 953) a judge may express opposition to the persecution of lawyers and judges anywhere in the world if the judge has ascertained, after reasonable inquiry, that the persecution is occasioned by conflict between the professional responsibilities of the persecuted judge or lawyer and the policies or practices of the relevant government.

A person other than a spouse with whom the judge maintains both a household and an intimate relationship should be considered a member of the judge's family for purposes of legal assistance under Canon 4A(5), fund raising under Canon 4C, and family business activities under Canon 4D(2).

**Canon 4A.** Teaching and serving on the board of a law school are permissible, but in the case of a for-profit law school, board service is limited to a nongoverning advisory board.

Consistent with this Canon, a judge may encourage lawyers to provide pro bono legal services.

**Canon 4A(4).** This Canon generally prohibits a judge from mediating a state court matter, except in unusual circumstances (*e.g.*, when a judge is mediating a federal matter that cannot be resolved effectively without addressing the related state court matter).

**Canon 4A(5).** A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

**Canon 4B.** The changing nature of some organizations and their exposure to litigation make it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if the judge's continued association is appropriate. For example, in many jurisdictions, charitable hospitals are in court more often now than in the past.

**Canon 4C.** A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event. Use of a judge's name, position in the organization, and judicial designation on an organization's letterhead, including when used for fund raising or soliciting members, does not violate Canon 4C if comparable information and designations are listed for others.

**Canon 4D(1), (2), and (3).** Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties. Canon 4H requires a judge to report compensation received for activities outside the judicial office. A judge has the rights of an ordinary citizen with respect to financial affairs, except for limitations required to safeguard the proper performance of the judge's duties. A judge's participation in a closely held family business, while generally permissible, may be prohibited if it takes too much time or involves misuse of judicial prestige or if the business is likely to come before the court on which the judge serves. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

**Canon 4D(5).** The restriction on using nonpublic information is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

**Canon 4E.** Mere residence in the judge's household does not by itself make a person a member of the judge's family for purposes of this Canon. The person must be treated by the judge as a member of the judge's family.

The Applicable Date of Compliance provision of this Code addresses continued service as a fiduciary.

A judge's obligation under this Code and the judge's obligation as a fiduciary may come into conflict. For example, a judge should resign as a trustee if it would result in detriment to the trust to divest holdings whose retention would require frequent disqualification of the judge in violation of Canon 4D(3).

**Canon 4F.** The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources and the need to protect the courts from involvement in matters that may prove to be controversial. Judges should not accept governmental appointments that could interfere with the effectiveness and independence of the judiciary, interfere with the performance of the judge's judicial responsibilities, or tend to undermine public confidence in the judiciary.

**Canon 4H.** A judge is not required by this Code to disclose income, debts, or investments, except as provided in this Canon. The Ethics Reform Act of 1989 and

implementing regulations promulgated by the Judicial Conference impose additional restrictions on judges' receipt of compensation. That Act and those regulations should be consulted before a judge enters into any arrangement involving the receipt of compensation. The restrictions so imposed include but are not limited to: (1) a prohibition against receiving "honoraria" (defined as anything of value received for a speech, appearance, or article), (2) a prohibition against receiving compensation for service as a director, trustee, or officer of a profit or nonprofit organization, (3) a requirement that compensated teaching activities receive prior approval, and (4) a limitation on the receipt of "outside earned income."

### **CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY**

- A. *General Prohibitions.* A judge should not:
- (1) act as a leader or hold any office in a political organization;
  - (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
  - (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.
- B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.
- C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.

#### **COMMENTARY**

The term "political organization" refers to a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.

#### **Compliance with the Code of Conduct**

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge

A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

- (1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);
- (2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

B. Judge Pro Tempore

A judge pro tempore is a person who is appointed to act temporarily as a judge or as a special master.

- (1) While acting in this capacity, a judge pro tempore is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4D(3), 4E, 4F, or 4H(3); further, one who acts solely as a special master is not required to comply with Canons 4A(3), 4B, 4C, 4D(4), or 5.
- (2) A person who has been a judge pro tempore should not act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

C. Retired Judge

A judge who is retired under 28 U.S.C. § 371(b) or § 372(a), or who is subject to recall under § 178(d), or who is recalled to judicial service, should comply with all the provisions of this Code except Canon 4F, but the judge should refrain from judicial service during the period of an extrajudicial appointment not sanctioned by Canon 4F. All other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions) should comply with the provisions of this Code governing part-time judges. A senior judge in the territories and possessions must comply with this Code as prescribed by 28 U.S.C. §§ 373(c)(5) and (d).

### **Applicable Date of Compliance**

Persons to whom this Code applies should arrange their financial and fiduciary affairs as soon as reasonably possible to comply with it and should do so in any event within one year after appointment. If, however, the demands on the person's time and the possibility of conflicts of interest are not substantial, such a person may continue to act, without compensation, as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of the person's family if terminating the relationship would unnecessarily jeopardize any substantial interest of the estate or person and if the judicial council of the circuit approves.

## Annex 12

[American Bar Ass'n Model Code of Judicial Conduct]

# ABA MODEL CODE OF JUDICIAL CONDUCT<sup>1</sup>

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<sup>1</sup> As adopted February 2007 and amended August 2010.

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## Annex 13

[Federal Statute on Private International Law, Switzerland]

### Chapter 12: International Arbitration

#### Article 176

##### *I. Field of application; seat of the arbitral tribunal*

<sup>1</sup> The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.

<sup>2</sup> The parties may exclude the application of this chapter by an explicit declaration in the arbitration agreement or by an agreement at a later date and agree on the application of the third part of the CPC.

<sup>3</sup> The seat of the arbitral tribunal shall be determined by the parties, or the arbitral institution designated by them, or, failing both, by the arbitrators.

#### Article 177

##### *II. Arbitrability*

<sup>1</sup> Any dispute of financial interest may be the subject of an arbitration.

<sup>2</sup> A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

#### Article 178

##### *III. Arbitration agreement*

<sup>1</sup> The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

<sup>2</sup> Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

<sup>3</sup> The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

#### Article 179

##### *IV. Arbitrators*

###### *1. Constitution of the arbitral tribunal*

<sup>1</sup> The arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties.

<sup>2</sup> In the absence of such agreement, the judge where the arbitral tribunal has its seat may be seized with the question; he shall apply, by analogy, the provisions of the CPC on appointment, removal or replacement of arbitrators.

<sup>3</sup> If a judge has been designated as the authority for appointing an arbitrator, he shall make the appointment unless a summary examination shows that no arbitration agreement exists between the parties.

#### Article 180

###### *2. Challenge of an arbitrator*

<sup>1</sup> An arbitrator may be challenged:

- a) if he does not meet the qualifications agreed upon by the parties;
- b) if a ground for challenge exists under the rules of arbitration agreed upon by the parties;

c) if circumstances exist that give rise to justifiable doubts as to his independence.

<sup>2</sup> No party may challenge an arbitrator nominated by it, or whom it was instrumental in appointing, except on a ground which came to that party's attention after such appointment. The ground for challenge must be notified to the arbitral tribunal and the other party without delay.

<sup>3</sup> To the extent that the parties have not made provisions for this challenge procedure, the judge at the seat of the arbitral tribunal shall make the final decision.

## **Article 181**

### ***V. Lis Pendens***

<sup>1</sup> The arbitral proceedings shall be pending from the time when one of the parties seizes with a claim either the arbitrator or arbitrators designated in the arbitration agreement or, in the absence of such designation in the arbitration agreement, from the time when one of the parties initiates the procedure for the appointment of the arbitral tribunal.

## **Article 182**

### ***VI. Procedure***

#### *1. Principle*

<sup>1</sup> The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

<sup>2</sup> If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.

<sup>3</sup> Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.

## **Article 183**

#### *2. Provisional and conservatory measures*

<sup>1</sup> Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.

<sup>2</sup> If the party concerned does not voluntarily comply with these measures, the arbitral tribunal may request the assistance of the state judge; the judge shall apply his own law.

<sup>3</sup> The arbitral tribunal or the state judge may make the granting of provisional or conservatory measures subject to appropriate sureties.

## **Article 184**

#### *3. Taking of evidence*

<sup>1</sup> The arbitral tribunal shall itself conduct the taking of evidence.

<sup>2</sup> If the assistance of state judiciary authorities is necessary for the taking of evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the state judge at the seat of the arbitral tribunal; the judge shall apply his own law.

## **Article 185**

#### *4. Other judicial assistance*

For any further judicial assistance the state judge at the seat of the arbitral tribunal shall have jurisdiction.

## **Article 186**

### ***VII. Jurisdiction***

<sup>1</sup> The arbitral tribunal shall itself decide on its jurisdiction.

<sup>1bis</sup> It shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.

<sup>2</sup> A plea of lack of jurisdiction must be raised prior to any defence on the merits.

<sup>3</sup> The arbitral tribunal shall, as a rule, decide on its jurisdiction by preliminary award.

## **Article 187**

### ***VIII. Decision on the merits***

#### *1. Applicable law*

<sup>1</sup> The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection.

<sup>2</sup> The parties may authorize the arbitral tribunal to decide ex aequo et bono.

## **Article 188**

#### *2. Partial award*

Unless the parties otherwise agree, the arbitral tribunal may render partial awards.

## **Article 189**

### ***3. Arbitral award***

<sup>1</sup> The arbitral award shall be rendered in conformity with the rules of procedure and in the form agreed upon by the parties.

<sup>2</sup> In the absence of such an agreement, the arbitral award shall be made by a majority, or, in the absence of a majority, by the chairman alone. The award shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient.

## **Article 190**

### ***IX. Finality; Action for annulment***

#### *1. Principle*

<sup>1</sup> The award is final from its notification.

<sup>2</sup> The award may only be annulled:

- a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
- b) if the arbitral tribunal wrongly accepted or declined jurisdiction;
- c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
- d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
- e) if the award is incompatible with public policy.

<sup>3</sup> Preliminary awards can be annulled on the grounds of the above paras. 2(a) and 2(b) only; the time limit runs from the notification of the preliminary award.

## **Article 191**

#### *2. Judicial authority to set aside*

The sole judicial authority to set aside is the Swiss Federal Supreme Court. The procedure follows Art. 77 of the Swiss Federal Statute on the Swiss Federal Supreme Court of June 17, 2005.

## **Article 192**

### ***X. Waiver of annulment***

<sup>1</sup> If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).

<sup>2</sup> If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.

## **Article 193**

### ***XI. Deposit and certificate of enforceability***

<sup>1</sup> Each party may at its own expense deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.

<sup>2</sup> On request of a party, the court shall certify the enforceability of the award.

<sup>3</sup> On request of a party, the arbitral tribunal shall certify that the award has been rendered pursuant to the provisions of this statute; such certificate has the same effect as the deposit of the award.

## **Article 194**

### ***XII. Foreign arbitral awards***

The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

## Annex 14

[AAA-ICDR Code of Ethics for Arbitrators]

## **The Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004**

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

### *Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone,

to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

*Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

**CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.**

A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.

B. One should accept appointment as an arbitrator only if fully satisfied:

(1) that he or she can serve impartially;

(2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;

(3) that he or she is competent to serve; and

(4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

- I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

**CANON II: AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:

- (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
- (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
- (3) the nature and extent of any prior knowledge they may have of the dispute; and
- (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.

- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.

- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.

- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

### CANON III: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests

for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

- (4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;
- (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or
- (6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

#### CANON IV: AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

**CANON V: AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

**CANON VI: AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.**

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

**CANON VII: AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.**

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

(1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;

(2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and

(3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

**CANON VIII: AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.**

A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.

B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

*Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

**CANON IX: ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.**

A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.

B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.

C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

- (1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
  - (2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
  - (3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.
- D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

**CANON X: EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.**

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

*A. Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

- (1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

*B. Obligations under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

*C. Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
  - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
  - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
  - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

*G. Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

*H. Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

*I. Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

# EXHIBIT 43

International Chamber of Commerce  
New Generic Top Level Domain Names (“gTLD”)  
Dispute Resolution Procedure  
In re Community Objection to <.RUGBY>  
EXP/517/ICANN/132  
Application ID 1-1206-66762

23 July, 2013

Dear Sirs

### **Objection to Panel Appointment of Richard Henry McLaren**

We write in support of the position of Atomic Cross, LLC (“Atomic Cross”) in its Objection of July 23, 2013 to Panel Appointment of Richard Henry McLaren in the .rugby matter before the International Chamber of Commerce. We respectfully draw your attention to material which may supplement the arguments presented by Atomic Cross.

The Applicant shares Atomic Cross’ faith in the personal sincerity of Mr McLaren that he is “impartial and independent” and iterates that it does not have any personal issues with Mr McLaren.

*Nemo iudex in res sua*

However, the principles of natural justice require, *inter alia*, that the person passing judgment of any sort in any matter should be and, equally, *be perceived* to be completely free of bias. In English law, there are several aspects of this basic rule which have been clearly delineated in case law and constitute guidance for persons serving in a judicial capacity. We feel it might assist to draw attention to a number which we consider of primary relevance in the current matter.

(i) **No apparent bias**

The test of apparent bias has been developed through a series of cases. Lord Denning MR, in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] said:

*"The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand . . . "*

Mr McLaren has or currently functions as an arbitrator for the Court of Arbitration for Sport (CAS). As the governing body of CAS is partially appointed by the IRB, and IRB has direct input into the selection of the CAS arbitrators.

Furthermore, Mr McLaren is appointed as President of the Basketball Arbitral Tribunal. This body is directly set up by the Federation Internationale de Basketball, FIBA. The Objector in this case, IRB, and FIBA, have both used almost identical structures to apply for the .rugby, and .basketball Top Level Domains respectively. Both are represented by the same law firm, Fletcher, Heald & Hildreth and both have as business partners Roar Domains LLC and Top Level Domain Holdings Plc. Their respective applications are almost identical. It is not unreasonable to assume that there are some business relationships between both the Objector and FIBA, to whom Mr McLaren is closely connected.

The above factors create clear grounds for *perceived bias*.

**(ii) No interest**

It is established law that where a decision-maker has an interest with a party or witness he should disclose this and stand down unless there has been an express waiver by the affected party. It was held that Lord Hoffman ought to have so recused himself in *Re: Pinochet* [1999] HL, on the grounds that he had a former interest in Amnesty International, that he should have disclosed because the case involved precisely the type of activity that Amnesty was engaged in preventing.

Mr McLaren, with respect, can be said to have an interest in IRB via his appointment to CAS as established above; or at the very least, he demonstrates his prior involvement with the sporting community and his interest in the latter.

**(iii) No pecuniary interest**

Moreover, where there is a pecuniary interest, the law *assumes* bias: the rules of natural justice require that the judge has no interest in the outcome: in *Dimes v Grand Junction Canal* (1852) HL

the judge Vice Chancellor Cottenham held shares in the canal, which was a party to the proceedings, and was, therefore, biased.

Mr McLaren is presumably being remunerated, whether directly or indirectly, for his role as arbitrator for CAS and the Basketball Arbitral Tribunal. Such interest, we respectfully submit, arguably amounts to a *pecuniary interest*, which would be grounds for automatic recusal.

(iv) **Personal relationships**

The Guide to Judicial Conduct (*March 2013*) issued by the Judges' Council of the Judiciary of England and Wales, advises that relationships, a current or recent business association with a party, will usually mean that a judge should not sit on a case (*Section 7.2.3, Chapter 7: Personal Relationships and Perceived Bias*).

While past professional association with a party as a client need not of itself be a reason for disqualification, the judge must assess whether the particular circumstances could create an appearance of bias (*Section 7.2.6, Ibid*).

With respect, Mr McLaren's position as arbitrator with CAS creates the possible perception of a business or personal relationship, whether directly or indirectly, with IRB, which again, create the *appearance* of bias, which would constitute grounds for recusal.

(v) **Judicial independence**

Judicial independence "connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the Executive Branch of government, that rest on objective conditions or guarantees." *Valente v The Queen* (1985).

A specific application of that principle mentioned in the Guide to Judicial Conduct mentioned is that "a judge must forego any kind of political activity and on appointment sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided."

Clearly, Mr McLaren's relationship with the international sporting world in addition to his highly regarded status as arbitrator with CAS (over which IRB has a direct influence) and the Basketball Arbitral Tribunal would in itself throw into question the perceived independence of his role as

arbitrator in the current dispute between an international sports federation and a non-sports organisation in a case involving Internet domain names and non-sports.

For the foregoing reasons, which in summary, present specific reasons as to how it necessary in practical terms to maintain the crucial importance of expert impartiality and independence, we would respectfully and with regret support the objection to Mr McLaren in the present matter.

With kind regards,

A handwritten signature in blue ink, appearing to read 'Peter Young', with a stylized flourish at the end.

Peter Young  
Chief Legal Officer

# EXHIBIT 44

**EXP/517/ICANN/132 (c. EXP/519/ICANN/134)**

**INTERNATIONAL RUGBY BOARD (IRELAND) vs/ DOT RUGBY LIMITED (GIBRALTAR)**

**INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA)**

**Response to Applicants' Objections to Panel Appointment of Richard Henry McLaren  
in the Above-Referenced Consolidated Proceeding**

Pursuant to Article 11(4) of the Rules, we hereby respond on behalf of the International Rugby Board (IRB) to the *Applicant's Objection to Panel Appointment of Richard Henry McLaren* and the *Objection to Panel Appointment of Richard Henry McLaren* filed by Applicants Atomic Cross, LLC and Dot Rugby Limited, respectively. IRB submits that the Applicants have failed to make a case to overcome Mr. McLaren's Statement of Impartiality and Independence and to have him removed from this proceeding, and their objections should accordingly be denied.

Furthermore, the Applicants' underlying suggestion that anyone with a background in sports-related matters should be disqualified from consideration for the Panel in this proceeding is both unwarranted and contrary to ICC Rules, and should likewise be rejected. Further, we acknowledge Mr. McLaren's filing of July 31, 2013, and support his conclusion that his recusal is not warranted under the circumstances.

**I. INTRODUCTION AND SUMMARY**

Mr. McLaren was properly appointed as the Expert and sole member of the Panel in this consolidated matter by the ICC. Mr. McLaren submitted the required "Declaration of Acceptance and Availability, Statement of Impartiality and Independence," checking the box in section 3 thereof marked "Nothing to disclose." The Applicants nonetheless have objected to the appointment of Mr. McLaren on two grounds. First, they assert that Mr. McLaren's status as an arbitrator for the Court of Arbitration for Sport (CAS) and as President of the Basketball Arbitral Tribunal ("BAT") somehow create a disqualifying professional relationship, or at least the "appearance" of same, despite Mr. McLaren's apparent conclusion otherwise. As shown below, such relationships are far too attenuated to rise to the level of requiring Mr. McLaren's removal here. Presumably Mr. McLaren was aware of these matters when he submitted his Statement, and his conclusion that they will not affect his ability to decide the pending Objection proceedings appropriately should be respected.

Second, the Applicants contend essentially that Mr. McLaren's, or indeed any appointee's, background in sports-related matters calls into question their independence and impartiality as an Expert. In fact, such sports-related expertise is a necessary qualification under Article 7(2) of the Rules for an Expert hearing these sports-based Community Objections. That provision requires that the ICC consider a "prospective expert's qualifications relevant to the circumstances of the case ...." Rugby, like other sports, comprises a distinct type of community with its own unique institutions, events and relationships. That is why entities like the CAS and BAT have been created to ensure that disputes involving sporting communities and their members, including with entities outside of the sporting community, are heard by individuals with an understanding of that uniqueness. The ICC has obviously recognized the same here. Any failure to appoint an Expert with such requisite subject matter expertise would invite an objection under Article 11(4) of the Rules "that the expert does not have the necessary qualifications ...."

## II. THE RELATIONSHIPS AMONG THE CAS, THE ICAS, THE BAT AND ROAR'S BUSINESS PARTNERS DO NOT REQUIRE REMOVAL OF MR. MCLAREN

IRB does not dispute the importance of both actual and apparent independence and impartiality to the integrity of the ICC process here and recognizes the independence of the CAS and its appointed arbitrators. While the differences between arbitrators and judges may render some of the citations included by the Applicants in their objections not pertinent, in general the ICC correctly requires that "[e]very expert must remain independent of the parties involved in the expertise proceedings...." Article 11(1). Applicants have, however, cited no express authority for the proposition that Mr. McLaren's status as one of almost 300 CAS arbitrators (Attachment 1) somehow compromises his independence or impartiality here.

Most significantly, the independence of CAS arbitrators has been upheld by the highest court in Switzerland. See, e.g.:

"2003 - Acknowledgement of the CAS independence by the Swiss Federal Tribunal further to an appeal filed by two Russian cross country skiers, Larissa Lazutina and Olga Danilova, against a CAS award disqualifying them from the Winter Olympic Games in Salt Lake City. After having carefully analysed the organisation and the structure of ICAS and CAS, the TF admitted the independence of CAS towards the IOC and any other party using its services (Judgement of 27 May 2003, first civil Court, TF, Lazutina et Danilova v. International Olympic Committee (IOC), International Skiing Federation (FIS) and Court of Arbitration for Sport (CAS))."

(Attachment 2 at 2) (Full text of decision at Attachment 3)

Further, we note that the case of *Gundel*, a favorite case of Famous Four/Dot Rugby, has been superseded by a total reform of the CAS system, as reflected in the 2003 *Lazutina* case discussed above. (Attachment 3) The ICAS has no role in this proceeding and, therefore, any further citation to *Gundel* should be ignored as irrelevant.

CAS arbitrators are not employees of the IRB or any sports federation, nor are they employees of the CAS. They are thoroughly vetted professionals who are keenly aware of their obligations to maintain their independence and impartiality and to avoid impropriety.

Moreover, while it is true that, as an International Federation (IF), IRB is a federation recognized by the IOC, IRB is only one of twenty-eight summer Olympic federations which are grouped in the Association of Summer Olympic International Federations (ASOIF) (Attachment 4), which in turn appoints only three of twenty ICAS Members.

"The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law." (Attachment 5 at 1)

Moreover, the ICAS members themselves must act with independence and objectivity in performing their functions:

"Upon their appointment, the ICAS members must sign a declaration undertaking to exercise their function in a personal capacity, with total objectivity and independence. This obviously means that in no circumstances can a member play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party." *Id.*

Mr. McLaren's relationship with the Basketball Arbitral Tribunal (BAT) is equally irrelevant to the question of his independence and impartiality in this proceeding. Indeed, the Applicants' suggestion that the putative connection from the IRB through Roar and its business partners to FIBA, then to the BAT and finally to Mr. McLaren himself is somehow problematic is ludicrous. With this illogic, Applicants precede four steps down the road to "Six Degrees of Separation." Mathematically, their logic would encompass and eliminate most of the world as possible ICC Panelists.

If we were to perform equivalent chains of association for all of Donut's more than 300 New gTLD applications and Famous Four's more than 60 New gTLD applications, we would disqualify all eligible, qualified Panelists. The world may be interrelated and interlinked, but this fact does not compromise the impartiality and independence of all who operate, work and arbitrate within it. If this objection is sustained, IRB respectfully submits that the Applicants must, at a minimum, be required to reveal their connections to the "fourth degree of separation" with respect to any future Expert nominee. We note, in preparation for such disclosure, that Donuts and Famous Four are, collectively, associated with hundreds of applications and thousands of individuals, and any failure to fully disclose as required should be sanctioned by forfeiture of this proceeding.

With respect to the BAT itself, it is an independent adjudication body of FIBA and therefore bears no relevance to the IRB response in this regard. The IRB has a similar adjudication body, and Mr. McLaren is not and never has been associated with it. Moreover, FIBA is not a party to this matter, we are not before the CAS, and Mr. McLaren's other business positions do not call into question his qualifications to participate in this consolidated proceeding.

### III. CONTRARY TO APPLICANTS' CLAIMS, THIS DOES PRESENT A SPORTS-RELATED DISPUTE

Applicants' strained attempt to stretch legitimate principles of independence and impartiality to cover the above-described remote relationships reveals their true agenda – to seek to ban any type of sports-related expertise from the decisionmaking in these proceedings. Applicant Atomic Cross claims that this Objection proceeding "does not present a 'sports-related' dispute." At 2. Applicant Dot Rugby Limited complains about Mr. McLaren's "prior involvement with the sporting community and his interest in the latter" and further questions the "perceived independence of his role as arbitrator in the current dispute between an international sports federation and a non-sports organisation in a case involving Internet domain names and non-sports." At 2,3-4. Irrespective of the ICC's decision regarding the status of Mr. McLaren, the Centre should make abundantly clear that sports-related expertise is a requisite qualification for any Expert hearing these matters.

As Applicant Atomic Cross concedes (at 2, 3), the critical issues presented in these proceedings include the nature of the Rugby Community, IRB's status within that Community, and the adverse impact on that Community of denying IRB its proper stewardship role over the .RUGBY gTLD. By definition, ALL of these issues involve aspects of the sports world that are unique among other worldwide communities and industries. Absent an understanding of these unique attributes, an Expert will be incapable of rendering a just and informed decision in these proceedings.

Sporting communities are not the same as other communities of interest. The members are different, composed of associations and federations and teams and players as opposed to corporations and shareholders and workers or particular individuals. Members include both amateurs and professionals, and many members are non-profit. They run clubs, leagues and tournaments, not strictly businesses. Positions of authority are often filled by volunteers and frequently unpaid. Notwithstanding the important financial elements in many sports, this unique structure results in differing incentives and vulnerabilities when compared to other commercial and non-commercial communities.

For example, in our Objections to the applications of Atomic Cross and Dot Rugby for the .RUGBY string, we identified the many players in the Rugby Community, both national and international, and the leadership role that IRB enjoys. Moreover, we identified the harms the Rugby Community would suffer were the .RUGBY string awarded to another entity. Those harms include not simply typical cybersquatting, trademark infringement and marketing abuses, but also unique problems such as protecting the rights of amateur players, non-profit clubs and leagues for youth and adults, scalping and ambush marketing in connection with tournaments, and association with gambling interests. An individual lacking the knowledge, experience and background necessary to understand and rule upon these types of sports-related issues cannot be deemed an "expert" competent to be appointed by the ICC in these proceedings.

Indeed, the CAS and BAT were established for the purpose of ensuring the availability of arbitrators with the necessary expertise to resolve disputes between members of sporting communities AND between such members and their non-sports commercial partners. (Attachment 6 at S14 and Attachment 7 at S20 and page 3 ) Further, the CAS is not alone in recognizing the need for decisionmakers to have such subject matter expertise. As reflected in the appointment of Mr. McLaren, the ICC itself apparently understands that "necessary qualifications" under Articles 7(2) and 11(4) include this background. Similarly, for example, the American Arbitration Association (AAA) requires golf experience for its Golf Industry Panel arbitrators and labor relations experience for its Labor Panel arbitrators. (Attachments 8 and 9) Indeed, it would be nonsensical to exclude such basic knowledge from proceedings of this type, yet that is what the Applicants appear to be trying to do.

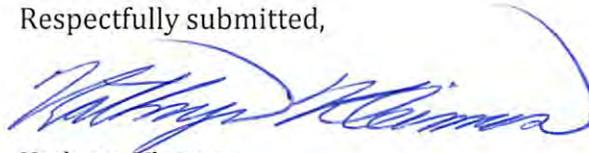
#### IV. CONCLUSION

As AAA has explained in its Code of Ethics for Arbitrators in Commercial Disputes (Attachment 10 at 4), Canon I dealing with impartiality, independence and competence to serve:

"A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience of expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration." Comment to Canon I at 4.

In sum, our Community Objections are not merely Internet-related domain name disputes. An understanding of sporting communities is critical not only to the definition of the Rugby Community itself, but also to an understanding of the harms we face should our Objections to the Applicants' applications not be sustained. Accordingly, for all of the foregoing reasons, we respectfully request that the Applicants' objections to the appointment of Mr. McLaren as Expert in these consolidated proceedings be denied.

Respectfully submitted,



Kathryn Kleiman

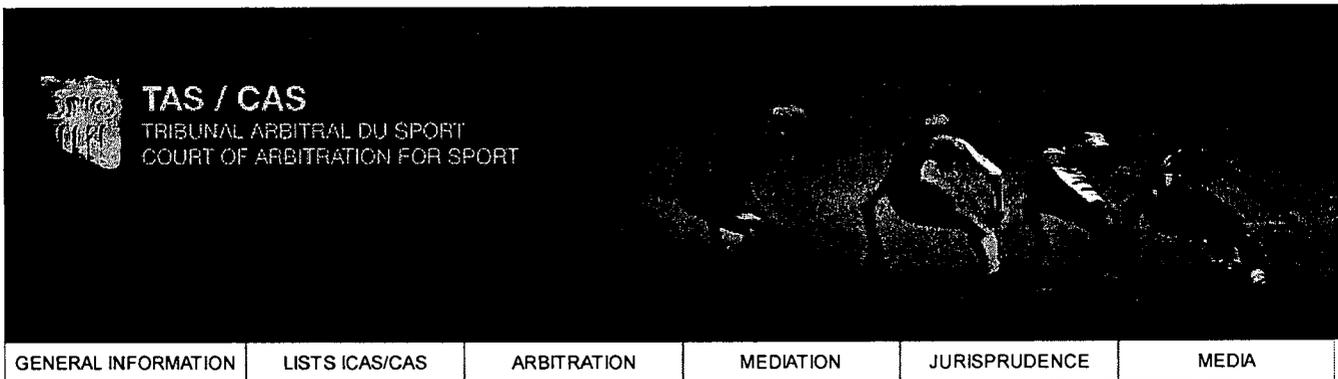
Robert J. Butler

On behalf of the International Rugby Board (IRB)

### **Description of Attachments**

- |               |   |
|---------------|---|
| Attachment 1  | What is the Court of Arbitration for Sport? from the CAS Website.                 |
| Attachment 2  | Important Dates in the CAS History from the CAS Website.                          |
| Attachment 3  | Judgement of 27 May 2003, Swiss Federal Tribunal.                                 |
| Attachment 4  | ASOIF Members from the ASOIF Website.   |
| Attachment 5  | Organization and Structure of the ICAS and CAS from the CAS Website.              |
| Attachment 6  | CAS Code Excerpt from the CAS Website.  |
| Attachment 7  | CAS Code Excerpt and Types of Disputes Submitted to the CAS from the CAS Website. |
| Attachment 8  | AAA National Golf Industry Panel Qualifications.                                  |
| Attachment 9  | AAA Labor Panel Qualifications.   |
| Attachment 10 | AAA Code of Ethics for Arbitrators in Commercial Disputes.                        |

# **ATTACHMENT 1**



## GENERAL INFORMATION

## 20 QUESTIONS ABOUT THE CAS

[home](#) / [General Information](#) / [20 questions about the CAS](#)

**WHAT IS THE COURT OF ARBITRATION FOR SPORT ?**

The Court of Arbitration for Sport (CAS) is an institution independent of any sports organization which provides for services in order to facilitate the settlement of sports-related disputes through arbitration or mediation by means of procedural rules adapted to the specific needs of the sports world.

The CAS was created in 1984 and is placed under the administrative and financial authority of the International Council of Arbitration for Sport (ICAS).

The CAS has nearly 300 arbitrators from 87 countries, chosen for their specialist knowledge of arbitration and sports law. Around 300 cases are registered by the CAS every year.

1. **WHAT IS THE COURT OF ARBITRATION FOR SPORT ?**
2. **WHAT IS THE FUNCTION OF THE CAS ?**
3. **WHERE IS THE CAS BASED ?**
4. **WHAT KINDS OF DISPUTE CAN BE SUBMITTED TO THE CAS ?**
5. **WHO CAN REFER A CASE TO THE CAS ?**
6. **UNDER WHAT CONDITIONS WILL THE CAS INTERVENE ?**
7. **WHAT ARE THE WORKING LANGUAGES OF THE CAS ?**
8. **WHAT ARE THE CAS PROCEDURES ?**
9. **HOW DOES ONE SET THE ARBITRATION IN MOTION ?**
10. **CAN ONE BE REPRESENTED DURING THE PROCEEDINGS ?**
11. **HOW ARE THE ARBITRATORS CHOSEN ?**
12. **HOW DOES CAS ARBITRATION PROCEDURE WORK ?**
13. **WHAT LAW DO THE ARBITRATORS APPLY ?**
14. **HOW MUCH DOES THE ARBITRATION COST ?**
15. **HOW LONG DOES CAS ARBITRATION LAST ?**
16. **ARE THE ARBITRATION PROCEEDINGS CONFIDENTIAL ?**
17. **WHAT IS THE SCOPE OF AN AWARD PRONOUNCED BY THE CAS ?**
18. **IS IT POSSIBLE TO APPEAL AGAINST A CAS AWARD ?**
19. **WHAT IS CAS MEDIATION ?**
20. **HOW DOES CAS MEDIATION WORK ?**



## **ATTACHMENT 2**



**TAS / CAS**  
 TRIBUNAL ARBITRAL DU SPORT  
 COURT OF ARBITRATION FOR SPORT



GENERAL INFORMATION	LISTS ICAS/CAS	ARBITRATION	MEDIATION	JURISPRUDENCE	MEDIA
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GENERAL INFORMATION

STATISTICS

[home / General Information / Statistics](#)

**IMPORTANT DATES IN THE CAS HISTORY**

Statistics 2012

**1981:**

- The creation of a specialised sports jurisdiction envisaged for the first time by HE Juan Antonio Samaranch, former IOC President ;

**1983 :**

- Statutes of the Court of Arbitration for Sport (CAS) officially ratified by the IOC on the occasion of its 86th session in New Delhi in March 1983 ;

**1984 :**

- 30 June 1984, implementation of the CAS Statutes ;
- Beginning of the CAS activities under the presidency of HE the Judge Kéba Mbaye and of the Secretary General, Mr Gilbert Schwaar ;

**1986 :**

- First case submitted to CAS ;

**1987 :**

- First award rendered by CAS ;

**1991 :**

- Publication by CAS of a Guide to Arbitration including several standard arbitration clauses ;
- Adoption of the first arbitration clause referring to CAS by the International Equestrian Federation (FEI) ;

**1993 :**

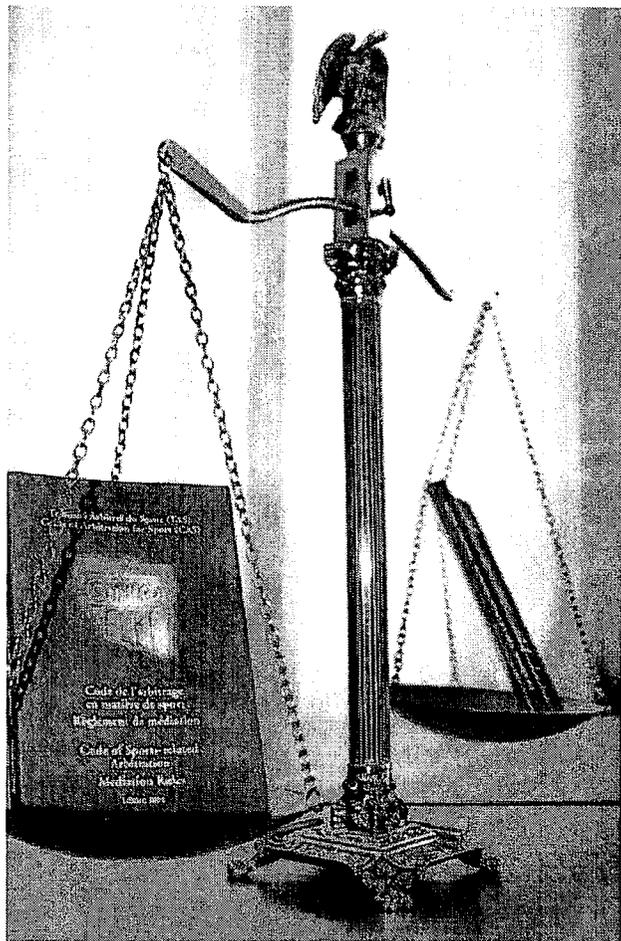
- 15 March 1993, Publication of the judgement of the Swiss Federal Tribunal (TF) recognising CAS as a true arbitral Tribunal but expressing doubts regarding its independence towards the IOC ;
- September 1993, International Conference « Law and Sport » organised by CAS in Lausanne with the aim of reforming the CAS structure in order to guarantee its independence ;

**1994 :**

- Appointment of Mr Jean-Philippe Rochat as CAS Secretary General in replacement of Mr Schwaar ;
- 22 June 1994, creation of the International Council of Arbitration for Sport (ICAS) enshrined in the « Paris Agreement » : the CAS has a new structure with the ICAS as supreme body ;
- 22 November 1994, implementation of the Code of Sports-related Arbitration confirming the CAS reform, in particular the creation of ICAS and of two arbitration divisions, the ordinary arbitration division and the appeals arbitration division ;

**1996 :**

- Creation of two decentralised Court Offices by ICAS, one in Sydney (Australia) and one in Denver (USA). These offices are linked to CAS Lausanne and constitute administrative branches ;
- Creation by ICAS of the first CAS ad hoc Division which has the mission to settle as a last instance disputes arising during the Olympic Games in Atlanta within a time limit of 24 hours (since 1996, creation of ad hoc Divisions for each edition of the OG) ;



**1998 :**

- Creation of an ad hoc Division for the Commonwealth Games in Kuala Lumpur ;
- Creation of an ad hoc Division for the Olympic Winter Games in Nagano ;

**1999 :**

- Appointment by ICAS of Mr Matthieu Reeb as CAS Secretary General in replacement of Mr Jean-Philippe Rochat ;
- The CAS decentralised Office of Denver moved to New York ;
- Amendment to the Code of Sports-related Arbitration in order to create a mediation procedure ;

**2000 :**

- Creation of an ad hoc Division for the European Football Championship in Belgium and in the Netherlands ;
- Creation of an ad hoc Division for the Olympic Games in Sydney ;

**2002 :**

- Creation of an ad hoc Division for the Olympic Winter Games in Salt Lake City ;
- Creation of an ad hoc Division for the Commonwealth Games in Manchester;
- Recognition by FIFA of the CAS jurisdiction ;

**2003 :**

- Acknowledgement of the CAS independence by the Swiss Federal Tribunal further to an appeal filed by two Russian cross country skiers, Larissa Lazutina and Olga Danilova, against a CAS award disqualifying them from the Winter Olympic Games in Salt Lake City. After having carefully analysed the organisation and the structure of ICAS and CAS, the TF admitted the independence of CAS towards the IOC and any other party using its services (Judgement of 27 May 2003, first civil Court, TF, Lazutina et Danilova v. International Olympic Committee (IOC), International Skiing Federation (FIS) and Court of Arbitration for Sport (CAS)) ;
- Designation of CAS as last instance Tribunal in relation to international disputes related to doping by the World Anti-Doping Code published by the World Anti-Doping Agency (WADA) ;

**2004 :**

- The new Code of Sports- related Arbitration entered into force ;
- Creation of an ad hoc Division for the European Football Championship in Portugal ;
- Creation of an ad hoc Division for the Olympic Games in Athens ;
- Publication of the Digest of CAS awards 2001-2003 ;

**2005 :**

- Inauguration of the new CAS headquarters at the Château de Béthusy in Lausanne;

**2006 :**

- Creation of an ad hoc Division for the Olympic Winter Games in Turin ;
- Creation of an ad hoc Division for the Commonwealth Games in Melbourne;
- Creation of an ad hoc Division for the FIFA World Cup in Germany;

**2007 :**

- Death of the Judge Kéba Mbaye ;
- Nomination of Mr. Mino Auletta as ICAS/CAS President ad interim.

**2008 :**

- April - Mr. Mino Auletta elected ICAS/CAS President
- Record number of procedures registered in one year: 318

.

**2010 :**

- November - Mr. John Coates elected ICAS/CAS President



Contact Information Redacted

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# **ATTACHMENT 3**

# Swiss Federal Tribunal

## Judgement of 27 May 2003

### 1st Civil Chamber

Composition Judges Corboz (President), Walter, Klett, Nyffeler and Favre  
Registrar: Mr Carruzzo

Parties A. \_\_\_\_\_  
B. \_\_\_\_\_  
plaintiffs, represented by Mr Rémy Wyler, lawyer, place  
Benjamin-Constant Contact Information Redacted

**versus**

**International Olympic Committee**, Contact Information Redacted  
Contact Information Redacted

defendant, represented by Mr Jean-Paul Maire, lawyer, rue du  
Contact Information Redacted

**International Ski Federation (FIS)**, Contact Information Redacted  
Contact Information Redacted

defendant, represented by Mr Hans-Kaspar Stiffler, lawyer,  
Contact Information Redacted

**Court of Arbitration for Sport (CAS)**, represented by its  
Secretary General, Matthieu Reeb, Contact Information Redacted  
Contact Information Redacted

Subject international arbitration; independence of the CAS; right to a fair  
hearing; procedural public policy

public-law appeal against the awards of the Court of Arbitration  
for Sport of 29 November 2002.

**In Fact:**

**A.**

**A.a** A.\_\_\_\_\_ and B.\_\_\_\_\_ are both cross-country skiers of X.\_\_\_\_\_ nationality and domiciled in X.\_\_\_\_\_. Members of the X.\_\_\_\_\_ Ski Association, they have represented X.\_\_\_\_\_ in various international competitions and participated in the Olympic Winter Games in Salt Lake City (United States of America) in 2002.

The International Olympic Committee (IOC) is an international not-for-profit non-governmental organisation, established as an association under Swiss law, with its headquarters in Lausanne. According to the Olympic Charter, it is responsible for managing the Olympic Movement, which comprises, in addition to the IOC, the International Federations (IFs), the National Olympic Committees (NOCs), the Organising Committees of the Olympic Games (OCOGs), the national associations, clubs, and the persons belonging to them, particularly athletes, as well as other organisations and institutions recognised by the IOC. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in the conditions described in the Olympic Charter. The Olympic Games represent the peak of its activity. In order to participate in the Games, competitors must conform to the Olympic Charter and to the rules laid down by the relevant IF. In particular, they are required to respect the Olympic Movement Anti-Doping Code. Athletes who infringe the Olympic Charter should be disqualified and lose the benefit of any ranking obtained; any medal they have won should be withdrawn, as well as any diploma they have been awarded. The Olympic Charter states that any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration.

The International Ski Federation (FIS), based in Switzerland, is the supreme authority for all questions related to skiing. Its members include all national ski associations that have approved its Statutes and been admitted as members. The X.\_\_\_\_\_ Ski Association is a member. In order to participate in an international skiing competition, competitors must hold an FIS licence issued by their national association. Licences are only issued to competitors who have signed the athletes' declaration. By signing this declaration, competitors promise to submit any claims firstly to an arbitral tribunal set up in accordance with the Statutes and Rules of the Court of Arbitration for Sport. Competitors must respect the rules laid down by the FIS. Those guilty of a first offence of deliberate doping are liable to suspension from all international competitions for a minimum of two years and to the invalidation of all results obtained during their suspension period. Decisions of the FIS Council in doping cases may be appealed before the CAS.

**A.b** On 8, 14 and 22 December 2001, at international cross-country skiing competitions organised by the FIS in Italy, Switzerland and Austria, A.\_\_\_\_\_ underwent anti-doping tests which revealed the presence of a prohibited substance, darbepoietine, in her body.

Tests carried out on 21 February 2002, during the Salt Lake City Olympic Games, on A.\_\_\_\_\_ and B.\_\_\_\_\_ produced the same result and, consequently, led to the opening of a disciplinary investigation. In view of the conclusions of that investigation, the IOC Executive Board, through a decision of 24 February 2002, disqualified both skiers from an event in which they had participated, withdrew the gold medal won by A.\_\_\_\_\_ and the diploma awarded to B.\_\_\_\_\_ and excluded both athletes from the 2002 Olympic Winter Games. The file was then submitted to the FIS so that it could amend the result of the race and take the necessary measures.

At its meeting on 3 June 2002, the FIS Council suspended both X.\_\_\_\_\_ skiers from international competitions for two years, A.\_\_\_\_\_ from 8 December 2001 and B.\_\_\_\_\_ from 21 February 2002.

**B.**

A.\_\_\_\_\_ and B.\_\_\_\_\_ appealed against the decisions of the IOC and FIS.

Giving judgement on 29 November 2002, the CAS, comprising C.\_\_\_\_\_ (President), D.\_\_\_\_\_, arbitrator chosen by the appellants, and E.\_\_\_\_\_, arbitrator chosen by the IOC and FIS, issued four awards, dismissing the appeals and upholding the decisions of the IOC and FIS against A.\_\_\_\_\_ (cases CAS 2002/A/370 and CAS 2002/A/397) and B.\_\_\_\_\_ (cases CAS 2002/A/371 and CAS 2002/A/398). The awards were issued free of charge, apart from the court fee of CHF 500. However, each appellant was ordered to pay CHF 25,000 to the IOC and CHF 15,000 to the FIS to cover their costs.

**C.**

A.\_\_\_\_\_ and B.\_\_\_\_\_ each lodged public-law appeals in accordance with Article 191 para. 1 of the Swiss Federal Code on Private International Law (LDIP) and Article 85 (c) of the Federal Statute on the Organisation of the Judiciary (OJ), requesting that each award concerning them be set aside.

The IOC and FIS consider that the appeals should be dismissed insofar as they are admissible. The CAS also believes they should be dismissed.

The plaintiffs submitted supplementary statements of appeal without being invited to do so.

**The Federal Supreme Court considers that, in law:**

**1.**

The four public-law appeals, even though they refer to four separate awards, are nevertheless closely linked. The two X.\_\_\_\_\_ skiers who lodged them are both represented by the same lawyer, who drafted four virtually identical statements of appeal. The responses to the questions raised by the plaintiffs are the same in each appeal, subject to the reservations set out in the main body of the present judgement. It is therefore appropriate, in order to shorten the proceedings, to join together cases 4P.267/2002

(A. \_\_\_\_\_ v. IOC), 4P.268/2002 (B. \_\_\_\_\_ v. IOC), 4P.269/2002 (A. \_\_\_\_\_ v. FIS) and 4P.270/2002 (B. \_\_\_\_\_ v. FIS), in accordance with Article 24 of the Federal Civil Procedure (PCF), which applies by analogy under the referral mentioned in Article 40 OJ (ATF 113 Ia 390 rec. 1 and the quoted judgements), and to deal with them in a single judgement.

## 2.

According to Article 85 (c) OJ, public-law appeals to the Federal Supreme Court may be lodged against arbitral awards under the conditions described in Articles 190 et seq. of the LDIP (RS 291). It is therefore necessary to consider first of all whether the conditions laid down in these provisions are met.

**2.1** The CAS headquarters are in Switzerland and at least one of the parties (in this case, both plaintiffs) at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. The provisions of Chapter 12 of the LDIP are therefore applicable (Art. 176 para. 1 LDIP).

An arbitral award, in the sense of Art. 189 LDIP, is a judgement rendered on the basis of an arbitration agreement by a non-State tribunal entrusted by the parties to decide an arbitrable dispute (Art. 177 para. 1 LDIP) of an international nature (Art. 176 para. 1 LDIP); a true award, which is comparable to the judgement of a State tribunal, is dependent on the arbitral tribunal concerned offering sufficient guarantees of impartiality and independence as derived from Article 30 para. 1 of the Constitution (regarding Art. 58 (a) of the Constitution, see ATF 119 II 271 rec. 3b and the quoted judgements). The Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases in which the IOC is not a party, but where the CAS is established by an international sports association as the appeals body charged with examining the validity of sanctions imposed by its organs (ATF 119 II 271 rec. 3b confirmed most recently by judgement 4P.64/2001 of 11 June 2001, rec. 2d/ee). There is therefore no doubt that the disputed decisions are awards, since they were rendered in cases between the plaintiffs and the FIS. The question of whether the CAS, if it rules on a request for arbitration that seeks the annulment of an IOC decision, renders a true arbitral award was raised in the aforementioned judgement (ATF 119 II 271 rec. 3b, p.279) and again more recently (judgement 5P.427/2000 of 4 December 2000, rec. 1c). However, the Federal Supreme Court left this question open in both cases. The matter cannot remain undecided any longer, since the plaintiffs expressly contest the fact that the CAS offers sufficient guarantees of impartiality and independence when it decides a dispute between an athlete and the IOC, as it did in their case. Besides, resolving this question of principle, on which judgement has been reserved for a decade, will help to clarify the fairly hazy situation which has evolved in the meantime and, therefore, to establish legal certainty in the interests of any athlete who might be faced with the same problem as the plaintiffs in the future. We will therefore disregard the illogicality of the plaintiffs' action in referring the disputed decision of the association in question (the IOC) to an arbitral tribunal accused of partiality (the CAS) instead of appealing to a State tribunal to set aside the decision on the basis of Article 75 of the Civil Code (CC). Therefore, since the point at issue - the alleged lack of independence of the CAS to pass judgement in a case involving the IOC -

constitutes both a ground of inadmissibility of the appeals and the plaintiffs' principal complaint, it seems sensible to examine it at a later stage (see rec. 3.3, below), to accept for the time being that we are dealing with a true arbitral award (analogical application of the theory of doubly relevant evidence; see ATF 128 III 50 rec. 2b/bb, p.56 in fine; 122 III 249 rec. 3b/bb) and to deal firstly with the other matters relating to the admissibility of the appeals.

A public-law appeal is only admissible if the arbitral tribunal concerned ruled on points of law and not solely on the application of sporting rules, which do not in principle fall under the jurisdiction of the courts. That is the case in this instance, since anti-doping rules, which deal primarily with sanctions, generally lie outside the framework of simple sporting rules (François Vouilloz, *Règles de droit et règles de jeu en droit du sport - l'exemple du dopage*, in PJA 1999, pp. 161 et seq., esp. p. 165 and the references mentioned in footnote 26). Furthermore, suspension from international competitions is far more serious than simple sanctions designed to protect the smooth running of a sport and constitutes a genuine statutory punishment that affects the legal interests of the person concerned. It therefore falls within the jurisdiction of the courts (ATF 119 II 271 rec. 3c and references).

Appeals may only be lodged on one of the grounds listed exhaustively in Article 190 para. 2 of the LDIP (ATF 128 III 50 rec. 1a, p. 53; 127 III 279 rec. 1a, p. 282; 119 II 380 rec. 3c, p. 383). The grounds submitted by the plaintiffs fall within the scope of this provision.

**2.2** Since a public-law appeal is possible in this case, we must now consider whether the procedural rules were respected. For appeals related to international arbitration, the procedure before the Federal Supreme Court is governed by the provisions of the Federal Statute on the Organisation of the Judiciary regarding public-law appeals (Art. 191 para. 1, sentence 2, LDIP).

The plaintiffs are directly affected by the disputed awards, which ratify the withdrawal of the prizes they received at the 2002 Olympic Winter Games (gold medal and diploma respectively), as well as their suspension from all international competitions for a two-year period which is still running. They therefore have a personal, current, legally protected interest in establishing whether these decisions were rendered in violation of the guarantees derived from Art. 190 para. 2 of the LDIP, and are thus entitled to appeal (Art. 88 OJ).

Having been lodged in due time (Art. 89 para. 1 OJ) and in the form prescribed by law (Art. 90 para. 1 OJ), all four appeals are admissible in principle.

**2.3** Since the applicable procedural rules are those relating to public-law appeals, the plaintiffs must list their complaints in accordance with the conditions set out in Art. 90 para. 1 (b) OJ (ATF 128 III 50 rec. 1c; 127 III 279 rec. 1c; 117 II 604 rec. 3, p. 606). When dealing with a public-law appeal, the Federal Supreme Court only examines admissible complaints that have been raised with sufficient grounds in the statement of

appeal (see ATF 129 I 113 rec. 2.1 and the judgements mentioned). The plaintiffs therefore had to indicate which of the situations mentioned in Art. 190 para. 2 LDIP had, in their view, arisen in this case and, based on the disputed awards, show, with evidence, how they thought the relevant principles had been violated (ATF 127 III 279 rec. 1c). It will be necessary to check whether this condition has been fulfilled when examining the various complaints raised by the plaintiffs.

**2.4** On 11 April 2003, the plaintiffs' lawyer submitted unsolicited supplementary statements of appeal, one for each appeal procedure, asking for a second exchange of correspondence. Such an exchange usually only takes place under exceptional circumstances (Art. 93 para. 3 OJ). The Federal Supreme Court holds strictly to this rule and only orders a reply and a rejoinder if they appear genuinely indispensable to resolve a case whilst respecting the right to a fair hearing (Bernard Corboz, *Le recours au Tribunal fédéral en matière d'arbitrage international*, in SJ 2002 II, pp. 1 et seq., 15 (h)).

There is no reason to make an exception to this rule in the present case. Indeed, as will be explained in the examination of the relevant complaint, the facts contained in the supplementary statement of appeal are unlikely to affect the outcome of the dispute (see rec. 4.2.2.1, below).

### **3.**

The plaintiffs submit, as their principal argument, that the CAS is not an independent tribunal in a dispute in which the IOC is a party. On the basis of Art. 190 para. 2 (a) LDIP in conjunction with Art. 6 para. 1 of the ECHR and Art. 30 para. 1 of the Constitution, they argue that the two awards in which the IOC is named as a party should be set aside. They claim that the defect inherent in the aforementioned awards is also present in the other two awards, which relate to the FIS, since the four appeals were heard jointly by the same Panel of arbitrators.

**3.1** By their own admission, the plaintiffs lodged their appeals with the CAS without reservation. In their opinion, this should not prevent them now from complaining that this arbitral tribunal lacks independence. However, the authors whose work they refer to (Thomas Rüede/Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, 2nd ed., pp. 142 et seq.) are of no help to them, since they say precisely the opposite (see also Corboz, *op. cit.*, p.17 in limine; Bernard Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987*, 3rd ed., note 4 ad Art. 190; Cesare Jermini, *Die Anfechtung der Schiedssprüche im internationalen Privatrecht*, Zurich, 1997, notes 178 et seq.). The case-law of the Federal Supreme Court also runs counter to the plaintiffs' opinion. If an arbitral tribunal lacks independence or impartiality, it is "constituted irregularly" in the sense of Art. 190 para. 2 (a) LDIP. According to the principle of good faith, however, this ground is only valid if the party raises it immediately; the latter cannot hold its arguments in reserve in order to bring them up should they lose the arbitral procedure (judgement 4P.188/2001 of 15 October 2001, rec. 2b, quoting ATF 126 III 249 rec. 3c).

In this case, the plaintiffs did not appeal to the State courts to set aside the IOC's decisions concerning them. Instead, they lodged an appeal with the CAS and, through

their counsel, signed the proceedings order confirming the jurisdiction of the CAS. At no point did they question the CAS' independence vis-à-vis the IOC. To raise this issue for the first time before the Federal Supreme Court in an appeal against the final award appears incompatible with the rules of good faith. Under these rules, the admissibility of the corresponding complaint, which was submitted late, is questionable. However, the question of admissibility would only need to be answered definitively if the complaint was deemed to be well-founded. We shall therefore now consider whether that is the case, leaving the issue of admissibility to one side, particularly since this is a question of principle which it would be unwise to leave unanswered.

**3.2** The Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases in which the IOC is not a party, but where the CAS is established by an international sports association as the appeals body charged with examining the validity of sanctions imposed by its organs (ATF 119 II 271 rec. 3b confirmed most recently by judgement 4P.64/2001 of 11 June 2001, rec. 2d/ee).

Applied to this particular case, this well-established case-law demands that the ground of the CAS' lack of independence should be rejected in relation to the two awards rendered in the cases between the plaintiffs and the FIS. There is no reason to assume that, just because the CAS lacked sufficient independence vis-à-vis the IOC, the same would be true vis-à-vis the FIS. The plaintiffs claim that this is the case, but fail to offer any convincing arguments to support this point of view. The fact that the four cases were heard jointly by the same arbitrators is not a convincing reason. Of course, there was nothing, in theory, to stop the arbitrators treating the appeals concerning the IOC differently from those involving the FIS in the four separate awards that were issued on the same day. Indeed, one of the awards (A.\_\_\_\_\_ v. FIS) concerned cases of doping established prior to the 2002 Olympic Winter Games and which were based on entirely different evidence from that which brought to light a further case of doping involving the same skier during the Games, subsequently resulting in her disqualification (A.\_\_\_\_\_ v. IOC).

**3.3** In order to tackle the question of the CAS' independence vis-à-vis the IOC, we shall begin by sketching a brief history of this permanent arbitral institution before describing its current structure (rec. 3.3.1) and the opinions that have been expressed concerning its reform (rec. 3.3.2). We shall then consider the CAS' situation in relation to the objections raised by the plaintiffs and the counter-arguments put forward by the IOC and the CAS itself (rec. 3.3.3). Finally, we shall draw the necessary conclusions concerning the merit of the complaint and, consequently, the admissibility of the appeals lodged against the awards involving the IOC (rec. 3.3.4).

**3.3.1** The CAS was officially created on 30 June 1984, when its Statute came into force. Its function was to resolve sports-related disputes and its headquarters were established in Lausanne. An independent arbitral institution without legal personality, it was originally composed of 60 members, 15 appointed by the IOC, 15 by the IFs, 15 by the NOCs and 15 by the IOC President. The operating costs of the CAS were borne by the IOC, which

was entitled to modify the CAS Statute (for more details, see ATF 119 II 271 rec. 3b, pp. 277 et seq. and the authors mentioned).

In a judgement issued in 1993, the Federal Supreme Court expressed reservations concerning the CAS' independence vis-à-vis the IOC on account of the organisational and financial links between the two bodies. It thought that the CAS needed to become more independent of the IOC (ATF 119 II 271 rec. 3b, p. 280). This judgement led to a major reform of the CAS. The main developments were the creation of the International Council of Arbitration for Sport (ICAS) in Paris on 22 June 1994 and the drafting of the Code of Sports-related Arbitration (hereinafter "the Code"), which entered into force on 22 November 1994 (for a more detailed history of the CAS, see the accounts by Matthieu Reeb, CAS Secretary General, in *Digest of CAS Awards II, 1998-2000*, pp. xxiii et seq. [hereinafter "Digest II"] and in *Revue de l'avocat 10/2002*, pp. 8 et seq. [hereinafter "Revue"]; see also, *inter alia*, Piermarco Zen-Ruffinen, *Droit du Sport*, Schulthess 2002, notes 1461 et seq.).

A private-law foundation subject to Swiss law (Art. 80 et seq. CC), the ICAS, whose seat is established in Lausanne (Art. S1 of the Code), is composed of 20 members, namely high-level jurists appointed in the following manner (Art. S4 of the Code): four members by the Summer Olympic IFs (3) and Winter Olympic IFs (1), chosen from within or from outside their membership; four members by the Association of the NOCs (ANOC), chosen from within or from outside its membership, four members by the IOC, chosen from within or from outside its membership, four members by the twelve members listed above, after appropriate consultation with a view to safeguarding the interests of the athletes; four members by the sixteen members listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS. The members of the ICAS are appointed for a renewable period of four years. Upon their appointment, they must sign a formal declaration of their independence (Art. S5 of the Code). The ICAS members may not appear on the list of arbitrators of the CAS nor act as counsel to one of the parties in proceedings before the CAS; under certain circumstances, they must spontaneously disqualify themselves or may be challenged (Art. S5 and S11 of the Code). According to Art. 3 of the Agreement related to the constitution of the ICAS, the foundation is funded through deductions made by the IOC from the sums allocated to the following bodies as part of the IOC's revenue from the television rights for the Olympic Games: 4/12 by the IOC, 3/12 by the Summer Olympic IFs, 1/12 by the Winter Olympic IFs and 4/12 by the ANOC. The tasks of the ICAS include to safeguard the independence of the CAS and the rights of the parties (Art. S2 of the Code). Its various functions include adopting and amending the Code, managing and financing the CAS, drawing up the list of CAS arbitrators who may be chosen by the parties, deciding on the challenge and removal of arbitrators and appointing the Secretary General of the CAS (Art. S6 of the Code).

The CAS sets in operation Panels which have the task of resolving disputes arising within the field of sport. It is composed of two divisions, each headed by a president who takes charge of the first arbitration operations before the Panel of arbitrators is appointed: the Ordinary Arbitration Division and the Appeals Arbitration Division (Art. S12 of the

Code). The former deals with cases submitted to the CAS as the sole instance (execution of contracts, civil liability, etc.), while the latter hears appeals against final-instance disciplinary decisions taken by sports bodies such as federations (e.g. suspension of an athlete for doping, violence on the field of play or abuse of a referee). The CAS has at least 150 arbitrators, who are not assigned to one particular division (Art. S13 and S18 of the Code). The ICAS draws up the list of arbitrators, which is updated and published (Art. S15 of the Code). It calls upon personalities with legal training and who possess recognised competence with regard to sport, while respecting the following distribution (Art. S14 of the Code) and ensuring, wherever possible, fair representation of the different continents (Art. S16 of the Code): one-fifth are selected from among the persons proposed by the IOC, the IFs and the NOCs respectively, chosen from within its/their membership or from outside; one-fifth are chosen from among persons independent of these bodies; and, finally, one-fifth are chosen after appropriate consultations with a view to safeguarding the interests of the athletes. Only the arbitrators included on the list - they appear on the list for a renewable period of four years (Art. S13 of the Code) - may serve on Panels (Art. R33, R38 and R39 of the Code). When they are appointed to a Panel, they must sign a formal declaration of their independence (Art. S18 of the Code). Incidentally, arbitrators must immediately disclose any circumstances likely to affect their independence with respect to any of the parties (Art. R33 of the Code). They may be challenged if the circumstances give rise to legitimate doubts over their independence. Challenges, which are in the exclusive power of the ICAS, must be brought immediately after the ground for the challenge has become known (Art. R34 of the Code). If three arbitrators are to be appointed, in the absence of an agreement, each party appoints one arbitrator, one in the request and the other in the response, and the President of the Panel is selected by the two arbitrators or, if they do not agree, by the President of the Division (Art. R40.2 of the Code). Any arbitrator selected by the parties or by other arbitrators is only deemed appointed after confirmation by the President of the Division. Once the Panel is formed, the file is transferred to the arbitrators for them to investigate the case and render their award.

In 1996, the ICAS created two permanent decentralised offices in Australia and the United States of America. In the same year, a specific new institution was established: the CAS ad hoc division. This is a temporary arbitral body, created by the ICAS under the terms of Art. S6 para. 8 of the Code for certain major sports events such as the Olympic Games, Commonwealth Games and European Football Championships. For each ad hoc division, the ICAS appoints a team of arbitrators which is usually based at the site of the event concerned so that it can meet at any time during a fixed period. Special arbitration rules make provision for a simplified procedure for the formation of Panels and the settlement of disputes. In principle, decisions must be made within 24 hours of the application being filed.

Having originally comprised 60 members, the CAS now has around 200 arbitrators. According to its Secretary General, all Olympic IFs have recognised its jurisdiction, which indicates that, over the years, it has become an indispensable institution in the world of sport.

**3.3.2** In the opinion of its President and Secretary General, the CAS, since it was restructured, has established its independence vis-à-vis the IOC (Kéba Mbaye, in Digest II, p. xi; Reeb, in Digest II, p. xxv and in *Revue*, p.9). Not all legal experts agree, contrary to the IOC's claim in its responses to the appeals. Certain authors do agree (Jean-François Poudret/Sébastien Besson, *Droit comparé de l'arbitrage international*, note 106; Philippe Meier/Cédric Aguet, *L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive internationale*, in *JdT 2002*, p. 56 footnote 6; Gérald Simon, *L'arbitrage des conflits sportifs*, in *Revue de l'arbitrage 1995*, pp. 185 et seq., 209 et seq.; Zen-Ruffinen, *op. cit.*, note 1463). Others are more sceptical about the effectiveness of the 1994 reforms (Mark Schillig, *Schiedsgerichtsbarkeit von Sportverbänden in der Schweiz*, Zurich, 1999, pp. 157 et seq.; Margareta Baddeley, *L'association sportive face au droit*, Geneva, 1994, pp. 272 et seq., footnote 79; Dietmar Hantke, *Brauchen wir eine Sport- Schiedsgerichtsbarkeit?*, in *SpuRt [Zeitschrift für Sport und Recht] 1998*, p. 187; Rémy Wyler, *La convention d'arbitrage en droit du sport*, in *RDS 116/1997 I* pp. 45 et seq., 60); one author describes the reforms as a "*Symptombekämpfung*" which does nothing to change the fundamental problem (Schillig, *op. cit.*, p. 159).

**3.3.3** In order to conclude whether an arbitral tribunal offers sufficient guarantees of independence and impartiality, reference must be made to the constitutional principles concerning State courts (ATF 125 I 389 rec. 4a; 118 II 359 rec. 3c, p. 361).

According to Article 30 para. 1 of the Constitution, every person whose case must be judged in judicial proceedings has the right to have this done by a court that is established by law, has jurisdiction, and is independent and impartial. This principle means it should be possible to demand that a judge be challenged if his situation or conduct is likely to give rise to doubts about his impartiality (ATF 126 I 68, rec. 3a, p. 73); in particular, it is meant to prevent circumstances external to a case from influencing the judgement either in favour or to the detriment of one of the parties. It does not mean that a judge can only be challenged if prejudice is established, since an internal predisposition on his part is virtually impossible to prove; it is sufficient that circumstances produce the appearance of prejudice and cast doubt over the judge's impartiality. Only objectively noted circumstances may be taken into consideration; the purely individual impressions of one of the parties to the case are not sufficient in themselves (ATF 128 V 82, rec. 2a, p. 84 and the quoted judgements).

The question of whether, as legal opinion suggests, the demands made on arbitrators chosen by one of the parties should be less strict has not been resolved (judgement 4P.188/2001 of 15 October 2001, rec. 2b in fine; ATF 118 II 359 rec. 3c, p. 362 and the authors mentioned; see also Corboz, *op. cit.*, pp. 16 et seq.) and does not need to be answered in the present case. However, case-law suggests that account should be taken of the specific characteristics of arbitration, especially international arbitration, when considering whether an arbitral tribunal offers sufficient guarantees of impartiality and independence (judgement 4P.224/1997 of 9 February 1998, rec. 3, published in *Revue suisse de droit international et de droit européen [RSDIE] 1999*, pp. 579 et seq.; judgement 4P.292/1993 of 30 June 1994, rec. 4a). International arbitration is actually a narrow field and it is inevitable that, after a few years on the circuit, arbitrators, many of

whom are lawyers themselves, will hear cases in which either a fellow arbitrator or one of the counsels has served with them on a previous Panel. This does not automatically mean they are no longer independent (Pierre Lalive/Jean-François Poudret/Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, note 8 ad Art. 180 LDIP; see also Philippe Fouchard/Emmanuel Gaillard/Berthold Goldman, *Traité de l'arbitrage commercial international*, note 1031; Poudret/Besson, *op. cit.*, notes 418 et seq.; Klaus Peter Berger, *Internationale Wirtschaftsschiedsgerichtsbarkeit*, p. 178, footnote 288; Corboz, *op. cit.*, p. 16).

**3.3.3.1** The plaintiffs dispute the fact that the CAS offers sufficient guarantees of impartiality and independence vis-à-vis the IOC. In their view, the structure of the ICAS, the way in which arbitrators are appointed, and the organisation, financing and functioning of the CAS create excessively close links between the permanent arbitral institution and the supreme authority of the Olympic Movement.

In concrete terms, the plaintiffs' first argument is that many ICAS members are subordinate to the IOC on account of their role within the Olympic Movement. They point out that the ICAS President is a former Vice-President of the IOC and remains an honorary IOC member. The two ICAS Vice-Presidents are both members of IOC Commissions. The President of the Appeals Division is an IOC Vice-President and his deputy is a member of an IOC Commission. Furthermore, of the nine ICAS members who do not have a particular function, four are current or previous NOC members. The Secretary of the ICAS, meanwhile, is also the Secretary General of the CAS.

The plaintiffs go on to observe that they had to choose an arbitrator from the official list. They argue that the range of possibilities open to athletes is extremely limited if they wish to appoint an arbitrator who is familiar with their sport, speaks their language and lives in the same country as them.

Finally, the plaintiffs claim that, by virtue of Art. 3 of the Paris Agreement and Art. 11 of the Olympic Charter, the IOC has complete control over the financing of the ICAS and CAS. In particular, the IOC pays the travel and accommodation costs and fees of arbitrators who work for the ad hoc divisions.

**3.3.3.2** The arguments summarised above, which are based partly on false premises, do not appear convincing.

According to the explanations submitted with supporting evidence by the CAS in its responses to the appeals - explanations which are not disputed by the plaintiffs - in 2002 the ICAS members included one former IOC member, one IOC Vice-President and one IOC member. However, none of its other members were part of the IOC nor any of its commissions. This proportion was not sufficient to enable the IOC actually to control the ICAS. Of course, the wording of Article S4 of the Code does not totally exclude the possibility of the former having control over the latter: if each of the bodies mentioned under letters a (IFs) and b (ANOC) of the said Article were to appoint four IOC members to the ICAS, which they are perfectly at liberty to do ("chosen from within or from

outside their/its membership"), and if the IOC appointed four of its own members, twelve of the twenty ICAS seats would be held by IOC members, which could cause problems. However, that is only a rather unlikely scenario which is irrelevant in the current case. Moreover, the plaintiffs are wrong to suggest that the ICAS organs are structurally dependent on the IOC because they belong to the Olympic Movement. An autonomous foundation, the ICAS is not mentioned in Rule 3 of the Olympic Charter which, in conjunction with Rule 4, sets out the conditions for membership of the Olympic Movement. It can amend its own Statutes (Art. S25 of the Code), does not take orders from the IOC and is not obliged to abide by the IOC's decisions (Rule 1 of the Olympic Charter, a contrario). Incidentally, the ICAS does not exercise any influence on the CAS' arbitral procedures as such, other than when it is asked to rule on a request for an arbitrator to be challenged (Art. R34 of the Code); however, in such cases, the ICAS member should spontaneously disqualify himself if a sports body to which he belongs (e.g. the IOC) is a party in the arbitration (Art. S11 of the Code). ICAS members may not, in any case, appear on the list of CAS arbitrators, nor act as counsel to any party in proceedings before the CAS (Art. S5 of the Code). As for the Secretary General of the CAS, who also acts as Secretary to the ICAS, he only has a consultative voice within the latter institution (Art. S8 of the Code) and does not form part of CAS Panels. With this structure, subject to the aforementioned reservation, the ICAS is therefore able to safeguard the independence of the CAS and the rights of the parties.

The rule that stipulates that only arbitrators appearing on the list drawn up by the ICAS may serve on Panels is much debated, as acknowledged by the CAS Secretary General (Reeb, *Revue*, p. 10; more generally, see also: Rüede/Hadenfeldt, *op. cit.*, p. 129 ch. 1 and p. 149 ch. 4; Baddeley, *op. cit.*, p. 267; Schillig, *op. cit.*, pp. 157 *et seq.*; Fouchard/Gaillard/Goldman, *op. cit.*, note 1004). This system is especially common in corporative institutions, where it is justified by the highly technical nature of most disputes, although it restricts parties' options and, depending on the circumstances, can jeopardise the principle of equality of the parties (Fouchard/Gaillard/Goldman, *ibid.*). Nevertheless, when faced with this problem, the Federal Supreme Court has always refused to condemn this system as such, whilst recommending that care should be taken to prevent any particular party influencing the composition of the list of arbitrators (see ATF 107 Ia 155, rec. 3b, p. 161; 93 I 265 rec. 3c; 84 I 39 rec. 6a, which nonetheless distinguish between the arbitral tribunals of chambers of commerce that were involved in these cases, and those created by associations; concerning this case-law, see Thomas Clay, *L'arbitre*, Dalloz 2001, note 477). In order to justify the continued use of this system, the CAS Secretary General advocates that arbitrators who are asked to decide disputes in this very specific context should be specialised (Reeb, *Revue*, *ibid.*). This is a valid point, which supports the notion that the status quo should be maintained. In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events, that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues (for more information on the advantages of judicial arbitration in the world of sport, see Zen-Ruffinen, *op. cit.*, note 1420). The idea of a list of arbitrators, as used by the CAS, helps to achieve these objectives. Thanks in particular to the creation of ad hoc divisions, it enables the parties concerned to obtain a decision quickly, following a hearing conducted

by persons with legal training and recognised expertise in the field of sport, whilst protecting their right to a fair hearing. Furthermore, since the CAS arbitrators are regularly informed of developments in sports law and CAS case-law, the system in question, which also helps to eliminate the problems linked to the international nature of many sports-related disputes, ensures a degree of consistency in the decisions taken (concerning the latter two points, see Zen-Ruffinen, *ibid.*).

Following the changes introduced since the 1994 reforms, the use of a list of arbitrators is now in keeping with the constitutional demands of independence and impartiality applicable to arbitral tribunals. At least 150 names must appear on the list of arbitrators and the CAS currently has around 200. Whatever the plaintiffs may argue, parties therefore have a wide choice of names to choose from, even taking into account the nationality, language and sport practised by athletes who appeal to the CAS. Besides, the importance of these three factors should be put into perspective: an arbitrator's nationality should not, under normal circumstances, influence his appointment, especially since all arbitrators must, or at least ought to, be independent of the parties, including the one which appointed them. Since the CAS working languages are French and English (Art. R29 of the Code), the issue of language should also not be a determining factor in the choice of an arbitrator. As far as the question of sports disciplines is concerned, the plaintiffs seem to have grasped the wrong end of the stick: they have no right to demand that their case be heard by arbitrators who once practised the same sport as them. The most important thing in this respect is that the list should comprise a wide range of competent arbitrators with a certain level of experience of competitive sport. Athletes are free to appoint arbitrators from another discipline if they think they seem more independent and impartial. The disadvantages of choosing an arbitrator from another sport should not be exaggerated, since the issues dealt with by the CAS (doping, abuse of officials, violence on the field of play, etc.) are more or less common to all sports. Doping cases in particular tend to be very similar, irrespective of the sport practised by the offender. A question mark remains over what would happen under the exceptional circumstances whereby, on account of the specific nature of the object of a dispute and of the issues involved, it proved necessary to appoint an arbitrator specialising in the sports discipline practised by an athlete involved in proceedings before the CAS, and where the arbitrator concerned was not sufficiently independent of the IOC. This does not apply in the present case.

Furthermore, the establishment of an independent body - the ICAS - which is responsible for drawing up the list of arbitrators, means that the IOC cannot influence the composition of the list. The same is true regarding the appointment of arbitrators to the list, given that the IOC can only propose one-fifth of the candidates. It is also worth mentioning that a further fifth are meant to be chosen to protect the interests of the athletes, thus enabling athletes involved in a procedure before the CAS to select from a pool of at least thirty arbitrators appointed on that basis.

Nevertheless, the list of arbitrators is perhaps not as legible as it might be. It would be preferable, with this in mind and with a view to greater transparency, if the published list were to indicate, alongside the name of each arbitrator, which of the five categories

mentioned in Article S14 they belonged to (arbitrators chosen from those proposed by the IOC, the IFs and the NOCs; arbitrators chosen to safeguard the interests of the athletes; arbitrators chosen from among persons independent of the three aforementioned bodies) and, for those in two of these categories, by which IF or NOC they were proposed (on the same subject, see Schillig, *op. cit.*, p. 159). The parties would then be able to appoint their arbitrator with full knowledge of the facts. For example, it would prevent a party in dispute with the IOC, in the belief that he was choosing an arbitrator completely unconnected to the latter, from actually appointing a person who was proposed by that organisation but who is not an IOC member (see Art. S14 of the Code, which advocates this practice).

As for the other points raised, the rules concerning the independence and challenge of arbitrators (Articles R33 and R34 of the Code), interpreted in the light of Articles S11 and S21 of the Code, prevent members of the IOC or its Commissions or persons too closely connected to it for other reasons such as the method of their selection, from acting as arbitrators in cases in which the IOC is a party.

It should also be pointed out that the CAS, which functions as an appeals body, independent of the international federations, cannot be compared to a permanent arbitral tribunal set up by an association and responsible to rule in the last instance on internal disputes. As a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in place of the body that gave the previous ruling (Reeb, *Revue, ibid.*), the CAS is more akin to a judicial authority independent of the parties. Used by the CAS, therefore, a list of arbitrators does not give rise to the same objections as those raised when such a list is used by an arbitral tribunal created by an association. Incidentally, the so-called open list system where, unlike the closed list system used by the CAS, the parties (or one party) are able to choose an arbitrator who is not listed (see Clay, *op. cit.*, note 478, p. 400) and which is favoured by some authors (see in particular: Baddeley, *op. cit.*, p. 274, Stephan Netzle, *Das Internationale Sport-Schiedsgericht in Lausanne. Zusammensetzung, Zuständigkeit und Verfahren, in Sportgerichtsbarkeit, in Recht und Sport*, vol. 22, pp. 9 et seq., 12) is not necessarily the answer. On the contrary, with regard to the effectiveness of the arbitral tribunal, the open list system carries the risk that one or more non-specialist arbitrators within the tribunal might be inclined to act as if they were lawyers representing the parties that had appointed them (see Schillig, *op. cit.*, p. 160).

The plaintiffs submit that the way in which the ICAS and CAS are financed, which has already been criticised by legal writers, means that these institutions are not financially independent of the IOC. We should point out straight away that, by way of legal opinion, the plaintiffs merely quote the opinion expressed, without any grounds at all, by their representative in the aforementioned article (RDS 116/1997 I, pp. 47 et seq.). Nevertheless, it is wrong to suggest, as the plaintiffs claim, that the IOC has complete control over the financing of the ICAS and CAS. In accordance with Art. S6 para. 5 of the Code, it is the ICAS that looks after the financing of the CAS and approves its budget and annual accounts. To this end, it receives and manages the funds allocated to its operations. The activities of the two bodies are funded by the IOC, the IFs and the ANOC

in the proportions laid down in the aforementioned Art. 3 of the Paris Agreement. According to this provision, the IOC only finances one-third, with the rest being covered by the other organisations, which are independent of the IOC. Admittedly, this financing structure involves deductions from the funds allocated by the IOC to the said organisations as part of the revenue earned from the sale of television rights for the Olympic Games. However, this does not in any way change the financing structure of the ICAS and CAS. It is merely a collection mechanism (deduction at source) used for practical reasons in order to prevent the ICAS from having to collect directly from each of the numerous IFs and from the ANOC or its various members the funds it and the CAS need to function. Furthermore, it is hard to see how the fact that the Olympic Games and all related rights are the exclusive property of the IOC (see Art. 11 of the Olympic Charter) would give the latter sole control of the remaining two-thirds of the funds allocated to the ICAS. If the IOC were to take the rather preposterous decision to keep for itself all the money received from the sale of television rights for the Olympic Games, the financing structure set out in Art. 3 of the Paris Agreement would still apply and the other organisations that are currently required, alongside the IOC, to fund the ICAS and CAS would probably have to look elsewhere for the resources needed to meet their obligation. Regarding the operational costs of the CAS ad hoc divisions, the CAS explains in its responses to the appeals that these are covered by the ICAS and the Organising Committee of the event in question, but never by the IOC. This leads us to conclude that the financing structure of the CAS is not likely to jeopardise the independence of this arbitral institution vis-à-vis the IOC.

On a more general level, it is also hard to imagine that any other possible structure could ensure the financial autarchy of the CAS, and the plaintiffs do not propose any alternative arrangement. This state of affairs is linked to the extremely hierarchical structure of sport at both international and national levels (on this point, see Zen-Ruffinen, *op. cit.*, notes 103 et seq.). The relationship between the athletes and the organisations that look after the various sports is a vertical one, as opposed to the horizontal ties between the parties to a contractual agreement. This structural difference between the two types of relationship does affect the financing of the bodies responsible for resolving the disputes that may result. Indeed, although an equal financing structure is logical when a dispute arising from a contractual relationship is referred to an arbitral tribunal, whether the costs are actually paid by the parties themselves or by organisations representing their interests (employers' federations, trade unions, home-owners' and tenants' associations, etc.), this does not apply when an arbitral tribunal is asked to examine the validity of a sanction imposed by the supreme body of a sports federation against one of its members: in the latter scenario, the financial means of the opposing parties (the federation and the sanctioned athlete) are extremely unequal (apart from a few rare exceptions) and the person at the bottom of the pyramid, i.e. the athlete, is much less able to contribute.

To conclude our discussion of the financing of the CAS, it should be added that there is not necessarily any relationship of cause and effect between the way a judicial body is financed and its level of independence. This is illustrated, for example, by the fact that State courts in countries governed by the rule of law are often required to rule on disputes involving the State itself, without their judges' independence being questioned on the

ground that they are financially linked to the State. Similarly, the CAS arbitrators should be presumed capable of treating the IOC on an equal footing with any other party, regardless of the fact that it partly finances the Court of which they are members and which pays their fees.

**3.3.3.3** The CAS has produced evidence to show that it is not the vassal of the IOC. Its Secretary General has listed the cases in which the IOC has been a party to CAS proceedings. According to his report, which has not been disputed, of the twelve cases submitted to the CAS since 1996 in which it was the respondent (excluding the cases currently pending), the IOC won eight and lost four. It is also interesting to note that arbitrators C.\_\_\_\_\_, E.\_\_\_\_\_ and D.\_\_\_\_\_, who dealt with the appeals lodged by the plaintiffs, have all been part of Panels that have ruled against the IOC. Of course, this statistic only has indicative value, but it nevertheless provides concrete evidence of the independence and freedom with which the CAS acts in relation to all parties, including the IOC.

A true "supreme court of world sport", to use the phrase coined by Juan Antonio Samaranch, former IOC President (quoted by Kéba Mbaye in Digest II, p. xii), the CAS is growing rapidly and continuing to develop (see Reeb, Digest II, p. xxx). An important new step in its development was recently taken at the World Conference on Doping in Sport, held in Copenhagen at the beginning of March 2003. This Conference adopted the World Anti-Doping Code as the basis for the worldwide fight against doping in sport. Many States, including China, Russia and the United States of America, have adopted the Copenhagen Declaration on Anti-Doping in Sport, thus undertaking to support a process which should result in the Code entering into force in time for the 2006 Olympic Winter Games. Under the terms of Art. 13.2.1 of the new Code, the CAS is the appeals body for all doping-related disputes related to international sports events or international-level athletes. This is a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS. It is hard to imagine that they would have felt able to endorse the judicial powers of the CAS so resoundingly if they had thought it was controlled by the IOC.

This new mark of recognition from the international community shows that the CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively. Certainly, the plaintiffs have not suggested one. The CAS, with its current structure, can undoubtedly be improved. This has already been noted in relation to the legibility of the list of arbitrators (see rec. 3.3.3.2, above). Having gradually built up the trust of the sporting world, this institution which is now widely recognised and which will soon celebrate its twentieth birthday, remains one of the principal mainstays of organised sport.

**3.3.4** To conclude, it is clear that the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgements of State courts.

Consequently, the public-law appeals lodged against the CAS awards in the cases between the two X.\_\_\_\_\_ skiers and the IOC are admissible. However, the complaint concerning the unlawful composition of this arbitral tribunal, also lodged by the plaintiffs, is unfounded.

#### 4.

**4.1** In a second ground of appeal, also based on Art. 190 para. 2 (a) of the LDIP, the plaintiffs dispute not the independence of the CAS as such, but that of the three arbitrators who made up the Panel which rendered the four contested awards.

They argue that, when a small number of arbitrators travel to the Olympic Games host city in order to form a CAS ad hoc division, they forge such close personal and professional relationships with one another that their independence is affected when, at a later time and in different roles, they are involved in cases submitted to the CAS, with one functioning as a Panel member and another as a lawyer or associate of the lawyer of one of the parties. For example, arbitrator E.\_\_\_\_\_ had worked alongside the IOC lawyer (Mr F.\_\_\_\_\_) in one such division which had dealt with a case involving the IOC. He, as well as President C.\_\_\_\_\_, had also served alongside Mr G.\_\_\_\_\_, associate of the FIS counsel (Mr I.\_\_\_\_\_). D.\_\_\_\_\_, meanwhile, had also been a member of an ad hoc division alongside lawyer F.\_\_\_\_\_. Under these circumstances, which were sufficient to cast doubt over their independence and impartiality, these three arbitrators, in the plaintiffs' view, should have disqualified themselves. The plaintiffs dispute the claim that they acted too late in this regard and accuse the CAS Panel of violating procedural public policy by taking a decision itself regarding its own disqualification instead of leaving that decision to the ICAS, which holds exclusive power in this area.

In their responses to the appeals, the IOC and FIS both dispute that the circumstances described by the plaintiffs, which they mentioned too late, constitute a ground for disqualification.

For its part, the CAS claims that the plaintiffs never submitted to the ICAS a request for a challenge in due form. The plaintiffs try to refute this in their supplementary statement of appeal. In their view, a request for a challenge need not be submitted in written form and may be addressed to the ICAS via the CAS.

#### 4.2

**4.2.1** An award can be attacked if it is incompatible with public policy (Art. 190 para. 2 (e) LDIP). A distinction is made between material public policy and procedural public policy. Procedural public policy guarantees the parties the right to an independent ruling on the conclusions and facts submitted to the arbitral tribunal in compliance with the applicable procedural law; procedural public policy is violated when fundamental, commonly recognised principles are infringed, resulting in an intolerable contradiction with the sentiments of justice, to the effect that the decision appears incompatible with

the values recognised in a State governed by the rule of law (see ATF 128 III 191 rec. 4a, p. 194 and the quoted judgement). However, it should be explained that not every violation, even arbitrary, of a procedural rule constitutes a violation of procedural public policy. Only the violation of a rule that is essential to ensure the fairness of proceedings can be taken into consideration (ATF 126 III 249 rec. 3b and references; Corboz, *op. cit.*, p. 29).

**4.2.2** The challenge of a CAS arbitrator is in the exclusive power of the ICAS (Art. R34 of the Code; see also Art. S6 para. 4 of the Code). In the present case, the Panel decided itself on its own disqualification at the hearing held in Lausanne on 4 and 5 November 2002, the discussions at which were recorded on CD-Rom. The fact that it assumed the right to take such a decision does not mean that it violated procedural public policy. On this point, it should be recalled that, according to the case-law of the Federal Supreme Court, a tribunal which is challenged *en bloc* may itself declare the request inadmissible if it is unreasonable or clearly unfounded, even though the applicable procedural law states that the decision should be taken by another authority (judgements 1P.391/2001 of 21 December 2001, rec. 3.1; 1P.553/2001 of 12 November 2001, rec. 2b; 1P.396/2001 of 13 July 2001, rec. 2a; ATF 114 Ia 278 rec. 1, p. 279; 105 Ib 301 rec. 1c and 1d, p. 304). If this exception to the rule is taken into account in the present case, the arbitrators cannot be accused of violating procedural public policy. Such is the case here, since the request for a challenge lodged by the plaintiffs was clearly not only inadmissible (see rec. 4.2.2.1) but also completely unfounded (see rec. 4.2.2.2).

**4.2.2.1** A party wishing to challenge an arbitrator must cite the ground for the challenge immediately after becoming aware of it (ATF 128 V 82 rec. 2b, p. 85; 126 III 249 rec. 3c and references). This judicial rule, which expressly appears in Art. R34 para. 1 of the Code, refers both to the grounds for a challenge that the party concerned was actually aware of and to those it might have become aware of if it had paid sufficient attention (rec. 6, not published, of ATF 119 II 271).

On 7 May 2002, the President of the Panel issued a proceedings order for the cases of A.\_\_\_\_\_ v. IOC and B.\_\_\_\_\_ v. IOC. This proceedings order, which was signed by the counsels of both parties, contained, *inter alia*, the names of the three arbitrators and those of the parties' counsels. A similar order was issued on 17 July 2002 for the cases of A.\_\_\_\_\_ v. FIS and B.\_\_\_\_\_ v. FIS. Having read these orders, the plaintiffs must have been aware of who would be judging their respective appeals and whom their opponent had appointed to represent its interests. It was therefore their responsibility to take the necessary steps to verify the independence of the arbitrators appointed to hear their cases. However, they waited several months before raising the question in *fine litis*. The practical reasons they give for this procrastination appear flimsy to say the least. In particular, the alleged difficulty of gaining access to documents and sources of information is barely credible, given that these were world-class athletes represented by a powerful national federation and involved in a case where the stakes were tremendously high (loss of a gold medal won at the Olympic Games, long-term suspension from all international competitions, etc.). Besides, as the CAS notes in its responses to the appeals, all the information concerning the personal circumstances that

the plaintiffs wished to raise as grounds for a challenge were published on the CAS Internet site at the time when the appeals were lodged. It was therefore easily accessible, even from X.\_\_\_\_\_, where the plaintiffs' main counsel was domiciled.

By themselves dismissing a request for a challenge that was clearly submitted late, the Panel members therefore did not violate procedural public policy. It therefore does not matter whether that request should have been made in writing and whether it was acceptable to address it to the ICAS via the CAS. Discussion of this point, which began in the responses to the appeals and continued in the supplementary statement of appeal that the plaintiffs wished to add to the file, is irrelevant to the outcome of the dispute. There is therefore no need to bring it to a conclusion.

**4.2.2.2** Under Art. 180 para. 1 (c) of the LDIP, an arbitrator may be challenged if the circumstances permit legitimate doubt about his independence. An arbitrator's independence means that he should not be linked in any way to the party which appointed him, but should ultimately be only a representative of that party. It can only be evaluated on a case-by-case basis; there are no absolute grounds for a challenge. Doubts about the independence of an arbitrator must be based on the existence of objective facts which are likely, for a rational observer, to arouse suspicion concerning the arbitrator's independence. On the other hand, the purely subjective reactions of one party should not be taken into account. The principles developed by the Federal Supreme Court on the basis of Art. 58 para. 1 (a) (now Art. 30 para. 1) of the Constitution concerning the challenge of State judges also apply to members of arbitral tribunals. However, account should be taken of the different context of the relations between a State court judge or an arbitrator on one hand, and the parties and their lawyers on the other. For those involved in private arbitration, these relations are more frequent due to economic and professional necessities, with the result that they alone should not be considered a ground for a challenge (see aforementioned judgement 4P.224/1997, 9 February 1998, rec. 3, published in RSDIE 1999, pp. 579 et seq.; and, on the same subject, Poudret/Besson, *op. cit.*, note 419, p. 372). It has even been ruled that the friendship (use of the familiar form of address plus mutual recommendations) between an arbitrator and the lawyer of one of the parties was, in principle, insufficient grounds for a challenge (see aforementioned judgement 4P.292/1993, 30 June 1994, rec. 4a, mentioned by Corboz, *op. cit.*, p. 17, footnote 79).

Generally speaking, a judge cannot be challenged simply on the ground that he dealt with one of the parties in a previous procedure, even if he ruled against that party in the previous case (ATF 114 Ia 278 rec. 1; 113 Ia 407 rec. 2a, p. 409 in fine; 105 Ib 301 rec. 1c). The same should apply to the field of arbitration, particularly international arbitration (see, *inter alia*, Lalive/Poudret/Reymond, *op. cit.*, note 8 ad Art. 180 LDIP, p. 343; Jermi, *op. cit.*, note 327). In the small world of international arbitration, individuals often find themselves working together on different cases; as the IOC points out, it is not uncommon for the same person to be an arbitrator in one particular case and the counsel to a party in another case, pleading in front of one of his fellow arbitrators from the previous case. Such contact will inevitably become even more regular if, as in the CAS, the arbitrators appear on a closed list and need to have legal training as well as recognised

competence with regard to sport. The fact that each member of the Panel that dealt with the plaintiffs' cases was, during the Olympic Games, part of the CAS ad hoc division alongside the lawyer of one of their opponents (IOC) or the associate of the lawyer of their other opponent (FIS) is therefore not, in itself, likely to permit legitimate doubt concerning their independence, particularly since arbitrators C.\_\_\_\_\_, E.\_\_\_\_\_, and D.\_\_\_\_\_ have all been part of Panels that have rendered awards unfavourable to the IOC. Additional circumstances would be required if these arbitrators were to be challenged. Those mentioned by the plaintiffs - that the arbitrators shared meals together, probably stayed at the same hotel and travelled together - are certainly not sufficient. Given the type of people involved, it can be assumed that these contacts are unlikely to affect their independence of mind and opinion. In fact, according to the case-law of the Federal Supreme Court, it should be assumed that the members of a tribunal are capable of rising above the eventualities linked to their appointment when they are required to render concrete decisions in the discharge of their duties (ATF 126 I 235 rec. 2c, p. 239; 119 Ia 81 rec. 4a, p. 85).

Therefore, the challenge of the arbitrators who formed the Panel appears clearly unfounded. By dismissing it themselves, the arbitrators concerned did not in any way infringe procedural public policy.

## **5.**

Having alleged violations of equality of the parties, the right to a fair hearing and public policy, the plaintiffs, in their final set of reasons, criticise the way in which proceedings before the Panel were conducted.

**5.1** According to Art. 190 para. 2 (d) of the LDIP, an award can be attacked if the equality of the parties or their right to be heard in an adversarial proceeding was not respected.

The right to be heard in this case is no different to that enshrined in Art. 29 para. 2 of the Constitution. According to case-law, the right to be heard includes, in particular, the chance for the defendant to explain his actions before a decision is taken against him, the right to produce evidence likely to influence the final decision, the right of access to the file, the chance to participate in the taking of evidence, to inspect it and to determine one's position in that connection (ATF 126 I 15 rec. 2a/aa; 124 I 49 rec. 3a; 241 rec. 2; 124 II 132 rec. 2b; 124 V 180 rec. 1a, 372 rec. 3b).

Art. 190 para. 2 (d) of the LDIP guarantees not only the right to be heard, but also the right to an adversarial proceeding. The adversarial principle enables each party to determine their position vis-à-vis the arguments of their opponent, to examine and discuss the evidence produced by the latter and to disprove it using their own evidence (ATF 117 II 346, rec. 1a, pp. 347 et seq.; 116 II 639 rec. 4c, p. 643).

Finally, the equality of the parties, which is expressly enshrined in Art. 182 para. 3 of the LDIP, is also protected by Art. 190 para. 2 (d) of the LDIP. It implies that proceedings should be regulated and conducted in such a way that all parties have the same

opportunities to argue their case. It demands that the parties should have access to the same tools, although procedural rights may clearly be subject to reasonable non-discriminatory conditions (Corboz, *op. cit.*, p. 22).

**5.2** In the light of these principles, it is necessary to consider the various complaints made by the plaintiffs concerning the conduct of the arbitration proceedings.

**5.2.1** At the beginning of the hearing of 4 and 5 November 2002, the plaintiffs formally requested permission to call as a witness Professor H.\_\_\_\_\_, a specialist in medical toxicology and former director of the Swiss doping analysis laboratory. The Panel refused this request for the reasons set out in its awards (ch. 2.5 to 2.18), which particularly included the fact that the request had been submitted late and that the letter sent by Prof. H.\_\_\_\_\_ could not be considered to be a "witness statement" (regarding this notion, see Podret/Besson, *op. cit.*, note 657). It nevertheless allowed Prof. H.\_\_\_\_\_ to remain in the arbitration room throughout the hearing and to assist the plaintiffs' counsel in the cross-examination of the IOC and FIS witnesses. Incidentally, the Panel did not take into account the objection raised by the plaintiffs, who claimed that they had not been able to read the voluminous witness statements of the IOC witnesses (K.\_\_\_\_\_ and L.\_\_\_\_\_) until a few days before the hearing began.

According to the plaintiffs, in order to guarantee the equality of the parties, the arbitrators should either have agreed to call Professor H.\_\_\_\_\_ as a witness or discarded the written declarations of the IOC witnesses. Their failure to do either amounted to a violation of the right to be heard as well as of the equality of the parties.

The grounds of this complaint do not meet the requirements set out by case-law relating to Art. 90 para. 1 OJ and which are also applicable to public-law appeals in the sense of Art. 191 para. 1 LDIP and Art. 85 (c) OJ. Firstly, the plaintiffs do not properly challenge the detailed grounds given by the arbitrators in their awards for rejecting the request for Prof. H.\_\_\_\_\_ to be called as a witness; in particular, they fail to explain why they think the arbitrators were wrong to consider that the written declaration produced by Prof. H.\_\_\_\_\_ did not constitute a witness statement. Secondly, the plaintiffs also do not criticise the ground on which the arbitrators dismissed their objection concerning the late submission of the witness statements of Professor K.\_\_\_\_\_ and Dr L.\_\_\_\_\_ (ch. 2.24 of the awards). It goes without saying that if, regarding the two points raised by the plaintiffs, the Panel respected the Code and its own proceedings orders, the plaintiffs' claim that their right to be heard and the equality of the parties were violated must be dismissed.

This complaint is therefore inadmissible.

**5.2.2** The subsequent complaint is also groundless. The plaintiffs criticise the Panel for failing to grant their request for the witness statements filed by the FIS to be rejected because they had not been signed. However, they do not question the various reasons given by the arbitrators for dismissing their request (ch. 2.19 to 2.22 of the awards). The arbitrators considered, *inter alia*, that the objection raised by the plaintiffs had been

submitted too late (ch. 2.21 of the awards). This is not disputed by the plaintiffs, whose claim that Article 13 of the Code of Obligations (CO) was breached is therefore dismissed.

**5.2.3** The plaintiffs also deplore the fact that the witnesses were allowed to be present at the hearing before they were questioned and that they were therefore inevitably influenced by preceding witnesses, the parties' statements and the proceedings in general. They believe this to be a breach of procedural public policy. This argument is groundless. The plaintiffs do not refer to any provision of the Code which either prevents witnesses from attending the debates before they are questioned or, in particular, obliges them to retire while another witness is being questioned. Neither do they mention any CAS case-law or legal opinion that suggests this should be the case. Furthermore, it cannot be argued that this rule is essential to the fairness of the proceedings. Besides, arbitration rules generally leave it to the arbitral tribunal to decide whether a witness should retire during part of the proceedings, particularly during the testimony of other witnesses (see, for example, Art. 54 (f) of the WIPO Arbitration Rules, Art. 4 of the Rules and Procedures of the American Arbitration Association and Art. 25 para. 4 of the UNCITRAL arbitration rules).

We should also mention that, in any case, following the example of the CAS and the FIS, on 22 October 2002 the plaintiffs' counsel himself asked the CAS to allow the expert witness called by the plaintiffs - Professor M. \_\_\_\_\_ - to be present in the chamber throughout the hearing; that this request was accepted the following day by the President of the Panel; and therefore that, in order to safeguard the equality of the parties, a similar measure applied to the other witnesses called by the IOC and FIS. The plaintiffs are therefore not entitled to complain about a measure which was intended solely to ensure that the parties were treated equally.

**5.2.4** Finally, the plaintiffs deplore, in vain, the fact that all their requests were dismissed, whereas the procedural errors attributable to the FIS and IOC were never punished. An ill-founded request should not be granted, nor a legitimate procedural measure sanctioned on the grounds of equal treatment.

**5.3** All the complaints concerning the conduct of the arbitral procedure therefore appear either groundless or inadmissible. Consequently, the four appeals must be dismissed insofar as they are admissible.

## **6.**

Both plaintiffs, having lost their appeals, must pay the costs associated with their respective appeals (Art. 156 para. 1 OJ) and compensate their opponents (Art. 159 para. 1 OJ).

**On these grounds, the Swiss Federal Tribunal hereby rules:**

### **1.**

Cases 4P.267/2002, 4P.268/2002, 4P.269/2002 and 4P.270/2002 are joined together.

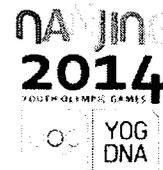
# **ATTACHMENT 4**



**ASOIF MEMBERS**

- Aquatics** - Federation Internationale de Natation
- Archery** - World Archery Federation
- Athletics** - International Association of Athletics Federations
- Badminton** - Badminton World Federation
- Basketball** - Federation Internationale de Basketball
- Boxing** - Association Internationale de Boxe
- Canoeing** - International Canoe Federation
- Cycling** - Union Cycliste Internationale
- Equestrian** - Federation Equestre Internationale
- Fencing** - Federation Internationale d'Escrime
- Field Hockey** - Federation Internationale de Hockey
- Football** - Federation Internationale de Football Association
- Golf** - International Golf Federation
- Gymnastics** - Federation Internationale de Gymnastique
- Handball** - International Handball Federation
- Judo** - International Judo Federation
- Modern Pentathlon** - Union Internationale de Pentathlon Moderne
- Rowing** - Federation Internationale des Societes D'Aviron
- Rugby Union** - International Rugby Board
- Sailing** - International Sailing Federation

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- Mexico City Laboratory Latest to be Accredited by WADA**  
01 Jul 2013
- WADA publishes 2012 Annual Report**  
01 Jul 2013
- Publication of Third Draft of 2015 Code**  
24 Jun 2013
- ASOIF Celebrates 30 Years in St. Petersburg**  
29 May 2013

**ASOIF MEMBERS**



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**ASOIF CALENDAR**

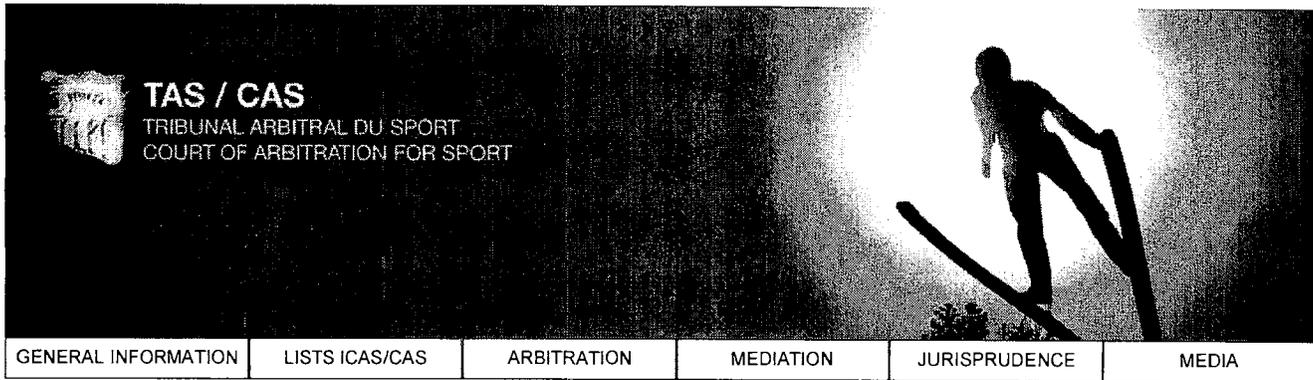
Rio 2016 CoCom

<b>Shooting</b> - International Shooting Sport Federation	28 Aug 2013 - 30 Aug 2013
<b>Table Tennis</b> - International Table Tennis Federation	<b>IOC Executive Board Meeting</b> 04 Sep 2013 - 05 Sep 2013
<b>Taekwondo</b> - World Taekwondo Federation	<b>ASOIF Council Meeting</b> 06 Sep 2013
<b>Tennis</b> - International Tennis Federation	<b>125th IOC Session</b> 07 Sep 2013 - 10 Sep 2013
<b>Triathlon</b> - International Triathlon Union	<b>2020 Olympic Games - Election of Host City</b> 07 Sep 2013
<b>Volleyball</b> - Federation Internationale de Volleyball	
<b>Weightlifting</b> - International Weightlifting Federation	
<b>Wrestling</b> - Federation Internationale des Luttes Associees	

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# **ATTACHMENT 5**



## GENERAL INFORMATION

## HISTORY OF THE CAS

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## ORGANISATION AND STRUCTURE OF THE ICAS AND CAS

### 1. The Code of Sports-related Arbitration of 22 November 1994

Since 22 November 1994, the Code of Sports-related Arbitration (hereinafter: the Code) has governed the organisation and arbitration procedures of the CAS. The Code was revised in 2003 in order to incorporate certain long-established principles of CAS case-law or practices consistently followed by the arbitrators and the Court Office. The latest version of the Code of Sports-related Arbitration entered into force on 1 January 2010. The 70-article Code is divided into two parts: the Statutes of bodies working for the settlement of sports-related disputes (articles S1 to S26), and the Procedural Rules (articles R27 to R70). Since 1999, the Code has also contained a set of mediation rules instituting a non-binding, informal procedure which offers parties the option of negotiating, with the help of a mediator, an agreement to settle their dispute.

The Code thus establishes rules for four distinct procedures:

- the ordinary arbitration procedure;
- the appeals arbitration procedure;
- the advisory procedure, which is non-contentious and allows certain sports bodies to seek advisory opinions from the CAS;
- the mediation procedure.

There are two classic phases to arbitration proceedings: written proceedings, with an exchange of statements of case, and oral proceedings, where the parties are heard by the arbitrators, generally at the seat of the CAS in Lausanne.

The mediation procedure follows the pattern decided by the parties. Failing agreement on this, the CAS mediator decides the procedure to be followed.

### 2. The International Council of Arbitration for Sport (ICAS)

The ICAS is the supreme organ of the CAS. The main task of the ICAS is to safeguard the independence of the CAS and the rights of the parties. To this end, it looks after the administration and financing of the CAS.

The ICAS is composed of 20 members who must all be high-level jurists well-acquainted with the issues of arbitration and sports law.

Upon their appointment, the ICAS members must sign a declaration undertaking to exercise their function in a personal capacity, with total objectivity and independence. This obviously means that in no circumstances can a member play a part in proceedings before the CAS, either as an arbitrator or as counsel to a party.

The ICAS exercises several functions which are listed under article S6 of the Code. It does so either itself, or through the intermediary of its Board, made up of the ICAS President and two vice-presidents, plus the two presidents of the CAS Divisions. There are, however, certain functions which the ICAS may not delegate. Any changes to the Code of Sports-related Arbitration can be decided only by a full meeting of the ICAS and, more specifically, a majority of two-thirds of its members. In other cases, a simple majority is sufficient, provided that at least half the ICAS members are present when the decision is taken. The ICAS elects its own President, who is also the CAS President, plus its two Vice-presidents, the President of the Ordinary Arbitration Division, the President of the Appeals Arbitration Division and the deputies of these divisions. It also appoints the CAS arbitrators and approves the budget and accounts of the CAS.

### 3. The Court of Arbitration for Sport (CAS)

The CAS performs its functions through the intermediary of arbitrators, of whom there are at least 150, with the aid of its court office, which is headed by the Secretary General. One of the major new features following the reform of the CAS was the creation of two divisions: an "Ordinary Arbitration Division", for sole-instance disputes submitted to the CAS, and an "Appeals Arbitration Division", for disputes resulting from final-instance decisions taken by sports organisations. Each division is headed by a president.

The role of the division presidents is to take charge of the first arbitration operations once the procedure is under way and before the panels of arbitrators are appointed. The presidents are often called upon to issue orders on requests for interim relief or for suspensive effect, and intervene in the framework of constituting the panels of arbitrators. Once nominated, the arbitrators subsequently take charge of the procedure.

The 275 CAS arbitrators (2007 figure) are appointed by the ICAS for a renewable term of four years. The Code stipulates that the ICAS must call upon "personalities with a legal training and who possess recognised competence with regard to sport". The appointment of arbitrators follows more-or-less the same pattern as for the ICAS members. The CAS arbitrators are appointed at the proposal of the IOC, the IFs and the NOCs. The ICAS also appoints arbitrators "with a view to safeguarding the interests of the athletes" (article S14 of the Code), as well as arbitrators chosen from among personalities independent of sports organisations.

Even when the CAS arbitrators are proposed by sports organisations, the fact remains that they must carry out their functions with total objectivity and independence. When they are appointed, they have to sign a declaration to this effect.

The arbitrators are not attached to a particular CAS division, and can sit on panels called upon to rule under the ordinary procedure as well as those ruling under the appeals procedure. CAS panels are composed either of a single arbitrator or of three. All arbitrators are bound by the duty of confidentiality and may not reveal any information connected with the parties, the dispute or the proceedings themselves.

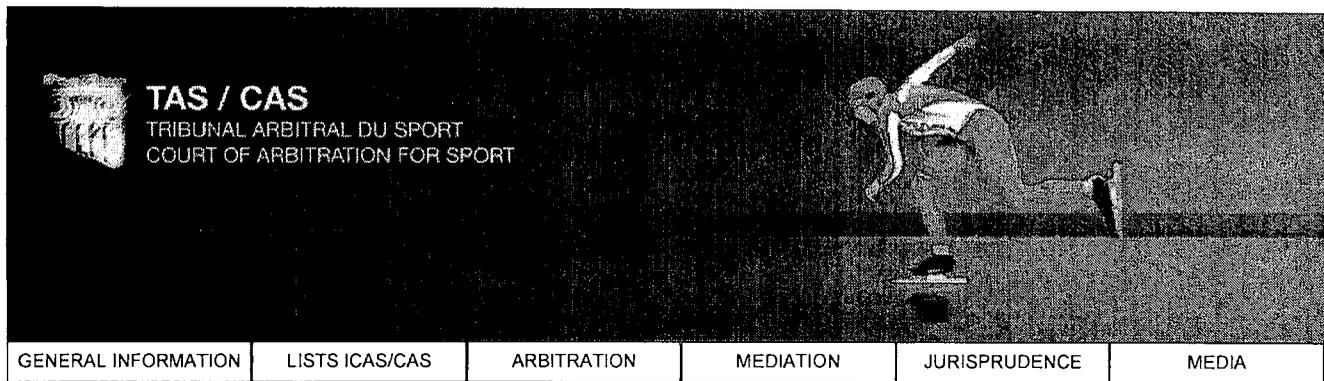


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# **ATTACHMENT 6**



ARBITRATION

CODE

[home / Arbitration / Code / Statutes / C. The Court of Arbitration for Sport \(CAS\) / 2. Arbitrators](#)**C. THE COURT OF ARBITRATION FOR SPORT (CAS)****2. ARBITRATORS AND MEDIATORS****S13**

The personalities designated by ICAS, pursuant to Article S6, paragraph 3, appear on the CAS list for one or several renewable period(s) of four years. ICAS reviews the complete list every four years; the new list enters into force on 1 January of the year following its establishment.

There shall be not less than one hundred fifty arbitrators and fifty mediators.

**S14**

In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes.

In establishing the list of CAS mediators, the ICAS shall appoint personalities with experience in mediation and a good knowledge of sport in general.

**S15**

ICAS shall publish such lists of CAS arbitrators and mediators, as well as all subsequent modifications thereof.

**S16**

When appointing arbitrators and mediators, the ICAS shall consider continental representation and the different juridical cultures.

**S17**

Subject to the provisions of the Procedural Rules (Articles R27 *et seq.*), if a CAS arbitrator resigns, dies or is unable to carry out his functions for any other reason, he may be replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.

**S18**

Arbitrators who appear on the CAS list may serve on Panels constituted by either of the CAS Divisions. Upon their appointment, CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code.

CAS arbitrators and mediators may not act as counsel for a party before the CAS.

**S19**

CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.

ICAS may remove an arbitrator or a mediator from the list of CAS members, temporarily or permanently, if he violates any rule of this Code or if his action affects the reputation of ICAS/CAS.

[Download the Code 2013 edition \(in force on 01.03.13\)](#)

[Download the Code 2012 edition, amended on 01.01.12](#)

[Amendments to the Code in force as of 01.01.2012](#)

[Download the Code \(2004 edition\)](#)

**A. JOINT DISPOSITIONS****B. THE INTERNATIONAL COUNCIL OF ARBITRATION FOR SPORT (ICAS)****1. COMPOSITION****2. ATTRIBUTIONS****3. OPERATION****C. THE COURT OF ARBITRATION FOR SPORT (CAS)****1. MISSION****2. ARBITRATORS****3. ORGANISATION OF THE CAS****D. MISCELLANEOUS PROVISIONS**

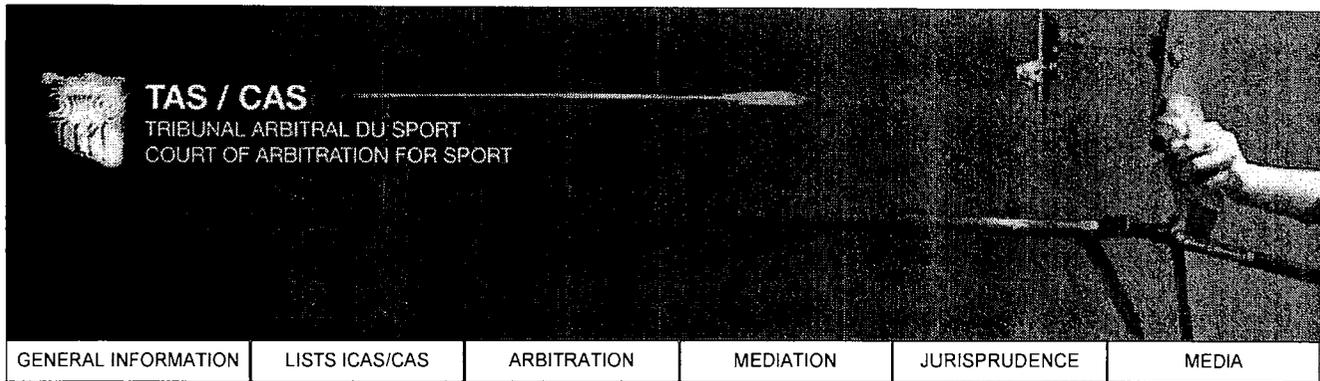
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# **ATTACHMENT 7**



ARBITRATION

CODE

[home / Arbitration / Code / Statutes / C. The Court of Arbitration for Sport \(CAS\) / 3. Organisation of the CAS](#)

## C. THE COURT OF ARBITRATION FOR SPORT (CAS)

### 3. ORGANISATION OF THE CAS

#### S20

The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.

1. **The Ordinary Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes submitted to the ordinary procedure, and performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*)
2. **The Appeals Arbitration Division** constitutes Panels, whose responsibility is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide. It performs, through the intermediary of its President or his deputy, all other functions in relation to the efficient running of the proceedings pursuant to the Procedural Rules (Articles R27 *et seq.*).

Arbitration proceedings submitted to CAS are assigned by the Court Office to the appropriate Division. Such assignment may not be contested by the parties nor be raised by them as a cause of irregularity. In the event of a change of circumstances during the proceedings, the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division. Such re-assignment shall not affect the constitution of the Panel nor the validity of any proceedings, decisions or orders prior to such re-assignment.

The CAS mediation system operates pursuant to the CAS Mediation Rules.

#### S21

The President of either Division may be challenged if circumstances exist that give rise to legitimate doubts with regard to his independence vis-à-vis one of the parties to an arbitration assigned to his Division. He shall pre-emptively disqualify himself if, in arbitration proceedings assigned to his Division, one of the parties is a sports-related body to which he belongs, or if a member of the law firm to which he belongs is acting as arbitrator or counsel.

ICAS shall determine the procedure with respect to any challenge. The challenged President shall not participate in such determination.

If the President of a Division is challenged, the functions relating to the efficient running of the proceedings conferred upon him by the Procedural Rules (Articles R27 *et seq.*), shall be performed by his deputy or by the CAS President, if the deputy is also challenged. No disqualified person shall receive any information concerning the activities of CAS regarding the arbitration proceedings giving rise to his disqualification.

#### S22

CAS includes a Court Office composed of the Secretary General and one or more Counsel, who may represent the Secretary General when required.

The Court Office performs the functions assigned to it by this Code.

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[Amendments to the Code in force as of 01.01.2012](#)

[Download the Code \(2004 edition\)](#)

#### A. JOINT DISPOSITIONS

#### B. THE INTERNATIONAL COUNCIL OF AR BITRATION FOR SPORT (ICAS)

1. COMPOSITION
2. ATTRIBUTIONS
3. OPERATION

#### C. THE COURT OF ARBITRATION FOR SPORT (CAS)

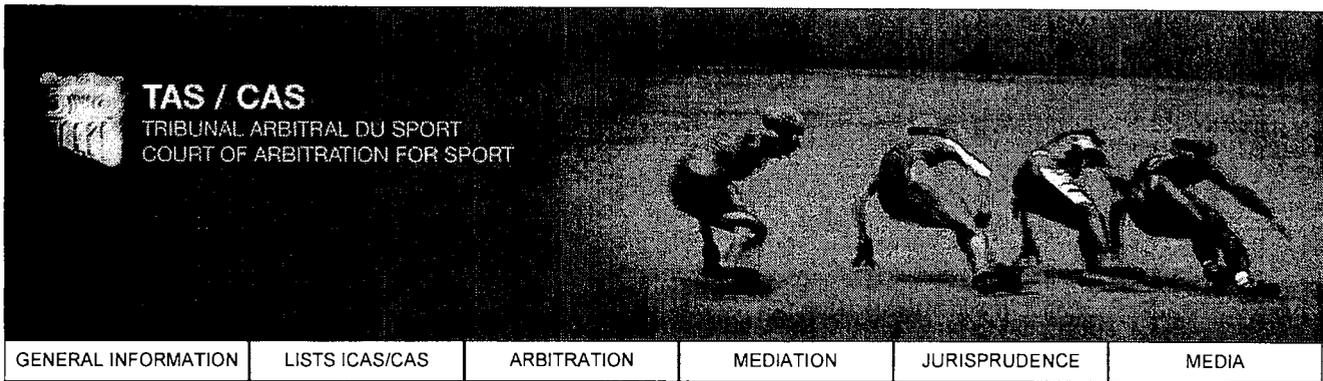
1. MISSION
2. ARBITRATORS
3. ORGANISATION OF THE CAS

#### D. MISCELLANEOUS PROVISIONS

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GENERAL INFORMATION

HISTORY OF THE CAS

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**TYPES OF DISPUTES SUBMITTED TO THE CAS**

Generally speaking, a dispute may be submitted to the Court of Arbitration for Sport only if there is an arbitration agreement between the parties which specifies recourse to the CAS. Article R27 of the Code stipulates that the CAS has jurisdiction solely to rule on disputes connected with sport. Since its creation, the CAS has never declared itself to lack jurisdiction on the grounds of a dispute's not being related to sport (see in this regard the award delivered in the arbitration TAS 92/81 in the *Digest of CAS Awards 1986-1998*).

In principle, two types of dispute may be submitted to the CAS: those of a commercial nature, and those of a disciplinary nature.

The first category essentially involves disputes relating to the execution of contracts, such as those relating to sponsorship, the sale of television rights, the staging of sports events, player transfers and relations between players or coaches and clubs and/or agents (employment contracts and agency contracts). Disputes relating to civil liability issues also come under this category (e.g. an accident to an athlete during a sports competition). These so-called commercial disputes are handled by the CAS acting as a court of sole instance.

Disciplinary cases represent the second group of disputes submitted to the CAS, of which a large number are doping-related. In addition to doping cases, the CAS is called upon to rule on various disciplinary cases (violence on the field of play, abuse of a referee).

Such disciplinary cases are generally dealt with in the first instance by the competent sports authorities, and subsequently become the subject of an appeal to the CAS, which then acts as a court of last instance.

**ORIGINS**

**ORGANISATION OF THE CAS FROM ITS CREATION UNTIL 1994**

**THE 1994 REFORM**

**THE PARIS AGREEMENT**

**ORGANISATION AND STRUCTURE OF THE ICAS AND CAS**

**TYPES OF DISPUTES SUBMITTED TO THE CAS**

**THE DECENTRALISED CAS OFFICES AND THE AD HOC DIVISIONS**

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# **ATTACHMENT 8**



## QUALIFICATION CRITERIA AND RESPONSIBILITIES FOR MEMBERS OF THE AAA NATIONAL GOLF INDUSTRY PANEL

*The American Arbitration Association (AAA) is the nation's leading provider of alternative dispute resolution services. The AAA is committed to offering a National Golf Industry Panel of neutrals in whom parties can have the utmost confidence, comprised of individuals with whom the AAA has a strong and positive relationship and is based primarily on caseload needs and user preferences.*

### QUALIFICATION CRITERIA

*Members on the AAA National Golf Industry Panel must meet or exceed the following qualification criteria:*

- ❖ **Golf Industry Experience:** The member must have golf industry experience as follows:

*Golf Industry Business Executive:* Minimum of 10 years golf experience with at least 7 years in one or more senior-level positions of a golf industry company, firm or organization.

*or*

*Legal Professional:* Attorney with a minimum of 10 years in legal practice with at least 20% of practice focused on issues pertaining to the golf industry.

- ❖ **ADR Training and Experience:** The member must have training in dispute resolution, and experience in arbitration, mediation and/or other forms of dispute resolution.
- ❖ **Knowledge and Commitment to Golf and the Golf Industry.** The member must demonstrate meaningful achievement of at least two of the following:
  - Membership in golf business, trade or professional associations.
  - Publications on golf industry topics.
  - Speaking on golf industry topics.
  - Educational degree(s) and/or professional license(s) pertaining to the golf industry.
  - Honors, awards and citations demonstrating leadership in the golf industry.
  - Other relevant experience or accomplishments in the golf industry.

## **RESPONSIBILITIES**

*Members on the AAA National Golf Industry Panel must understand and support their responsibilities to the Alternative Dispute Resolution (“ADR”) process, the parties that they serve, and the AAA. The responsibilities inherent in the role of a Neutral include:*

## **NEUTRALITY**

- Freedom from bias and prejudice.
- Commitment to impartiality and objectivity.
- Ability to evaluate and apply legal, business or trade principles.

## **JUDICIAL CAPACITY**

- Appropriate Temperament – unbiased, patient, professional.
- Dispute resolution Skills: Ability to manage the hearing process.
- Thorough and impartial evaluation of testimony and other evidence.

## **REPUTATION**

- Held in the highest regard by peers for integrity, fairness and good judgment.
- Dedicated to upholding the AAA Code of Ethics for Arbitrators.

## **COMMITMENT TO ADR PROCESS**

- Willingness to devote time and effort when selected to serve, in accordance with the needs of the parties.
- Willingness to commit to speed, economy and a just resolution.
- Willingness to support efforts of the AAA and the policies and practices the AAA applies to best serve the field of ADR.
- Willingness to successfully complete annual training under the guidelines of the Commercial Arbitration Development Program.

*The composition of the National Golf Industry Panel or other Roster of Neutrals is at the sole discretion of the AAA, including the selection and retention decisions of arbitrators and mediators. Continuation on the National Golf Industry Panel or other Roster of Neutrals is subject to standard review based on service need, qualifications and performance, as deemed appropriate by AAA. Neither acceptance to the National Golf Industry Panel, or other Roster of Neutrals nor appointment to cases shall make any member of the National Golf Industry Panel or other Roster of Neutrals an employee, agent or independent contractor of the AAA.*

# **ATTACHMENT 9**



### **Qualification Criteria for Admittance to the AAA Labor Panel**

The American Arbitration Association (AAA) is the nation's leading provider of alternative dispute resolution services. Openings on our Roster of Neutrals are based primarily on caseload needs and user preferences. Applicants for membership on the AAA National Roster of Arbitrators and Mediators must meet or exceed the following requirements:

#### **1. QUALIFICATIONS**

- a. Must have a minimum of 10 years senior-level business or professional experience or legal practice and cannot be an active advocate for labor or management.
- b. Must possess significant hands-on knowledge about Labor Relations.
- c. Must have a judicial temperament.
- d. Must have strong writing skills. The AAA may ask for a writing sample.
- e. Educational degree(s) and/or professional license(s) appropriate to your field of expertise.
- f. Honors, awards and citations indicating leadership in your field.
- g. Training and experience in arbitration and/or other forms of dispute resolution.
- h. Membership in a professional association(s).
- i. Other relevant experience or accomplishments (e.g. published articles, part of a mentoring program).

#### **2. NEUTRALITY**

- a. Freedom from bias and prejudice.
- b. Ability to evaluate and apply legal, business or trade principles.
- c. Applicants can not represent labor or management clients.

#### **3. JUDICIAL CAPACITY**

- a. Ability to manage the hearing process.
- b. Thorough and impartial evaluation of testimony and other evidence.
- c. Judicial temperament.

#### **4. REPUTATION**

- a. Held in the highest regard by peers for integrity, fairness and good judgment.
- b. Dedicated to upholding the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

#### **5. COMMITMENT TO ADR PROCESS**

- a. Willingness to devote time and effort when selected to serve.
- b. Willingness to support efforts of the AAA.
- c. Indicate whether or not you are currently a neutral with any other ADR agencies.

#### **6. APPLICATION PROCESS**

Applicants must have someone prominent in the Labor/Management field or user of AAA's services, preferably another arbitrator, who is familiar with the applicant's work, write a letter of nomination and include a copy of the applicant's resume, and send it to the **Labor/Employment Election Senior Vice President at AAA: One Center Plaza, Suite 300, Boston MA 02108**. The AAA will review the nominating letter and the resume, and then, if applicable, send the nominee an application package, which will need to be completed, and returned to the AAA for processing. The AAA will write to your local references, and request their comments with regard to the nature and duration of their relationship with the applicant; why they think the applicant would be qualified to serve; and the number of labor arbitration cases the reference was involved in during the past 24 months.

# **ATTACHMENT 10**



## **The Code of Ethics for Arbitrators in Commercial Disputes Effective March 1, 2004**

The Code of Ethics for Arbitrators in Commercial Disputes was originally prepared in 1977 by a joint committee consisting of a special committee of the American Arbitration Association and a special committee of the American Bar Association. The Code was revised in 2003 by an ABA Task Force and special committee of the AAA.

### *Preamble*

The use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibilities to the public, as well as to the parties. Those responsibilities include important ethical obligations.

Few cases of unethical behavior by commercial arbitrators have arisen. Nevertheless, this Code sets forth generally accepted standards of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hope of contributing to the maintenance of high standards and continued confidence in the process of arbitration.

This Code provides ethical guidelines for many types of arbitration but does not apply to labor arbitration, which is generally conducted under the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

There are many different types of commercial arbitration. Some proceedings are conducted under arbitration rules established by various organizations and trade associations, while others are conducted without such rules. Although most proceedings are arbitrated pursuant to voluntary agreement of the parties, certain types of disputes are submitted to arbitration by reason of particular laws. This Code is intended to apply to all such proceedings in which disputes or claims are submitted for decision to one or more arbitrators appointed in a manner provided by an agreement of the parties, by applicable arbitration rules, or by law. In all such cases, the persons who have the power to decide should observe fundamental standards of ethical conduct. In this Code, all such persons are called "arbitrators," although in some types of proceeding they might be called "umpires," "referees," "neutrals," or have some other title.

Arbitrators, like judges, have the power to decide cases. However, unlike full-time judges, arbitrators are usually engaged in other occupations before, during, and after the time that they serve as arbitrators. Often, arbitrators are purposely chosen from the same trade or industry as the parties in order to bring special knowledge to the task of deciding. This Code recognizes these fundamental differences between arbitrators and judges.

In those instances where this Code has been approved and recommended by organizations that provide, coordinate, or administer services of arbitrators, it provides ethical standards for the members of their respective panels of arbitrators. However, this Code does not form a part of the arbitration rules of any such organization unless its rules so provide.

### *Note on Neutrality*

In some types of commercial arbitration, the parties or the administering institution provide for three or more arbitrators. In some such proceedings, it is the practice for each party, acting alone,

to appoint one arbitrator (a "party-appointed arbitrator") and for one additional arbitrator to be designated by the party-appointed arbitrators, or by the parties, or by an independent institution or individual. The sponsors of this Code believe that it is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is, independent and impartial, and to comply with the same ethical standards. This expectation generally is essential in arbitrations where the parties, the nature of the dispute, or the enforcement of any resulting award may have international aspects. However, parties in certain domestic arbitrations in the United States may prefer that party-appointed arbitrators be non-neutral and governed by special ethical considerations. These special ethical considerations appear in Canon X of this Code.

This Code establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise. This Code requires all party-appointed arbitrators, whether neutral or not, to make pre-appointment disclosures of any facts which might affect their neutrality, independence, or impartiality. This Code also requires all party-appointed arbitrators to ascertain and disclose as soon as practicable whether the parties intended for them to serve as neutral or not. If any doubt or uncertainty exists, the party-appointed arbitrators should serve as neutrals unless and until such doubt or uncertainty is resolved in accordance with Canon IX. This Code expects all arbitrators, including those serving under Canon X, to preserve the integrity and fairness of the process.

#### *Note on Construction*

Various aspects of the conduct of arbitrators, including some matters covered by this Code, may also be governed by agreements of the parties, arbitration rules to which the parties have agreed, applicable law, or other applicable ethics rules, all of which should be consulted by the arbitrators. This Code does not take the place of or supersede such laws, agreements, or arbitration rules to which the parties have agreed and should be read in conjunction with other rules of ethics. It does not establish new or additional grounds for judicial review of arbitration awards.

All provisions of this Code should therefore be read as subject to contrary provisions of applicable law and arbitration rules. They should also be read as subject to contrary agreements of the parties. Nevertheless, this Code imposes no obligation on any arbitrator to act in a manner inconsistent with the arbitrator's fundamental duty to preserve the integrity and fairness of the arbitral process.

Canons I through VIII of this Code apply to all arbitrators. Canon IX applies to all party-appointed arbitrators, except that certain party-appointed arbitrators are exempted by Canon X from compliance with certain provisions of Canons I-IX related to impartiality and independence, as specified in Canon X.

#### **CANON I: AN ARBITRATOR SHOULD UPHOLD THE INTEGRITY AND FAIRNESS OF THE ARBITRATION PROCESS.**

- A. An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding. This responsibility may include pro bono service as an arbitrator where appropriate.
- B. One should accept appointment as an arbitrator only if fully satisfied:
  - (1) that he or she can serve impartially;

- (2) that he or she can serve independently from the parties, potential witnesses, and the other arbitrators;
- (3) that he or she is competent to serve; and
- (4) that he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect.

- C. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of the relationship or interest. Existence of any of the matters or circumstances described in this paragraph C does not render it unethical for one to serve as an arbitrator where the parties have consented to the arbitrator's appointment or continued services following full disclosure of the relevant facts in accordance with Canon II.
- D. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.
- E. When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules. An arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with this Code.
- F. An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.
- G. The ethical obligations of an arbitrator begin upon acceptance of the appointment and continue throughout all stages of the proceeding. In addition, as set forth in this Code, certain ethical obligations begin as soon as a person is requested to serve as an arbitrator and certain ethical obligations continue after the decision in the proceeding has been given to the parties.
- H. Once an arbitrator has accepted an appointment, the arbitrator should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue. When an arbitrator is to be compensated for his or her services, the arbitrator may withdraw if the parties fail or refuse to provide for payment of the compensation as agreed.

- I. An arbitrator who withdraws prior to the completion of the arbitration, whether upon the arbitrator's initiative or upon the request of one or more of the parties, should take reasonable steps to protect the interests of the parties in the arbitration, including return of evidentiary materials and protection of confidentiality.

*Comment to Canon I*

A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators may also have special experience or expertise in the areas of business, commerce, or technology which are involved in the arbitration. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration.

During an arbitration, the arbitrator may engage in discourse with the parties or their counsel, draw out arguments or contentions, comment on the law or evidence, make interim rulings, and otherwise control or direct the arbitration. These activities are integral parts of an arbitration. Paragraph D of Canon I is not intended to preclude or limit either full discussion of the issues during the course of the arbitration or the arbitrator's management of the proceeding.

**CANON II: AN ARBITRATOR SHOULD DISCLOSE ANY INTEREST OR RELATIONSHIP LIKELY TO AFFECT IMPARTIALITY OR WHICH MIGHT CREATE AN APPEARANCE OF PARTIALITY.**

- A. Persons who are requested to serve as arbitrators should, before accepting, disclose:
  - (1) any known direct or indirect financial or personal interest in the outcome of the arbitration;
  - (2) any known existing or past financial, business, professional or personal relationships which might reasonably affect impartiality or lack of independence in the eyes of any of the parties. For example, prospective arbitrators should disclose any such relationships which they personally have with any party or its lawyer, with any co-arbitrator, or with any individual whom they have been told will be a witness. They should also disclose any such relationships involving their families or household members or their current employers, partners, or professional or business associates that can be ascertained by reasonable efforts;
  - (3) the nature and extent of any prior knowledge they may have of the dispute; and
  - (4) any other matters, relationships, or interests which they are obligated to disclose by the agreement of the parties, the rules or practices of an institution, or applicable law regulating arbitrator disclosure.
- B. Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests or relationships described in paragraph A.
- C. The obligation to disclose interests or relationships described in paragraph A is a continuing duty which requires a person who accepts appointment as an arbitrator to disclose, as soon as practicable, at any stage of the arbitration, any such interests or relationships which may arise, or which are recalled or discovered.
- D. Any doubt as to whether or not disclosure is to be made should be resolved in favor of disclosure.

E. Disclosure should be made to all parties unless other procedures for disclosure are provided in the agreement of the parties, applicable rules or practices of an institution, or by law. Where more than one arbitrator has been appointed, each should inform the others of all matters disclosed.

F. When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve.

G. If an arbitrator is requested by all parties to withdraw, the arbitrator must do so. If an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists:

(1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or

(2) In the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.

H. If compliance by a prospective arbitrator with any provision of this Code would require disclosure of confidential or privileged information, the prospective arbitrator should either:

(1) Secure the consent to the disclosure from the person who furnished the information or the holder of the privilege; or

(2) Withdraw.

### CANON III: AN ARBITRATOR SHOULD AVOID IMPROPRIETY OR THE APPEARANCE OF IMPROPRIETY IN COMMUNICATING WITH PARTIES.

A. If an agreement of the parties or applicable arbitration rules establishes the manner or content of communications between the arbitrator and the parties, the arbitrator should follow those procedures notwithstanding any contrary provision of paragraphs B and C.

B. An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except in any of the following circumstances:

(1) When the appointment of a prospective arbitrator is being considered, the prospective arbitrator:

(a) may ask about the identities of the parties, counsel, or witnesses and the general nature of the case; and

(b) may respond to inquiries from a party or its counsel designed to determine his or her suitability and availability for the appointment. In any such dialogue, the prospective arbitrator may receive information from a party or its counsel disclosing the general nature of the dispute but should not permit them to discuss the merits of the case.

(2) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator;

(3) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning arrangements for any compensation to be paid to the party-appointed arbitrator. Submission of routine written requests

for payment of compensation and expenses in accordance with such arrangements and written communications pertaining solely to such requests need not be sent to the other party;

(4) In an arbitration involving party-appointed arbitrators, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the status of the arbitrator (i.e., neutral or non-neutral), as contemplated by paragraph C of Canon IX;

(5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views; or

(6) If a party fails to be present at a hearing after having been given due notice, or if all parties expressly consent, the arbitrator may discuss the case with any party who is present.

- C. Unless otherwise provided in this Canon, in applicable arbitration rules or in an agreement of the parties, whenever an arbitrator communicates in writing with one party, the arbitrator should at the same time send a copy of the communication to every other party, and whenever the arbitrator receives any written communication concerning the case from one party which has not already been sent to every other party, the arbitrator should send or cause it to be sent to the other parties.

#### CANON IV: AN ARBITRATOR SHOULD CONDUCT THE PROCEEDINGS FAIRLY AND DILIGENTLY.

- A. An arbitrator should conduct the proceedings in an even-handed manner. The arbitrator should be patient and courteous to the parties, their representatives, and the witnesses and should encourage similar conduct by all participants.
- B. The arbitrator should afford to all parties the right to be heard and due notice of the time and place of any hearing. The arbitrator should allow each party a fair opportunity to present its evidence and arguments.
- C. The arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.
- D. If a party fails to appear after due notice, the arbitrator should proceed with the arbitration when authorized to do so, but only after receiving assurance that appropriate notice has been given to the absent party.
- E. When the arbitrator determines that more information than has been presented by the parties is required to decide the case, it is not improper for the arbitrator to ask questions, call witnesses, and request documents or other evidence, including expert testimony.
- F. Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.
- G. Co-arbitrators should afford each other full opportunity to participate in all aspects of the proceedings.

*Comment to paragraph G*

Paragraph G of Canon IV is not intended to preclude one arbitrator from acting in limited circumstances (e.g., ruling on discovery issues) where authorized by the agreement of the parties, applicable rules or law, nor does it preclude a majority of the arbitrators from proceeding with any aspect of the arbitration if an arbitrator is unable or unwilling to participate and such action is authorized by the agreement of the parties or applicable rules or law. It also does not preclude ex parte requests for interim relief.

**CANON V: AN ARBITRATOR SHOULD MAKE DECISIONS IN A JUST, INDEPENDENT AND DELIBERATE MANNER.**

- A. The arbitrator should, after careful deliberation, decide all issues submitted for determination. An arbitrator should decide no other issues.
- B. An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision.
- C. An arbitrator should not delegate the duty to decide to any other person.
- D. In the event that all parties agree upon a settlement of issues in dispute and request the arbitrator to embody that agreement in an award, the arbitrator may do so, but is not required to do so unless satisfied with the propriety of the terms of settlement. Whenever an arbitrator embodies a settlement by the parties in an award, the arbitrator should state in the award that it is based on an agreement of the parties.

**CANON VI: AN ARBITRATOR SHOULD BE FAITHFUL TO THE RELATIONSHIP OF TRUST AND CONFIDENTIALITY INHERENT IN THAT OFFICE.**

- A. An arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.
- B. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.
- C. It is not proper at any time for an arbitrator to inform anyone of any decision in advance of the time it is given to all parties. In a proceeding in which there is more than one arbitrator, it is not proper at any time for an arbitrator to inform anyone about the substance of the deliberations of the arbitrators. After an arbitration award has been made, it is not proper for an arbitrator to assist in proceedings to enforce or challenge the award.
- D. Unless the parties so request, an arbitrator should not appoint himself or herself to a separate office related to the subject matter of the dispute, such as receiver or trustee, nor should a panel of arbitrators appoint one of their number to such an office.

**CANON VII: AN ARBITRATOR SHOULD ADHERE TO STANDARDS OF INTEGRITY AND FAIRNESS WHEN MAKING ARRANGEMENTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES.**

- A. Arbitrators who are to be compensated for their services or reimbursed for their expenses shall adhere to standards of integrity and fairness in making arrangements for such payments.
- B. Certain practices relating to payments are generally recognized as tending to preserve the integrity and fairness of the arbitration process. These practices include:

- (1) Before the arbitrator finally accepts appointment, the basis of payment, including any cancellation fee, compensation in the event of withdrawal and compensation for study and preparation time, and all other charges, should be established. Except for arrangements for the compensation of party-appointed arbitrators, all parties should be informed in writing of the terms established;
- (2) In proceedings conducted under the rules or administration of an institution that is available to assist in making arrangements for payments, communication related to compensation should be made through the institution. In proceedings where no institution has been engaged by the parties to administer the arbitration, any communication with arbitrators (other than party appointed arbitrators) concerning payments should be in the presence of all parties; and
- (3) Arbitrators should not, absent extraordinary circumstances, request increases in the basis of their compensation during the course of a proceeding.

**CANON VIII: AN ARBITRATOR MAY ENGAGE IN ADVERTISING OR PROMOTION OF ARBITRAL SERVICES WHICH IS TRUTHFUL AND ACCURATE.**

- A. Advertising or promotion of an individual's willingness or availability to serve as an arbitrator must be accurate and unlikely to mislead. Any statements about the quality of the arbitrator's work or the success of the arbitrator's practice must be truthful.
- B. Advertising and promotion must not imply any willingness to accept an appointment otherwise than in accordance with this Code.

*Comment to Canon VIII*

This Canon does not preclude an arbitrator from printing, publishing, or disseminating advertisements conforming to these standards in any electronic or print medium, from making personal presentations to prospective users of arbitral services conforming to such standards or from responding to inquiries concerning the arbitrator's availability, qualifications, experience, or fee arrangements.

**CANON IX: ARBITRATORS APPOINTED BY ONE PARTY HAVE A DUTY TO DETERMINE AND DISCLOSE THEIR STATUS AND TO COMPLY WITH THIS CODE, EXCEPT AS EXEMPTED BY CANON X.**

- A. In some types of arbitration in which there are three arbitrators, it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed by agreement either of the parties or of the two arbitrators, or failing such agreement, by an independent institution or individual. In tripartite arbitrations to which this Code applies, all three arbitrators are presumed to be neutral and are expected to observe the same standards as the third arbitrator.
- B. Notwithstanding this presumption, there are certain types of tripartite arbitration in which it is expected by all parties that the two arbitrators appointed by the parties may be predisposed toward the party appointing them. Those arbitrators, referred to in this Code as "Canon X arbitrators," are not to be held to the standards of neutrality and independence applicable to other arbitrators. Canon X describes the special ethical obligations of party-appointed arbitrators who are not expected to meet the standard of neutrality.
- C. A party-appointed arbitrator has an obligation to ascertain, as early as possible but not later than the first meeting of the arbitrators and parties, whether the parties have agreed that the party-appointed arbitrators will serve as neutrals or whether they shall be subject to Canon X, and to provide a timely report of their conclusions to the parties and other arbitrators:

- (1) Party-appointed arbitrators should review the agreement of the parties, the applicable rules and any applicable law bearing upon arbitrator neutrality. In reviewing the agreement of the parties, party-appointed arbitrators should consult any relevant express terms of the written or oral arbitration agreement. It may also be appropriate for them to inquire into agreements that have not been expressly set forth, but which may be implied from an established course of dealings of the parties or well-recognized custom and usage in their trade or profession;
- (2) Where party-appointed arbitrators conclude that the parties intended for the party-appointed arbitrators not to serve as neutrals, they should so inform the parties and the other arbitrators. The arbitrators may then act as provided in Canon X unless or until a different determination of their status is made by the parties, any administering institution or the arbitral panel; and
- (3) Until party-appointed arbitrators conclude that the party-appointed arbitrators were not intended by the parties to serve as neutrals, or if the party-appointed arbitrators are unable to form a reasonable belief of their status from the foregoing sources and no decision in this regard has yet been made by the parties, any administering institution, or the arbitral panel, they should observe all of the obligations of neutral arbitrators set forth in this Code.

D. Party-appointed arbitrators not governed by Canon X shall observe all of the obligations of Canons I through VIII unless otherwise required by agreement of the parties, any applicable rules, or applicable law.

#### CANON X: EXEMPTIONS FOR ARBITRATORS APPOINTED BY ONE PARTY WHO ARE NOT SUBJECT TO RULES OF NEUTRALITY.

Canon X arbitrators are expected to observe all of the ethical obligations prescribed by this Code except those from which they are specifically excused by Canon X.

##### *A. Obligations under Canon I*

Canon X arbitrators should observe all of the obligations of Canon I subject only to the following provisions:

- (1) Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, Canon X arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators; and
- (2) The provisions of subparagraphs B(1), B(2), and paragraphs C and D of Canon I, insofar as they relate to partiality, relationships, and interests are not applicable to Canon X arbitrators.

##### *B. Obligations under Canon II*

- (1) Canon X arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any partiality which may exist or appear to exist; and
- (2) Canon X arbitrators are not obliged to withdraw under paragraph G of Canon II if requested to do so only by the party who did not appoint them.

##### *C. Obligations under Canon III*

Canon X arbitrators should observe all of the obligations of Canon III subject only to the following provisions:

- (1) Like neutral party-appointed arbitrators, Canon X arbitrators may consult with the party who appointed them to the extent permitted in paragraph B of Canon III;
- (2) Canon X arbitrators shall, at the earliest practicable time, disclose to the other arbitrators and to the parties whether or not they intend to communicate with their appointing parties. If they have disclosed the intention to engage in such communications, they may thereafter communicate with their appointing parties concerning any other aspect of the case, except as provided in paragraph (3);
- (3) If such communication occurred prior to the time they were appointed as arbitrators, or prior to the first hearing or other meeting of the parties with the arbitrators, the Canon X arbitrator should, at or before the first hearing or meeting of the arbitrators with the parties, disclose the fact that such communication has taken place. In complying with the provisions of this subparagraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. A single timely disclosure of the Canon X arbitrator's intention to participate in such communications in the future is sufficient;
- (4) Canon X arbitrators may not at any time during the arbitration:
  - (a) disclose any deliberations by the arbitrators on any matter or issue submitted to them for decision;
  - (b) communicate with the parties that appointed them concerning any matter or issue taken under consideration by the panel after the record is closed or such matter or issue has been submitted for decision; or
  - (c) disclose any final decision or interim decision in advance of the time that it is disclosed to all parties.
- (5) Unless otherwise agreed by the arbitrators and the parties, a Canon X arbitrator may not communicate orally with the neutral arbitrator concerning any matter or issue arising or expected to arise in the arbitration in the absence of the other Canon X arbitrator. If a Canon X arbitrator communicates in writing with the neutral arbitrator, he or she shall simultaneously provide a copy of the written communication to the other Canon X arbitrator;
- (6) When Canon X arbitrators communicate orally with the parties that appointed them concerning any matter on which communication is permitted under this Code, they are not obligated to disclose the contents of such oral communications to any other party or arbitrator; and
- (7) When Canon X arbitrators communicate in writing with the party who appointed them concerning any matter on which communication is permitted under this Code, they are not required to send copies of any such written communication to any other party or arbitrator.

D. *Obligations under Canon IV*

Canon X arbitrators should observe all of the obligations of Canon IV.

E. *Obligations under Canon V*

Canon X arbitrators should observe all of the obligations of Canon V, except that they may be predisposed toward deciding in favor of the party who appointed them.

F. *Obligations under Canon VI*

Canon X arbitrators should observe all of the obligations of Canon VI.

*G. Obligations Under Canon VII*

Canon X arbitrators should observe all of the obligations of Canon VII.

*H. Obligations Under Canon VIII*

Canon X arbitrators should observe all of the obligations of Canon VIII.

*I. Obligations Under Canon IX*

The provisions of paragraph D of Canon IX are inapplicable to Canon X arbitrators, except insofar as the obligations are also set forth in this Canon.

## Bob Butler

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**From:** Bob Butler  
**Sent:** Wednesday, July 24, 2013 10:34 AM  
**To:** Bob Butler  
**Subject:** AAA Code of Ethics

[http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_003867](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867)

 **Fletcher, Heald & Hildreth**

Robert J. Butler

## Contact Information Redacted

Contact Information Redacted | [www.fhhlaw.com](http://www.fhhlaw.com) | [www.commlawblog.com](http://www.commlawblog.com)

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**TAS / CAS**  
 TRIBUNAL ARBITRAL DU SPORT  
 COURT OF ARBITRATION FOR SPORT



GENERAL INFORMATION	LISTS ICAS/CAS	ARBITRATION	MEDIATION	JURISPRUDENCE	MEDIA
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GENERAL INFORMATION

STATISTICS

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**IMPORTANT DATES IN THE CAS HISTORY**

 Statistics 2012

**1981:**

- The creation of a specialised sports jurisdiction envisaged for the first time by HE Juan Antonio Samaranch, former IOC President ;

**1983 :**

- Statutes of the Court of Arbitration for Sport (CAS) officially ratified by the IOC on the occasion of its 86th session in New Delhi in March 1983 ;

**1984 :**

- 30 June 1984, implementation of the CAS Statutes ;
- Beginning of the CAS activities under the presidency of HE the Judge Kéba Mbaye and of the Secretary General, Mr Gilbert Schwaar ;

**1986 :**

- First case submitted to CAS ;

**1987 :**

- First award rendered by CAS ;

**1991 :**

- Publication by CAS of a Guide to Arbitration including several standard arbitration clauses ;
- Adoption of the first arbitration clause referring to CAS by the International Equestrian Federation (FEI) ;

**1993 :**

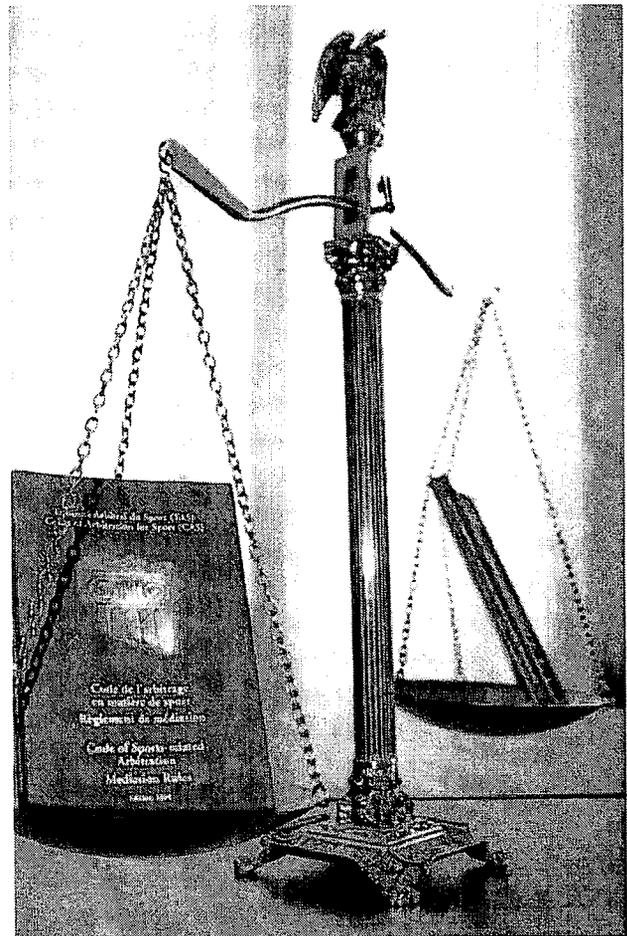
- 15 March 1993, Publication of the judgement of the Swiss Federal Tribunal (TF) recognising CAS as a true arbitral Tribunal but expressing doubts regarding its independence towards the IOC ;
- September 1993, International Conference « Law and Sport » organised by CAS in Lausanne with the aim of reforming the CAS structure in order to guarantee its independence ;

**1994 :**

- Appointment of Mr Jean-Philippe Rochat as CAS Secretary General in replacement of Mr Schwaar ;
- 22 June 1994, creation of the International Council of Arbitration for Sport (ICAS) enshrined in the « Paris Agreement » : the CAS has a new structure with the ICAS as supreme body ;
- 22 November 1994, implementation of the Code of Sports-related Arbitration confirming the CAS reform, in particular the creation of ICAS and of two arbitration divisions, the ordinary arbitration division and the appeals arbitration division ;

**1996 :**

- Creation of two decentralised Court Offices by ICAS, one in Sydney (Australia) and one in Denver (USA). These offices are linked to CAS Lausanne and constitute administrative branches ;
- Creation by ICAS of the first CAS ad hoc Division which has the mission to settle as a last instance disputes arising during the Olympic Games in Atlanta within a time limit of 24 hours (since 1996, creation of ad hoc Divisions for each edition of the OG) ;



**1998 :**

- Creation of an ad hoc Division for the Commonwealth Games in Kuala Lumpur ;
- Creation of an ad hoc Division for the Olympic Winter Games in Nagano ;

**1999 :**

- Appointment by ICAS of Mr Matthieu Reeb as CAS Secretary General in replacement of Mr Jean-Philippe Rochat ;
- The CAS decentralised Office of Denver moved to New York ;
- Amendment to the Code of Sports-related Arbitration in order to create a mediation procedure ;

**2000 :**

- Creation of an ad hoc Division for the European Football Championship in Belgium and in the Netherlands ;
- Creation of an ad hoc Division for the Olympic Games in Sydney ;

**2002 :**

- Creation of an ad hoc Division for the Olympic Winter Games in Salt Lake City ;
- Creation of an ad hoc Division for the Commonwealth Games in Manchester;
- Recognition by FIFA of the CAS jurisdiction ;

**2003 :**

- Acknowledgement of the CAS independence by the Swiss Federal Tribunal further to an appeal filed by two Russian cross country skiers, Larissa Lazutina and Olga Danilova, against a CAS award disqualifying them from the Winter Olympic Games in Salt Lake City. After having carefully analysed the organisation and the structure of ICAS and CAS, the TF admitted the independence of CAS towards the IOC and any other party using its services (Judgement of 27 May 2003, first civil Court, TF, Lazutina et Danilova v. International Olympic Committee (IOC), International Skiing Federation (FIS) and Court of Arbitration for Sport (CAS)) ;
- Designation of CAS as last instance Tribunal in relation to international disputes related to doping by the World Anti-Doping Code published by the World Anti-Doping Agency (WADA) ;

**2004 :**

- The new Code of Sports- related Arbitration entered into force ;
- Creation of an ad hoc Division for the European Football Championship in Portugal ;
- Creation of an ad hoc Division for the Olympic Games in Athens ;
- Publication of the Digest of CAS awards 2001-2003 ;

**2005 :**

- Inauguration of the new CAS headquarters at the Château de Béthusy in Lausanne;

**2006 :**

- Creation of an ad hoc Division for the Olympic Winter Games in Turin ;
- Creation of an ad hoc Division for the Commonwealth Games in Melbourne;
- Creation of an ad hoc Division for the FIFA World Cup in Germany;

**2007 :**

- Death of the Judge Kéba Mbaye ;
- Nomination of Mr. Mino Auletta as ICAS/CAS President ad interim.

**2008 :**

- April - Mr. Mino Auletta elected ICAS/CAS President
- Record number of procedures registered in one year: 318

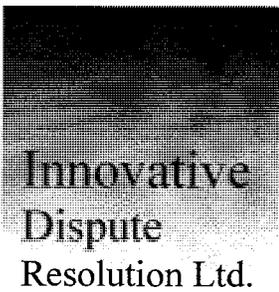
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**2010 :**

- November - Mr. John Coates elected ICAS/CAS President



# EXHIBIT 45



Contact Information Redacted

**Richard H. McLaren, C.Arb.**  
Dispute Facilitator

*Dispute Resolution Facilitators, Arbitration, Mediation, Mini Trials*

[www.idresolution.com](http://www.idresolution.com)

*Alternative Dispute Resolution*

Contact Information Redacted

31 July 2013

Delivered Via Email

Špela Košak  
Deputy Manager  
ICC International Centre  
for Expertise  
Contact Information Redacted

RE: **EXP/517/ICANN/132 (c. EXP/519/ICANN/134)**  
INTERNATIONAL RUGBY BOARD (Ireland) vs/ DOT RUGBY LIMITED  
(GIBRALTAR) **and**  
INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CORSS, LLC (USA)

Dear Ms Košak:

I would like to submit the following in reply to the objections raised to my appointment in the above referenced matter.

I do not believe there is an actual lack of independence or an appearance of lack of independence once the following information is set out. I believe the complaint will be regarded as without merit and foundation once the facts set out below are known.

**Complaint in respect of my position as an arbitrator with the Court of Arbitration for Sport (the "CAS")**

1. The CAS is an independent international arbitration body in the same manner as is the ICC. This feature of the CAS has been recognized most recently in the cases of 4A 612 2009 Pechstein; 4A 428 2011 Malisse & Wickmayer; and, 4A 530 2011 Dumbravean, copies of which are attached.
2. My role with the CAS is as an independent and impartial adjudicator and has always been so.
3. I was appointed in 1993. The international body who supported my appointment was the International Ice Hockey Federation. At the time of my appointment, the IRB was not even one of the international federations using the services of the CAS. I do not know precisely when the IRB joined the CAS system, but I believe it was sometime in the early 2000s. Thus, the IRB played no part in my initial appointment.

4. All appointments to the CAS and renewals of 4 year terms are carried out by an independent body of jurists drawn from ICAS members. The international federations who use the CAS are not involved in those appointments. The ICAS makes the appointments.
5. The reference in the Applicant's note on page 2 to the ICAS-CAS Statutes, S4-a and S6-3 relate to initial appointments which in my case took place in 1993 and as I have already pointed out, the IRB was not even a member of the federations using the CAS at the time of my initial appointment. Any renewals of appointment are completed by the committee of jurists selected by ICAS. Renewals do not require the support of the International Olympic Committee; National Olympic Committees or International Federations. They are carried out based upon performance not who initially proposed an arbitrator for consideration for appointment.
6. In summary, I did not lobby for my position as an adjudicator and my position as a CAS arbitrator is wholly apart and separate from the ICAS. On the arguments as submitted, all CAS Arbitrators and counsel who have appeared before the CAS would have the appearance of bias. I respectfully disagree.
7. In the interests of further disclosure, since the IRB has been put in issue, I would point out that I have heard two arbitrations where an athlete who has doped was disciplined by the IRB. I was appointed in 2005 in *IRB v. Worgan* CAS 2005/A/963. In that matter, I was appointed by the IRB to a three person panel. As required by the CAS Code, I was obliged to act as an independent impartial arbitrator and not as a party appointed arbitrator. The appeal was granted and the local board decision was quashed and a different decision issued. I was also appointed in 2006 in *IRB v. Keyster* CAS 2006/A/1067 again by the IRB, but as an independent and impartial arbitrator. The appeal was upheld. I did not disclose these matters earlier because they are outside the customary five year time frame for disclosures normally made in these matters and I did not see my role as an independent adjudicator being any different for the CAS than for the ICC. However, given the present challenge, I thought I should now bring these two appointments forward. Since 2006, I have had no contact with the IRB whatsoever and I have not acted as an impartial adjudicator in any matters involving the IRB.

### **Complaint regarding my position as President of the BAT**

1. The Basketball Arbitral Tribunal ("BAT") is an independent international arbitration body in the same fashion as the CAS. Its seat is in Geneva and it has been implicitly recognized as an independent international arbitration court by the Swiss Federal Tribunal in SFT 4A\_198-2012. See attachment of both the original decision in French and an English translation. The relevant paragraph is 2.1.
2. The BAT is independent of FIBA and would not be recognize as an international arbitral tribunal if it were not.
3. FIBA appoints only the President. I have as President, security of tenure and cannot be removed by anyone, absent personal misconduct. As President, I have authority over who is appointed as arbitrators and how the BAT Secretariat operates. I do not consult FIBA in respect of any decisions that I make, nor do they attempt to advise me about what I should be doing.

4. The BAT is entirely funded by the parties who use the system including my own payment on each case. The monies do not come from FIBA but the parties and I am not paid any money from FIBA nor am I an employee or independent contractor with FIBA. FIBA does not guarantee BAT funding.
5. The only role FIBA may take on in the resolution of a dispute before the BAT relates to the enforcement of arbitral decisions. If the parties fail to adhere to the decision of the arbitrator, it is possible for FIBA to take sanctions against the party in contempt.

**Complaint that a sports arbitrator will decide a dispute in favour of an international sports federation rather than the non-sports organization**

1. The CAS does resolve sports related disputes. However, it does so as an independent arbitration tribunal and does not resolve matters in favour of international sports federations unless the merits so dictate.
2. I regularly do international and national commercial dispute resolution work and have an active arbitration practice that has nothing to do with sports related matters.
3. I know nothing of the dealings of Roar Domains with either FIBA or the IRB or indeed if they have any dealings.

I have not been given the papers in this matter to date. Therefore, I will leave the balance of the Applicants submissions to the good judgment of whomever is to decide if there is an actual conflict or a perception of bias.

I remain respectfully yours,

  
Richard H. McLaren

Attachments (5)

# EXHIBIT 46



International Chamber of Commerce

*The world business organization*

International Centre for Expertise • Centre international d'expertise

**EXP/517/ICANN/132 (c. EXP/519/ICANN/134)**

INTERNATIONAL RUGBY BOARD (IRELAND) vs/

DOT RUGBY LIMITED (GIBRALTAR) **and**

INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA)

---

FLETCHER, HEALD & HILDRETH, PLC

Ms. Kathryn A. Kleiman

Contact Information Redacted

*By email:* Contact Information Redacted

FAMOUS FOUR MEDIA LIMITED

Mr. Peter Young

Contact Information Redacted

*By email:* Contact Information Redacted

THE IP AND TECHNOLOGY LEGAL GROUP, P.C.

Mr. John M. Genga and Mr. Don C. Moody

Contact Information Redacted

*By email:* Contact Information Redacted

23 August 2013

Dear Madam, Dear Sirs,

The Centre writes to you with reference to its letter dated 8 August 2013.

We inform you that on 23 August 2013, the vice-chairman of the Standing Committee of the ICC International Centre for Expertise has decided to accept the request for replacement of the Expert, pursuant to Article 3(4)(A) of Appendix I to the Rules.

.../...

**ICC International Centre for ADR • Centre international d'ADR de la CCI**

Contact Information Redacted

Accordingly, the Centre will now proceed with the appointment of another Expert and inform the parties of such appointment thereafter.

Subsequently, the Centre will transfer the file to the fully constituted Expert Panel.

Should you have any questions, please do not hesitate to contact us.

Yours faithfully,



Hannah Tümpel  
Manager  
ICC International Centre for Expertise

c.c.:

Mr. Daniel Schindler  
Mr. Jon Nevett  
Mr. Richard Henry McLaren

*By email:* Contact Information Redacted  
*By email:* Contact Information Redacted  
*By email:* Contact Information Redacted

# EXHIBIT 47

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE  
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/517/ICANN/132 (c. EXP/519/ICANN/134)

INTERNATIONAL RUGBY BOARD

(IRELAND)

vs/

DOT RUGBY LIMITED

(GIBRALTAR)

and

INTERNATIONAL RUGBY BOARD

(IRELAND)

vs/

ATOMIC CROSS, LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**Consolidated Expert Determination**

In the Matter of the Consolidated Community Objections by International Rugby Board to the  
“.rugby” Applications of dot Rugby Limited and Atomic Cross, LLC

INTERNATIONAL RUGBY BOARD (IRELAND) vs/ DOT RUGBY LIMITED  
(GIBRALTAR)  
EXP/517/ICANN/132  
(c. EXP/519/ICANN/134)

INTERNATIONAL RUGBY BOARD (IRELAND) vs/ ATOMIC CROSS, LLC (USA)  
EXP/519/ICANN/134  
(c. EXP/517/ICANN/132)

January 31, 2014

Mark Kantor  
Sole Panel Member and Expert  
Contact Information Redacted

## **PARTIES AND REPRESENTATION**

### **Case N° EXP/517/ICANN/132 (c. EXP/519/ICANN/134)**

INTERNATIONAL RUGBY BOARD (IRELAND)

Contact person: Ms. Julie O'Mahony

Address: Contact Information Redacted

Email: Contact Information Redacted

DOT RUGBY LIMITED (GIBRALTAR)

Contact person: Mr. Geir Andreas Rasmussen

Address: Contact Information Redacted

Email: Contact Information Redacted

International Rugby Board is represented by Ms. Kathryn A. Kleiman and by Mr. Robert J. Butler from the law firm FLETCHER, HEALD & HILDRETH, PLC, **Contact Information Redacted**

Contact Information Redacted

Emails: Contact Information Redacted

Dot Rugby Limited is currently not represented by outside counsel in this matter.

### **Case N° EXP/519/ICANN/134 (c. EXP/517/ICANN/132)**

INTERNATIONAL RUGBY BOARD (IRELAND)

Contact person: Ms. Julie O'Mahony

Address: Contact Information Redacted

Email: Contact Information Redacted

ATOMIC CROSS, LLC (USA)

Contact p

Address: **Contact Information Redacted**

Email: Contact Information Redacted

International Rugby Board is represented by Ms. Kathryn A. Kleiman and by Mr. Robert J. Butler from the law firm FLETCHER, HEALD & HILDRETH, PLC, **Contact Information Redacted**

Contact Information Redacted

Emails: Contact Information Redacted

Atomic Cross LLC is represented by Mr. John M. Genga and Mr. Don C. Moody from the law firm IP & TECHNOLOGY LEGAL GROUP, P.C., **Contact Information Redacted**

Emails: Contact Information Redacted

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1. This Expert Determination is made in connection with (1) the Community Objection (collectively with annexes thereto, the “dot Rugby Objection”) made by International Rugby Board (“IRB” or the “Objector”) to the Application (the “dot Rugby Application”) made by dot Rugby Limited (“dot Rugby”), the shares of which are partially owned by Domain Venture Partners PCC Limited (“DVP”) and (2) the Community Objection (collectively with annexes thereto, the “Atomic Cross Objection” and, together with the dot Rugby Application, the “Applications”) made by IRB to the Application (the “Atomic Cross Application” and, together with the dot Rugby Application, the “Applications”) made by Atomic Cross, LLC (“Atomic Cross”; together with dot Rugby, each an “Applicant” and collectively the “Applicants”), an indirect subsidiary of Donuts Inc. (“Donuts”), each for the generic top-level domain (“gTLD”) “.rugby.” For the reasons set forth below, the Panel determines that the dot Rugby Objection and the Atomic Cross Objection should each be upheld.

## **I. Introduction**

2. As explained more fully below, the International Centre for Expertise (the “Centre”) of the International Chamber of Commerce (“ICC”) consolidated the proceedings with respect to the dot Rugby Objection by IRB with the proceedings with respect to the Atomic Cross Objection by IRB. The Panel is issuing one Consolidated Expert Determination with respect to the Applications. The determinations relating to the two Applications and Objections necessarily cover similar ground in many (but not all) respects.

3. In light of the consolidation of the two Objections, the Expert considers that respect for the process calls for assuring all parties that (a) each party has had the opportunity to make its own pleadings in full, separately from those of the other parties, (b) the Expert has considered the merits of each Objection and Response separately where the circumstances so require, (c) each argument has been taken into account regardless of which party made the argument and (b) the rules and principles the Expert has determined to be applicable pursuant to Article 20 of the Procedure have been applied fairly with respect to both Objections and Responses. The Expert has concluded that these responsibilities are best fulfilled by issuing a single Consolidated Expert Determination with respect to both Objections.

4. The establishment of new gTLDs requires the operation of a domain registry and a demonstration of technical and financial capacity for such operations and the management of registrar relationships. On 13 March 2013, IRB submitted its Objections to the dot Rugby Application and the Atomic Cross Application for the string “.rugby”. The Objections were made as community objections under the Attachment to Module 3 of the gTLD Applicant Guidebook (the “Guidebook”), New gTLD Dispute Resolution Procedure (the “Procedure”) for resolution in accordance with the Rules for Expertise (the “Rules”) of the ICC supplemented by the ICC Practice Note on the Administration of Cases (the “ICC Practice Note”) and Appendix III thereto.

5. Pursuant to Article 1(d) of the Procedure, the Applicants by applying for the gTLD “.rugby”, and the Objector by filing the Objections, have each accepted the applicable principles in the Procedure and the Rules.

6. Article 3(d) of the Procedure specifies that the Centre shall administer community objections.
7. Terms used in this Expert Determination and not otherwise defined herein shall have the respective defined meanings given to them in the Procedure and the Rules, as the case may be.
8. Pursuant to the Procedure, these findings “will be considered an Expert Determination and advice that ICANN [the *Internet Corporation for Assigned Names and Numbers*] will accept within the dispute resolution process.” Guidebook, Section 3.4.6.
9. The Centre conducted the administrative review of the dot Rugby Objection called for under Article 9 of the Procedure. By letter dated 9 April 2013, the Centre informed IRB and dot Rugby “that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedure).”
10. Atomic Cross disputed whether IRB had filed the Atomic Cross Objection on a timely basis. The Centre reviewed the matter and advised the parties the Atomic Cross Objection had been timely filed. The timeliness of that Objection and the correctness of the Centre conclusion are not matters before the Panel of Experts for determination.
11. The Centre conducted the administrative review of the Atomic Cross Objection called for under Article 9 of the Procedure. By letter dated 11 April 2013, the Centre informed IRB and Atomic Cross “that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedure).”
12. By letter dated 7 May 2013, following correspondence with the Applicants and the Objector, the Centre consolidated the proceedings with respect to both Objections into one administrative proceeding, on the basis set forth in that letter. The 7 May 2013 letter provides that only one Panel of Experts would be appointed to the consolidated proceeding, that the Panel will examine each objection on the merits and that the Panel would have the discretion to decide whether, based on the specificities of each case, to issue one or separate expert determinations.
13. On 5 June 2013, dot Rugby filed its Response to the dot Rugby Objection (collectively with annexes thereto, the “dot Rugby Response”).
14. On 6 June 2013, Atomic Cross filed its Response to the Atomic Cross Objection (collectively with annexes thereto, the “Atomic Cross Response” and, together with the dot Rugby Response, the “Responses”).
15. Following a prior appointment that did not proceed, the Centre by letter dated 27 August 2013 advised the Applicants and the Objector that it had proceeded with the appointment of the undersigned pursuant to Article 13 of the Procedure. Pursuant to Article 7 of the Rules and Article 3(3) of Appendix I to the Rules, the Vice-Chairman of the Standing Committee of the International Centre for Expertise of the ICC appointed the undersigned, Mark Kantor, on 26 August 2013 as the Expert in this consolidated matter and the sole member of the Panel.

16. By letter dated 29 August 2013, the Centre advised the Applicants and IRB that all advance payments had been received with respect to the Applications and Objections. Therefore, estimated Costs for the matter have been paid in full. Accordingly, “the Centre now confirms the full constitution of the Expert Panel.” In connection with that letter, the Centre transferred the files to the undersigned Expert in accordance with the Procedure and the Rules, together with any relevant correspondence between the Centre and the parties in the matters.

17. The Expert submitted a draft Determination to the Centre for scrutiny in accordance with Articles 21(a) and (b) of the Rules.

18. All submissions in the Procedure were made, and the Procedure was conducted, in English. All communications by the parties, the Expert and the Centre were submitted electronically. The place of these proceedings is the location of the Centre in Paris, France. See Articles 4(d), 5(a) and 6(a) of the Procedure.

19. No party has challenged the undersigned as Expert or raised any question as to the fulfillment by the undersigned of his duties as Expert or the qualifications, the impartiality or independence of the undersigned as Expert.

## **II. Applicable Standards**

20. IRB filed its Objections to the Applications as community objections. A community objection, according to the Procedure and the Guidebook, refers to an objection that “there is substantial opposition to the application from a significant portion of the community to which the string [here, “.rugby”] may be explicitly or implicitly targeted.” Procedure, Article 2(e)(iv).

21. Article 20 of the Procedure sets out the standards to be applied by an Expert Panel with respect to each category of objections, including a community objection. Article 20 states as follows:

### Article 20. Standards

(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

22. ICANN has set out standards in the Guidebook for determining whether the Objector has standing to make a community objection.

#### **3.2.2.4 Community objection**

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the Objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the Objector must prove both of the following:

***It is an established institution*** – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

***It has an ongoing relationship with a clearly delineated community*** – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an Objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

23. In addition, ICANN has set out standards in the Guidebook for the Panel to determine whether or not a community objection will be successful.

#### **3.5.4 Community objection**

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the Objector must prove that:

- The community invoked by the Objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and

- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

24. Each of these tests is described in further detail below.

***Community*** – The Objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the Objector is not determined to be a clearly delineated community, the objection will fail.

***Substantial Opposition*** – The Objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
  - Regional
  - Subsectors of community
  - Leadership of community
  - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by the Objector in expressing opposition, including other channels the Objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

**Targeting** – The Objector must prove a strong association between the applied-for gTLD string and the community represented by the Objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

**Detriment** – The Objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the Objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the Objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the Objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the Objector that would result from the applicant’s operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant’s operation of the applied-for gTLD, the objection will fail. The Objector must meet all four tests in the standard for the objection to prevail.

25. The Guidebook refers back to the ICANN Final Report Regarding the Introduction of New Generic Top-Level Domains, dated 8 August 2007 (the “[Final Report](#)”). The Final Report set out a table of Implementation Guidelines with views regarding the determination by the Panel of *inter alia* “community,” “substantial opposition” and “material detriment” in connection with a community objection.

<p>IG P*</p>	<p>The following process, definitions and guidelines refer to Recommendation 20.</p> <p><b>Process</b></p> <p>Opposition must be objection based.</p> <p>Determination will be made by a dispute resolution panel constituted for the purpose.</p> <p>The Objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).</p> <p><b>Guidelines</b></p> <p>The task of the panel is the determination of substantial opposition.</p> <ul style="list-style-type: none"> <li>a) <b>substantial</b> – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment</li> <li>b) <b>significant portion</b> – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.</li> <li>c) <b>community</b> – community 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.</li> </ul>	
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d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) **implicitly targeting** – implicitly targeting means that the Objector makes an assumption of targeting or that the Objector believes there may be confusion by users over its intended use.

f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) **detriment** – the Objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.

### III. Standing and Merits

26. In this Section of the Expert Determination, the Panel summarizes the positions of the parties as set out in the Objections, the Responses and related correspondence. This summary is made for the convenience of the reader and does not purport to be exhaustive. The Panel has carefully

reviewed the Objections (including all annexes), the Responses (including all annexes), other correspondence from the parties, the Procedure, the Rules, the Guidebook and any other rules or principles that the Expert has determined to be applicable. The absence in this Expert Determination of any specific reference to any particular information, document or provision is not to be taken as an indication that the Panel has failed in any way to consider fully the submissions of the parties or the standards, principles and rules applicable under the Procedure.

#### **a. Standing**

27. Each Applicant asserts that IRB does not have standing to pursue a community objection. Pursuant to Article 20 of the Procedure, IRB has the burden of proving it has standing to assert a community objection. IRB must prove, among other matters, that it is an “established institution,” that there is a “clearly delineated community” corresponding to the “rugby community” and that IRB has an “ongoing relationship” with such a community.

28. The challenges by dot Rugby and by Atomic Cross to IRB’s standing to pursue a community objection are quite similar. I address them together below.

29. Recognizing that it has the burden of proof, IRB initially set forth its position regarding standing in its Objections. IRB detailed its background, the identity of its members, and its participation with the members of the global rugby community. As a preliminary matter, the Expert notes that neither Applicant has challenged IRB’s assertion that it is an “established institution” as required under Section 3.2.2.4 of the Guidebook.

#### **1. Clearly Delineated Community.**

30. Objector asserts that a clearly delineated “rugby community” exists. Objector points to the number of participants in, and growth of rugby as a team sport throughout the world. The government of the United Kingdom notes the existence of a “global community of rugby players, supporters and stakeholders” (attachment C2 Objection). The Objector has more than 5 ½ million registered individuals participating in 118 countries. Rugby 15’s have participated in four Olympics. Rugby 7’s will participate in the 2016 Olympics. Several federations (including the Objector, the Rugby League International Federation, and Wheelchair Rugby) represent the interest of members of the community. The Rugby World Cup is one of the most prominent of sporting events in the world.

31. Each Applicant argues that Objector has not shown it has “an ongoing relationship with a clearly delineated community” (Guidebook Sec. 3.2.2.4) or that Objector represents “a community... strongly associated with the applied-for gTLD string” (Guidebook Sec. 3.2.2.4 at 3-8). In this regard, both Applicants assert that Objector has failed to describe the “formal boundaries” defining the community or what constitutes that community. The Applicants each, for example, argue that the “community” described by Objector “is too broad, diverse and wide-ranging to be “clearly delineated.”” Atomic Cross further asserts that the notion of a rugby community “which would allow a single party to control the use of that dictionary term to the exclusion of all others, defies reason.” (Atomic Cross Response, p. 7)

32. It is also worth noting that Atomic Cross argues Objector must satisfy a “more stringent “clearly delineated” test on the merits than it need do for standing.” I am highly skeptical of the argument that a “more stringent” standard applies on the merits, but there is no need to resolve that question because Objector has easily satisfied the requirement.

33. I determine that Objector has established for purposes of both standing and merits the existence of a “clearly delineated” rugby community “strongly associated” with “.rugby.” Objector has also established its “ongoing relationship” with that community.

34. Numerous individuals and organizations self-identify with the rugby community, whether as players, fans or otherwise. The fact that the game of rugby is played in several configurations and in several leagues, as well as being played outside leagues, does not undermine the existence of a clearly delineated community. Rather, it simply reminds us that rigidity is not a necessary component of a community. Here, Objector has persuasively demonstrated that the rugby community has more cohesion than a mere commonality of interest. Rather, participants in the rugby community are an “identifiable group of individuals sharing specific interests or characteristics.” One need only stand on the edges of a dispute between rugby partisans and cricket partisans to see a demonstration of that sharing of interests and characteristics. As Expert, I agree with the United Kingdom Government that a global rugby community of players, supporters and stakeholders exists. The boundaries of the rugby community are set by its players, fans, organizations, teams and clubs, tournaments and other economic and social stakeholders.

35. The Applicants appear to argue impliedly that ICANN rules require one and only one representative of the community. The fact that several associations exist in support of different configurations of rugby play does not either undermine the existence of a global rugby community or prevent Objector from asserting a community objection on behalf of that community. Neither ICANN procedures nor common sense so require.

36. Both Applicants argues that the Objector does not have an “ongoing relationship” with a clearly delineated rugby community. Rather, says dot Rugby, “their [IRB’s] relationship is with a particular subset of the alleged community which is itself not clearly delineated.”

37. Illustratively, dot Rugby asserts that Objector does not have a relationship with the sport as a whole (“for example Touch Rugby or Rugby league”), that Objector purportedly focuses “too heavily on elite rugby” and has been “accused of failing the smaller nations,” and that Objector “does not represent the alleged community as a whole which would include unorganized or unofficially recognized leagues, many clubs and teams (e.g., community social/recreational leagues and clubs, company-sponsored after work rugby recreational leagues and social leagues), rugby equipment/clothing manufacturers and retailers, media outlets, fan participants (i.e. fantasy rugby league), the video game industry and indeed Touch Rugby or Rugby League.”).

38. Both Applicants further argue that Objector lacks standing because Objector could have itself applied for “.rugby” as a community applicant, but chose not to do so. Rather, an affiliate of IRB (IRB Strategic Developments Limited) has also applied for an open registry for the string. Nothing in the Procedure requires a community objector itself to make a community application as a condition to pursuing the community objection to another application. Moreover, it would not be

sensible to create such a presumption (especially in the absence of any ICANN rule so requiring). To do so would unnecessarily restrict the choices available to applicants and objectors, without providing any meaningful benefits for the system.

39. Dot Rugby also points to a self-commissioned survey “suggesting that formal organization is not a necessity to participate in the sport.”

40. It is also quite clear that Objector is an established institution with an ongoing relationship with the rugby community. Objector has been the global governing body for Rugby Union for many years, established in 1886. Its charter documents have been publicly available for more than a century. Membership comprises 100 national rugby unions or associations, 17 associate members and 6 regional members. The IRB Council meets twice yearly with members from eight founder unions, four additional nations and the six regional associations. The executive committee meets regularly. The full membership meets every other year.

41. The professional staff of the IRB (50+) organizes and runs numerous tournaments, including the Rugby World Cup, the Women’s Rugby World Cup and many others. The established nature of the Objector and its ongoing relationship with the rugby community are undeniable

42. Applicants argue that IRB does not have an “ongoing relationship” with the rugby community. Those arguments are unpersuasive. Applicants’ approach towards determining whether an ongoing relationship exists seeks to create an exclusivity requirement not found either in the Procedure or in common sense. Any community may have more than one representative. Moreover, the proposed approach would effectively eliminate any representative organization from ever being within an ongoing relationship, except in the very smallest and homogenous of communities. Here too, the Procedure does not compel such unrealistic barriers to standing.

43. The Applicants further insists that the asserted global rugby community is not “clearly delineated.” For example, dot Rugby asserts that the term “rugby” is a generic word and that the community is comprised of “a significant number of stakeholders who do not necessarily share similar goals, values or interest, and thereby lack formal boundaries.”

44. While members of the global rugby community may have diverse goals, values or interest, that does not preclude them from sharing at the same time similar goals, values and interests - here, participation in and promotion of the sport in its many variants. The illustration of an extraordinarily broad “book community” offered by the Independent Objector encompasses a far broader set of stakeholders and participants than a community focused on one sport, rugby.

45. The argument that Objector only represents a subsector of the rugby community, made by both Applicants in differing ways, implicitly presumes that a community must comprise only one strand of thread in a garment. The garment itself exists in its entirety as a cohesive unit, even if it (like every single entity or activity in the world) can be deconstructed down into specific components of different characteristics and qualities. Again, that argument, if accepted, would set an unrealistically high barrier to standing – one that is not found in the Procedure. Moreover, the opposition letters from the Rugby League International Federation and other associations illustrate

that important representative associations inside the rugby community do not establish such artificial barriers between themselves.

## **2. Other**

46. The claim that the rugby community has not expended substantial resources to protect their interest in the “.rugby” gTLD is frivolous. The size of sums expended relative to the size of a large community such as the global rugby community is plainly not the only measure of whether substantial resources have been expended. Moreover, numerical measures are not the only test of whether substantial resources human commitment and organizational commitment count equally. The many opposition letters demonstrate the expenditure of substantial human and organizational resources.

### **b. Merits Objections and Responses**

47. Having easily established it has standing to make these objections, the Objector must still demonstrate as to each Applicant that granting the string “.rugby” to that particular Applicant would likely cause material detriment to the global rugby community (Guidebook Sec. 3.5.4). The Panel now turns to the substantive objections to the Applications that are presented by IRB. Pursuant to Article 20 of the Procedure, IRB again has the burden of proving its substantive objections.

48. As noted in the Introduction above, the Panel addresses the objections to each of the Applicants separately below to assure that all objections and responses are addressed in this Determination.

49. As a preliminary matter, it is important to note the unequivocal views of the Government of the United Kingdom as to both Applicants - the U.K. Government has stated that these Applicants do “not represent the global community of rugby players, supporters and stakeholders.” Further, the U. K. Government has advised that each Applicant “should withdraw their application.” The strength of the opposition by the U.K. to these Applications is an extremely important factor in the balance, in view of the substantial role the U.K. plays with respect to the rugby community.

### **1. Substantial Opposition**

50. Both dot Rugby and Atomic Cross argue that Objector has not shown “substantial opposition” to their respective Applications (Guidebook Sec. 3.5.4), claiming that the demonstrations of opposition Objector has assembled are small relative to the size of the rugby community as a whole. Of course, Objector itself is an umbrella organization broadly representative of the rugby community. Moreover, the Government of the United Kingdom opposes. Associations in Tonga, Japan, Kenya and Italy, as well as umbrella organizations in numerous other countries, oppose. They are joined in their opposition by a wide array of prominent rugby organizations: Australian Rugby Union; Tonga Rugby union; South African Rugby Union; New Zealand Rugby Union; Fédération Française Rugby; Federazione Italiana Rugby; Rugby Football Union; Unión Argentina de Rugby; Rugby League International Federation; Rugby Football League; International Wheelchair Rugby Federation; IRUPA (the players union); and numerous prominent individuals.

51. The arguments by Applicants that Objector has not shown “substantial opposition” are frivolous.

## **2. Strong Association**

52. Objector must show that a “strong association” exists between the rugby community and the gTLD string “.rugby.” Objector points out, correctly, that the term “rugby” defines the community; “it is the sport of rugby, in all of its denominations, and globally organized under the auspices of IRB and the other rugby federations and associations that represent the common interest and link among all of the members of the community.”

53. Moreover, the Government of the United Kingdom, a pre-eminent public voice with respect to the sport of rugby and its continuing integrity, has expressly recognize the existence of a rugby community and Objector’s own representative position in that community (UK GAC Early Warning, Objections Attachment C).

54. Dot Rugby asserts that any association between the rugby community and Objector is “purely ancillary or derivative”. That assertion is unpersuasive rhetoric. The claim by dot Rugby that public perception shows it has a broader target than the rugby community may indeed define DVP’s commercial objectives, but that has little bearing on the patently strong association between the term “rugby” and the global rugby community. Dot Rugby claims that the survey also shows that the dot Rugby Application does not expressly or implicitly target the rugby community. That claim is equally unpersuasive. Both Applications patently aim at the rugby community, even if they aim beyond as well. The Applicants again seek to create exclusivity requirements not found in the Procedure.

55. Atomic Cross has argued that “The TLD has an open purpose and is not tied to a specific community. That is the whole point of the generically worded TLD.” Whatever an Applicant’s subjective purpose may be, though, the term “.rugby” is objectively tied to the rugby community. Atomic Cross’s critique is not persuasive.

## **3. dot Rugby (DVP)**

56. Objector argues that granting the Application of DVP’s affiliate dot Rugby would be likely to cause material detriment for several reasons.

57. First, the affiliation with DVP itself. Objector points out that DVP has submitted a number of applications across three general categories: lifestyle applications such as “.date,” gambling applications such as “.bet” and sports applications such as “.rugby.” As discussed below, the association with gambling strings is particularly troubling for operation of a string such as “.rugby.”

58. Objector further criticizes the failure of dot Rugby and its parent DVP to consult with stakeholders in the rugby community. Thus, says Objector, Applicant is not acting in the interest of the rugby community. As part of this objection, Objector asserts that dot Rugby and DVP have

not consulted with Objector. That part of the complaint is unpersuasive. An applicant has no duty to “engage in outreach” to the very association organizing the opposition to its application and mounting a competing bid through an affiliate. Objector offers no evidence that dot Rugby and DVP have failed to engage in outreach to others in the rugby community. The persuasiveness of the dot Rugby Objection must thus rest elsewhere.

59. Objector additionally criticizes DVP for its profit motive; “DVP apparently exists for one purpose: profit.” That criticism too is misplaced. ICANN procedures do not count the profit motive as a negative factor, nor is there any persuasive reason to deny an application because the applicant is a “for-profit” enterprise.

60. More substantively, Objector criticizes the dot Rugby Application and the Governance Council proposed by DVP for allocating management and control entirely to DVP and its affiliates (“The true system of management and control within the TLD is entirely within the DVP structure.”). That criticism is correct. The global rugby community, including IRB and the other representative associations, would be left with a voice only in a weak forum. ICANN procedures do not compel an applicant to give a formal role in governance to members of a community strongly associated with the applied-for gTLD string. Still, this criticism, in association with other objections, does weigh in the balance.

61. Again more substantively, Objector criticizes the approach DVP will employ for registration of domain names; general availability and “all domain names will generally be registered on the first-come, first-served basis.” Objector argues that this policy will provide inadequate protection for brands, players, officials, sponsors and teams in the rugby community, including (1) ambush marketing in bad faith association of products and services, (2) scalping of tickets and fraudulent ticket sales, (3) improper sale of merchandise in violation of intellectual material property rights and (4) cybersquatting.

62. Dot Rugby responds to these criticisms by citing to its proposed Governance Council and to the commitment by applicant to a “PIC Spec,” thereby permitting challenges (whether by the Governance Council or others) under the Public Interest Commitment dispute resolution procedures. Dot Rugby further asserts that the harms to which Objector points are speculative.

63. The Governance Council, however, is advisory in nature. It does not afford community voices any meaningful substantive role in protecting the interests of the community, including misuse of intellectual property interests and cybersquatting.

64. Dot Rugby also points to its intention to perform periodic consumer surveys to measure trust and satisfaction with “.rugby.” While commercially sensible, Dot Rugby offers no link between those surveys and either governance of the gTLD or responsiveness to the protection of intellectual property interests held by members of the rugby community, big and small.

65. Dot Rugby points to its Acceptable Use Policy as protection from abusive or infringing registrations. Further, DVP will participate in the Trademark Claims Service during the first 90 days of general registration to provide notice to potential registrants of registered marks in the Trademark Clearinghouse. This is a useful mechanism, but it cannot and does not affirmatively

reach out to all worldwide holders of marks. Instead, it leaves individual investigatory responsibility in the hands of the holder - who may be a small club or team, or a commercial provider, individual or organization with limited resources. That weakness is particularly apparent for small communities and in the developing world. The protections offered by the Trademark Claims Service (however valuable they may be) do not offer sufficient solace to the rugby community, other than to members of that community who are themselves fortunate to have significant investigatory resources.

66. Further, the Trademark Claims Service covers only registered trademarks. It does not provide protection for intellectual property interests other than registered trademarks, a matter of particular importance again to smaller and resource-poor organizations especially in the developing world.

67. In addition, says dot Rugby, the Applicant will require “all registrars... to review all domain names requested to be registered during the trademark claims to determine if they are an identical match that is been filed with the trademark clearinghouse.” That approach fails to give protection outside the trademark claims, fails to give protection to marks not affirmatively filed with the Trademark Clearinghouse, and fails to provide protection from domain names that are confusingly similar rather than “an identical match.”

68. Applicant also proffers an Abuse Prevention and Mitigation Plan, in conjunction with the Governance Council and an internal working group. I have commented on the limitations of the Governance Council above. The additional presence of an internal working group and a “plan” are not a substitute for demonstrable enforcement mechanisms and resource commitment.

69. Objector additionally asserts that Applicant’s operation of “.rugby” will significantly interfere with core activities of the rugby community, both commercial and non-commercial. Objector notes that “[f]ew if any of these activities at the local and provincial levels are associated with trademarks.” As pointed out above, Objector correctly notes that the DVP proposals fail to offer protection for identifiers that are not trademark and registered with clearinghouse. Under various applicable laws, many such names and brands cannot be trademarked, as they are non-commercial activities.

70. The response by dot Rugby is to assert that “it seems unlikely that local and provincial amateur teams would suffer significant cybersquatting issues.” In any event, further says dot Rugby, the Governance Council Board may recommend reservation of specific domains. Those responses are inadequate. The worldwide local and small rugby activities, especially in communities that are resource-poor, are entitled to protection just like major commercial sponsors. The Governance Council is, as noted above, advisory in nature and lacks management and enforcement impact.

71. Objector makes two complaints about the prospects that granting the string to dot Rugby will injure the reputation of the rugby community. The first complaint, relating to a civil lawsuit in the U.S. Federal courts in Florida against the CEO and COO of DVP along with DVP in the United States, is entirely speculative unless that case proceeds and until the court makes rulings on the merits of the claims in the case. The mere bringing of a claim, especially in the U. S. judicial system (which is characterized by quite low barriers to the bringing of claims), is not alone a basis for inferring, before the adversarial process has moved forward, that such a claim has merit.

Further, the full record of the court proceedings is not in the record before me. The Objector bears the burden of coming forward with evidence in support of its Objection and has not done so on this point.

72. The second criticism is that DVP, by bidding on a number of gambling-related gTLDs, is seeking to become associated with gambling. IRB argues that association would harm the rugby community. That argument is persuasive, especially in light of the measures the rugby community has taken to minimize the potential adverse impact generally. IRB Regulation 6 and IRB Code of Conduct Section 1 illustrate a concern felt widely in the global rugby community: “Unions, Associations, Rugby bodies, clubs and persons may not engage in conduct that would undermine the integrity of the sport or bring it into disrepute.” Moreover, Host Union Agreements prohibit any improper association with gambling-related sponsorships.

73. DVP seeks to operate at least five gambling strings and simultaneously seeks to operate at least eight sport strings. Moreover, DVP has made no persuasive showing of any effort to avoid cross-promotion, cross-staffing and commingling of resources between gambling domains and sports domains. To the contrary, dot Rugby is noticeably silent as to the substance of these allegations.

74. Dot Rugby characterizes Objector’s assertion of this association as “pure speculation.” To support this position, dot Rugby notes that there is no mention in its Application of any plan to associate “.rugby” with gambling. Dot Rugby further, and carefully, writes “Neither Applicant nor any of its affiliated entities have any link or do business with Gibraltar based gaming companies.” But dot Rugby is silent about gambling links outside Gibraltar. Dot Rugby is also substantively silent in its Application and its Response as to its plans. Silence offers little comfort. Moreover, DVP’s intended links with gambling-related domains is itself a red flag for the likelihood of material detriment to the rugby community.

75. DVP’s Acceptable Use Policy, moreover, only commits that *registrants* will “use in accordance with applicable law.” That says nothing about the conduct of DVP and its affiliates themselves. It also says nothing about activities that are lawful but nevertheless detrimental to the sport and to participants in the rugby community, such as an improper association with gambling.

76. Objector’s claim that operation of the “.rugby” gTLD will create a likelihood of material detriment to the rugby community due to DVP’s proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure, is persuasive.

77. For the foregoing reasons, I find that granting the dot Rugby Application is likely to cause material detriment to the global rugby community.

78. In light of the foregoing, the dot Rugby Objection is successful and the Objector thus prevails with respect to that Objection.

79. Pursuant to Article 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party, as determined by the Panel, its advance

payment in costs. The Objector has prevailed on the dot Rugby Objection, and thus shall have its advance costs refunded by the Centre.

#### **4. Atomic Cross (Donuts)**

80. Objector argues that granting the Atomic Cross Application would be likely to cause material detriment. As stated above, I address the Atomic Cross Objection and Atomic Cross's responses as well in this Consolidated Expert Determination.

81. Objector argues that granting the Application of Donut's affiliate Atomic Cross would be likely to cause material detriment for several reasons.

82. First, Objector points out that, "in addition to seeking to operate .RUGBY, Donuts has applied for gambling-related strings including .BET, .BINGO, .CARDS, .CASINO and .POKER." Donuts seeks to operate gambling-related strings along with ".rugby" and other sports-related strings, without limitations and protections to mitigate the adverse consequences.

83. The association with gambling strings is particularly troubling for operation with a string such as ".rugby." IRB argues that association would harm the rugby community. As stated above with respect to the dot Rugby Application, that argument is persuasive, especially in light of the measures the rugby community has taken to minimize the potential adverse impact generally. Here again, IRB Regulation 6 and IRB Code of Conduct Section 1 illustrate a concern felt widely in the global rugby community: "Unions, Associations, Rugby bodies, clubs and persons may not engage in conduct that would undermine the integrity of the sport or bring it into disrepute." Moreover, Host Union Agreements prohibit any improper association with gambling-related sponsorships.

84. I conclude that operation of the ".rugby" gTLD by Atomic Cross 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.

85. Second, Objector claims that persons associated with Atomic Cross have a track record for weak operation of domains.

It is our understanding that the founder and CEO of Donuts was formerly President of Demand Media. Demand Media has a well-known track records in the ICANN Community. During Stahura's tenure, the public record shows that Demand Media and its subsidiaries faced numerous allegations of cybersquatting – the registration, trafficking in, or using a domain name with bad-faith intent to profit from the goodwill of a trademark belonging to another. During this time, Demand Media, eNom and other subsidiaries of Demand Media lost twenty-six "UDRP" cases, domain names disputes brought under ICANN's Uniform Dispute Resolution Policy rules. In many of these cases, the Panelists of the World Intellectual Property Forum and National Arbitration Forum delivered a finding of that "the disputed domain name has been registered and used in bad faith."

86. The Atomic Cross Response is silent as to this allegation. The record of Demand Media in managing other domains is not by any means dispositive of this Application. It does, however, weigh in the balance.

87. The Atomic Cross Application too “proposes limitations based only on trademark protection and abuse mitigation.” It does not propose protection for intellectual property interests other than registered trademarks. As I have concluded above with respect to the dot Rugby Application, that approach is insufficient protection for a worldwide community characterized by so many small participants, especially in resource-poor communities and in the developing world.

88. The Atomic Cross 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.

89. Objector further criticizes the failure of Atomic Cross and its parent Donuts to consult with stakeholders in the rugby community. Thus, says Objector, Applicant is not acting in the interest of the rugby community. As part of this objection, Objector makes a complaint substantially identical to its complaint against dot Rugby and DVP; IRB asserts that “Donuts has not reached out to IRB leadership for review or support of its policies and plans for the .RUGBY TLD.” IRB’s criticism of the conduct of the Applicants and their parents in this regard is not persuasive. As noted above, an applicant has no duty to “engage in outreach” to the very association organizing the opposition to its application and mounting a competing bid through an affiliate. Objector offers no evidence that Atomic Cross and Donuts have failed to engage in outreach to others in the rugby community.

90. But other aspects of the Atomic Cross Objection are much more persuasive. Atomic Cross admittedly has no links at all with the worldwide rugby community. And Atomic Cross additionally seeks to operate gambling-related strings along with “.rugby” and other sports-related strings, without limitations and protections to mitigate the adverse consequences. “In addition to seeking to operate .RUGBY, 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 and other Governments and institutions with a strong interest in the integrity of the sport.

91. According to the Applicant, “Objector tenders not a shred of evidence that Applicant’s operation of the string would create any *greater* or *different* harm than takes place under the existing regime of <.COM.> and other generics.” That argument, however, fails to appreciate the difference between a generic and a domain strongly associated with a particular community.

92. Atomic Cross has committed to employ a compliance staff to enforce intellectual property protections and restrain fraudulent activity. Atomic Cross further points to “eight additional measures” to protect users:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate WhoIs data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

93. A review of these measures shows that few, if any, are new and innovative. Audits of WhoIs data and remediation of WhoIs data are standard operating procedure for a careful operator. Terms of use and published policies and procedures for abusive activity are also standard operating procedure.

94. Two of the remaining measures, items 3 and 4, relate solely to implementing standard trademark protections or to extending the duration of those protections. As described in Atomic Cross's Public Interest Commitment, they comprise the following:

3.3 Establish and maintain a Domains Protected Marks List (DPML), a trademark protection service that allows rights holders to reserve registration of exact match trademark terms and terms that contain their trademarks across all gTLDs administered by Registry Operator under certain terms and conditions.

3.4 At no cost to trademark holders, establish and maintain a Claims Plus service, which is a notice protection mechanism that begins at the end of ICANN's mandated Trademark Claims period.

95. Proper resourcing for all of these measures (item 8), and indeed for operations of a gTLD generally, is a minimum requisite for domain operation, not a new and additional measure.

96. Objector argues that Atomic Cross's operation of ".rugby" will significantly interfere with core activities of the rugby community, both commercial and non-commercial. The Donuts proposals fail to offer protection for identifiers that are not trademarks and registered with a clearinghouse. Under various applicable laws, as I commented above with respect to the dot Rugby Objection, many such names and brands cannot be trademarked, as they are non-commercial activities.

97. Atomic Cross also challenges Objector's claim that Applicant "does not intend to act in accordance with the interest of the community of users more widely." In this regard, Objector does not offer persuasive evidence of mal-intent on Applicant's part. Objector in this regard criticizes Donuts for its profit motive just as it criticized DVP. That criticism does not carry persuasive weight under the Procedure. For the reasons I pointed out in connection with the similar criticism of dot Rugby, ICANN procedures do not count the profit motive as a negative factor, nor is there any persuasive reason to deny an application because the applicant is a "for-profit" enterprise.

98. Objector’s claim that Applicant’s operation of the string would interfere with the core activities of the rugby community has much more force. Objector points in this regard to Atomic Cross’s lack of ties to the rugby community. Objector further asserts the prospect of losing to speculators domain names corresponding to non-trademarked identities.

99. In both cases, Atomic Cross argues in response that these concerns are in fact advantages rather than disadvantages. Atomic Cross 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, in addition to that response focusing only on Objector and its affiliates, rather than the rugby community as a whole, that approach, as previously noted, fails to take account of the strong association between the rugby community and the particular string “.rugby.”

100. Additionally, Atomic Cross argues that “a group without trademark status or comparable protection on existing gTLDs should not enjoy trademark-level protection in any TLD.” That argument, as discussed above, 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.

101. Atomic Cross argues as well that Objector has made no showing that the rugby community depends on the DNS for core activities. The argument that “rugby is played on an athletic field, not a DNS,” is fine rhetoric but ignores the extraordinary growth of the Internet in supporting and encouraging communication, participation and commerce for this community like so many others.

102. One final element of Applicant’s response deserves attention. Atomic Cross asserts that Objector has failed to show any level of certainty that Applicant’s 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.

103. In light of the foregoing, the Atomic Cross Objection is successful and the Objector thus prevails with respect to that Objection.

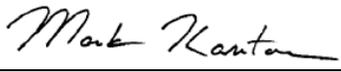
104. Pursuant to Article 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party, as determined by the Panel, its advance payment in costs. The Objector has prevailed on the Atomic Cross Objection, and thus shall have its advance costs refunded by the Centre.

#### **IV. Decision**

105. For the foregoing reasons and according to Article 21(d) of the Procedure, the Expert renders the following Expert Determination.

1. IRB's dot Rugby Objection is successful.
2. IRB is thus the prevailing party with respect to the dot Rugby Objection.
3. IRB's advance payment of Costs with respect to the dot Rugby Objection shall be refunded to it by the Centre.
4. IRB's Atomic Cross Objection is successful.
5. IRB is thus the prevailing party with respect to the Atomic Cross Objection.
6. IRB's advance payment of Costs with respect to the Atomic Cross Objection shall be refunded to it by the Centre.

Date: January 31, 2014

Signature:   
Mark Kantor  
Expert

EXHIBITS 48-50  
INTENTIONALLY OMITTED

# EXHIBIT 51

12 March 2014



On behalf of Donuts Inc. ("Donuts"), I offer the following comments regarding ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections.

We generally are supportive of a limited review process to address inconsistent string confusion objection *outcomes* and not just inconsistent determinations.

The ICANN Bylaws provide that:

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of competition." See Article II, Section 3. Non-Discriminatory Treatment.

By having a limited review process to deal with inconsistent outcomes, ICANN would be complying with its Bylaws and helping to administer the new gTLD process in a fair, transparent, and orderly manner as required in the Applicant Guidebook ("AGB") – the contract between ICANN and new gTLD applicants.

We also support ICANN's view that only the "losing" applicant should have the ability to seek redress under the limited review process. Applicants agreed in the AGB to one round of objections only. They did not agree to a review process that includes a second bite at the apple for objectors in cases where the applicant prevailed. To do otherwise would be to change the AGB in a way that materially harms the applicants. Such harm would invoke the protections afforded to applicants under AGB Module 6, Section 14. Objectors – those filing objections – are not party to the AGB contract for purposes of their objections (even if they might be applicants as well). As such, they are not subject to Section 14 of the AGB and the AGB offers no protection from changes to the process that may not be in an objector's favor.

As a matter of fundamental fairness, ICANN should provide a review mechanism for applicants that lost string confusion objections in cases where there is an inconsistent outcome, such as .CAM and .COM and .CAR and .CARS. In the latter case, Charleston Road Registry filed string confusion objections against all three applicants for .CARS. Might it help Donuts that DERCars, LLC lost that string confusion objection and Donuts (and Uniregistry) won? Perhaps. But, would such disparate treatment of two applications in the same set be a fair outcome? No.

As such, this limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. .SHOPPING objection, the same panelist who found .SHOP to be confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts' .SHOPPING application. For some reason, however, the objector

failed to file an objection to the other .SHOPPING applicant. Therefore, there currently exists an inconsistent outcome of the string confusion objection result in the .SHOPPING contention set due to the objector's omission, thereby causing disparate treatment to Donuts' detriment. The net result is the same as the .CAR and .CARS set. We have a complicated indirect contention set due to a determination related to one .SHOPPING applicant, but not the other one.

String confusion is a binary concept – it exists or it doesn't. There should not be string confusion in the eyes of the public for one applicant and not the other in the same string. Please see **Exhibit A** for a diagram of the .SHOP and .SHOPPING contention sets.

While .SHOPPING should be included with the other two in the limited review proposal, we are unaware of other instances of such an inconsistent outcomes of string confusion objections. Indeed, Donuts lost six string confusion objections and is seeking to include in this limited review only the .SHOPPING application.

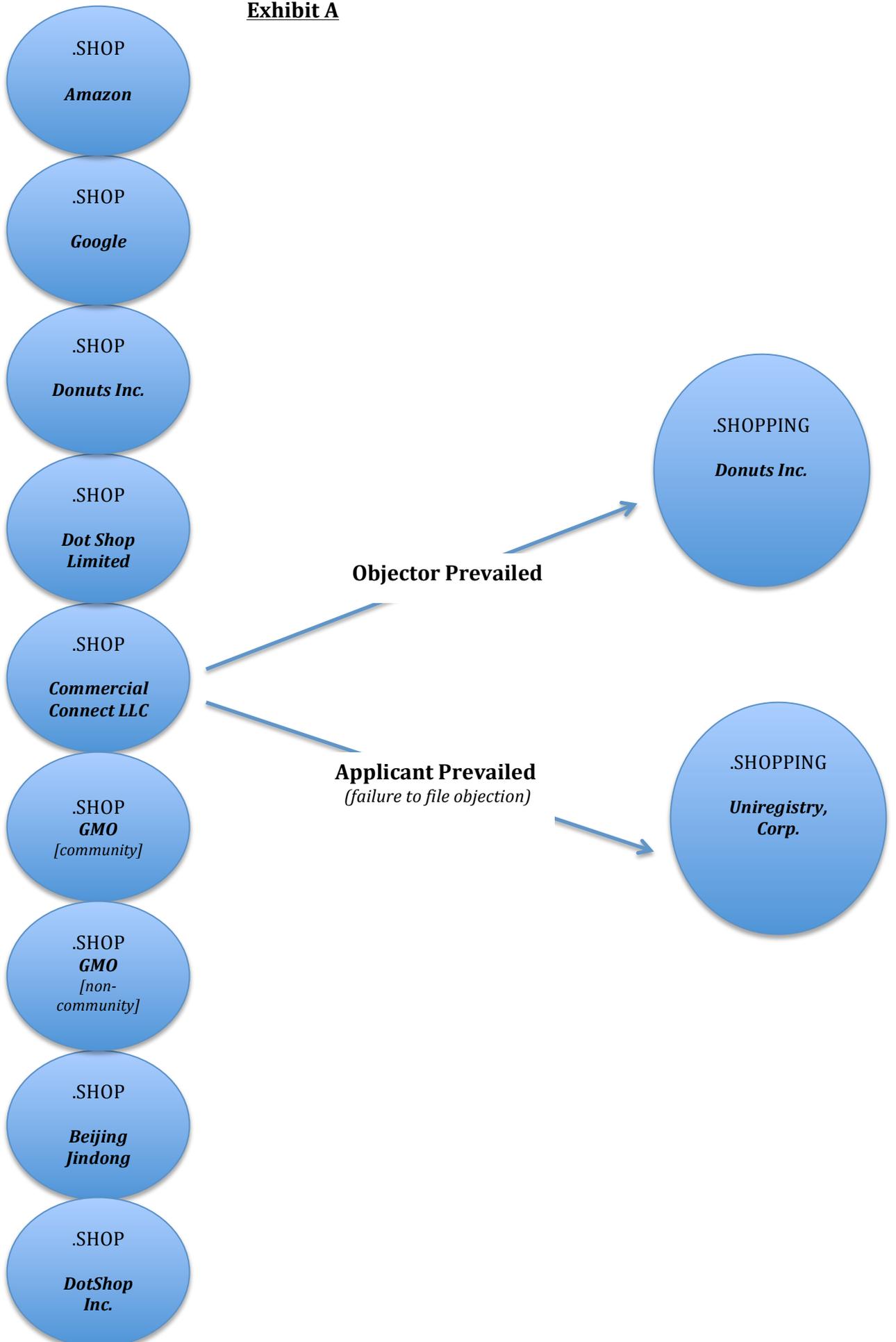
In order for ICANN to adequately address the disparate treatment caused by inconsistent outcomes, however, the standard of review should not be merely whether it was reasonable for a panelist to have reached that decision. Rather, the standard should include whether it is reasonable to have inconsistent outcomes in the same contention set. The purpose of the string similarly objection determination is completely frustrated if not all TLDs in that contention set are treated consistently. For example, in the .CAM and .COM situation, even if the panelists in all three cases acted reasonably in holding that either .CAM and .COM should be treated as confusingly similar or not, it doesn't matter if there is an inconsistent outcome. If any one .CAM applicant is permitted to proceed, both .CAM and .COM will be active TLDs. Hence, any confusion on the part of the public between .CAM and .COM will exist. As such, the review should look at the reasonableness of the outcome in light of the other outcomes and the end result. If there will be a .CAM and resulting consumer confusion, is it reasonable to permit two of the .CAM applicants to proceed and not a third? Obviously not. Therefore, the standard should be changed to take this into account.

Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections.

Sincerely,

Jonathon L. Nevett  
Co-Founder and EVP

**Exhibit A**



# EXHIBIT 52

To,

Mr. Cherine Chalaby, Chair, NGPC, ICANN

Mr. Fadi Chehadé, President and CEO, ICANN

Mr. Akram Atallah, President, Generic Domains Division, ICANN

Ms. Christine Willett, VP of New gTLD Operations, ICANN

CC: Ms. Špela Košak, Deputy Manager, ICC

1<sup>st</sup> November 2013

Dear Mr.Chalaby, Mr.Chehadé, Mr. Atallah, Ms. Willett,

We, the undersigned, are writing to express our ever growing concerns relating to the Community Objection process. Some of our concerns in this regard have already been communicated to you in two letters, dated 22<sup>nd</sup> July 2013 and 24<sup>th</sup> September 2013.

Unfortunately, the issues surrounding Community Objection determinations are growing, and we are more concerned than ever that this process, and therefore the entirety of the New gTLD Program, is being corrupted by significant departures from the Applicant Guidebook (AGB). The undersigned strictly followed and relied upon the AGB throughout the application process. This included consideration about whether or not to apply for strings that may have been subject to Community Objections or contested by Community Priority Applicants. We were part of the ICANN community's discussion that set a high bar for prevailing Community Objections and resulted in the high standard that is in the AGB. The analysis we present herein related to the ICC's Expert Panels shows a disregard of the model and the standards set forth in the AGB. This is intolerable and deserves immediate mitigation.

While the decision regarding .SPORT provided by the expert can be questioned in all four criteria, the analysis is most clearly erroneous and is in clear contradiction of the AGB with regard to two specific criteria: community definition, and the likelihood of material detriment. Specifically, the record clearly demonstrates that panelists are not considering the very stringent definition of "community" set forth in the AGB. The decisions to date indicate that panelists are employing their own personal assumptions of "community" or have accepted the objectors' definition of "clearly delineated communities" without question. Additionally, panelists are ignoring the AGB requirements for a showing of material detriment. Among those requirements is the objector's burden to prove that its community is likely to be adversely affected by the delegation of the string in question.

Please note that the undersigned represent a variety of companies, including both single string applicants and portfolio applicants, not all of which are facing community objections. We must stress that this is an issue that affects the entire New gTLD Program and ICANN community, and the support of applicants not directly affected by Community Objection proceedings speaks to our shared interest in strictly adhering to *all* AGB procedures.

To recap our prior correspondence, the first letter brought to ICANN's attention the fact that Expert Panels appointed by the DRSPs for the purpose of providing an Expert Determination on each community objection are three degrees removed from ICANN. They have neither prior experience with the new gTLD program nor a deep understanding of the AGB. It was then explicitly suggested that these Expert Panels should be provided with training or education materials that reinforce certain standards—primarily that the Panels must strictly follow the AGB to arrive at Expert Determinations. We are concerned that this process was never put into place.

The second letter pointed out specific examples of serious lapses on ICC Experts' parts in the Expert Determinations for .ARCHITECT and .FLY. The letter was a sincere attempt to inform ICANN of the fact that, although ICANN may have spent significant amounts of time working with the personnel at the DRSPs to familiarize them with the AGB, it is clear that the requisite knowledge and understanding of the AGB has not been successfully conferred to the actual Expert Panels appointed by the ICC. It was also recommended that ICANN should make appropriate appeal mechanisms available to parties who have been materially affected by decisions that departed from AGB standards. Finally, we urged ICANN to consider temporarily suspending all objection adjudications until a certain basic level of training was conducted to ensure that all concerned Experts are well versed with the AGB.

The response that was received from ICANN to this letter was disappointing, to say the least, given that ICANN's only follow through was a simple acknowledgement of the correspondence, with no forthcoming engagement on these very serious issues.

Although the form response we received from Customer Service claimed that our comments would be "considered carefully," we believe this assurance was not genuine. We say this because the ICC recently published an Expert Determination on a community objection against an application for the .SPORT<sup>1</sup> generic TLD which, again, is fatally flawed. In particular, we draw ICANN's attention to at least five examples of glaring errors in this determination, which prove that at least one of ICC's Experts is not familiar with the AGB or its intent.

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<sup>1</sup> .SPORT Expert Determination: [http://www.iccwbo.org/Data/Documents/Buisness\\_Services/Dispute\\_Resolution\\_Services/Expertise/ICANN\\_New\\_gTLD\\_Dispute\\_Resolution/EXP\\_471\\_ICANN\\_88\\_Expert\\_Determination/](http://www.iccwbo.org/Data/Documents/Buisness_Services/Dispute_Resolution_Services/Expertise/ICANN_New_gTLD_Dispute_Resolution/EXP_471_ICANN_88_Expert_Determination/)

1. The Expert reported that, *“the concept of ‘community’ is not defined by the ICANN Guidebook.”*<sup>2</sup>

Clearly, the Expert did not know that the concept of “community” is actually explained by the ICANN Guidebook:

“‘Community’ Usage of the expression ‘community’ has evolved considerably from its Latin origin – ‘communitas’ meaning ‘fellowship’ –while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non transience—into the future.”<sup>3</sup>

We reiterate that the above definition of the term “community” was relied upon by *all* applicants whilst making their decisions to stake hundreds of thousands of dollars applying as standard applicants for generic strings in the new gTLD Program. It is absolutely unfair and unacceptable for an application to be rejected under the premise that the concept of “community” is not defined in the AGB. This is blatantly untrue and to disregard this is to compromise the integrity of the AGB, the New gTLD Program, and ICANN.

We understand that the above description of “community” is referenced with regard to community applications; however, the context is relevant to “community” objections as well. This is because, like a community application, a community objection that is upheld directly eliminates the bona fide standard application against which it is filed. Consequently, it is the Expert’s duty to thoroughly test the existence of a “clearly delineated community” as per AGB descriptions before eliminating the standard application from the program altogether.

2. While the Expert is clearly aware that the objector needs to prove that “the application creates a likelihood of material detriment...”, none of the factors that were considered included anything about the application. The Expert did not identify a single objectionable or lacking aspect in the application that creates a likelihood of material detriment.
3. The Expert states:

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<sup>2</sup> Page 18 of the .SPORTExpert Determination

<sup>3</sup> §4 11 of AGB

*“In other words, the standard of a “likelihood of material detriment” is, in the Appointed Expert’s opinion, equivalent to future “possible” damage.”<sup>4</sup>*

In this case, the Expert opines that “likelihood” is equivalent to “future possible.” It almost appears as if the criteria have been deliberately weakened in order to allow the objector to prevail. In fact, the Expert even made this statement:

*“...Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical...”*

In spite of this, the Expert ruled in favor of the Objector. If the Expert’s current logic is followed, every application, including the Objector’s own application, creates “possible” damage. In this case, an allegation of material detriment against any application would be upheld because there is future “possible” damage. How can any applicant guarantee that it is “not possible,” in all conceived hypotheticals, for any future damage to occur?

The .SPORT ruling leaves no doubt the panelist replaced the word “likelihood” with the word “possibility” thus materially altering AGB fourth test to read as follows:

*“The application creates a ~~likelihood~~ possibility 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>5</sup>*

Procedurally, the guidebook explicitly does not provide the panelist with discretion to change the burden of proof the objector bears. If this is not true, then ICANN did not notify applicants and other interested parties of such discretion provided to the panelist. Either way a procedural error has occurred. In the spirit of fairness and due process, we call upon ICANN to incorporate an appeals process for exactly such procedural errors in the community objection proceedings.

4. The Expert has erroneously considered the “economic damage” that the *objector* “may suffer.”<sup>6</sup> Instead, he was supposed to consider the “nature and extent of damage to the reputation of the *community* represented by the objector...”. It appears that the Expert misread the AGB or inappropriately assumed that the Objector IS the “sports community.”
5. The decision provides no evidence that the Expert even considered the “level of certainty that alleged detrimental outcomes would occur.” As noted above, in point 3,

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<sup>4</sup> Page 27 of the .SPORT Expert Determination

<sup>5</sup> §3 24 of AGB

<sup>6</sup> Page 28 of the .SPORT Expert Determination

unlikely and hypothetical situations have been given credence over any level of certainty.

To evidence that unbiased industry insiders share our viewpoint on this subject, please take note of two recently published relevant articles, both by reputed journalists who are not participants in the new gTLD program:

- 1) <http://www.thedomains.com/2013/10/29/wow-icc-upholds-objection-of-sportaccord-to-famous-fours-app-for-new-gtld-sport-giving-sportaccord-the-extension/>. In this case, the title itself expresses shock over this Expert Determination.
- 2) <http://domainnamewire.com/2013/10/29/breatheaccord-wins-community-objection-against-breathe-top-level-domain-name/>. This article is a satirical response to the above news that the .sport objection was upheld. It shows the extent to which the journalist found the .sport decision to be unmerited.

We also bring to ICANN's attention the fact that objectors on other unrelated cases are citing these decisions in their Supplemental Submissions in order to influence Experts to weaken the objection criteria and rule in their favor. If these are considered to be precedents for other Experts, we can assure you that most community objectors will unfairly prevail over applicants who applied as standard applicants in good faith.

Not only does this situation cause immense commercial damage to the affected applicants, but also sets a precedent for future application rounds where applicants cannot rely on the application documents and ICANN can expect absolutely any applicant to use (or rather, abuse) the community objection process as its first attempt at contention resolution. These current decisions by ICC Experts will probably be used as grounds for rejecting future applications on the most generic words.

ICANN should *immediately* rectify this obvious deficiency. We sincerely request ICANN to take a more active role in the Dispute Resolution Process altogether. This includes impressing upon the ICC that its Experts need appropriate training before additional decisions are published to avoid any further inadequate decision making, by ensuring that the AGB is followed for future cases, and by putting in place an appeals mechanism so that procedural errors such as those in the .sport decision can be rectified. As applicants in the program, we are confident that ICANN will do the right thing, and ensure that its contracted parties uphold the AGB at any cost.

We thank you for taking the time to read this letter, and look forward to a positive and constructive response from you.

Sincerely,

Shweta Sahjwani, Radix FZC

United TLD Holdco Ltd.

DotClub Domains, LLC

Top Level Design, LLC

Donuts Inc.

Top Level Domain Holdings Ltd

Priver Nivel S.A.

Fegistry, LLC

Employ Media, LLC

Famous Four Media Limited

Merchant Law Group, LLP

DOTSTRATEGY CO.