

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DONUTS INC., ) ICDR CASE NO. 01-14-0001-6263  
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 Claimant, )  
 )  
 and )  
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 INTERNET CORPORATION FOR ASSIGNED )  
 NAMES AND NUMBERS, )  
 )  
 Respondent. )  
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**ICANN'S RESPONSE TO CLAIMANT DONUTS INC.'S  
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF  
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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21 September 2015

## **I. INTRODUCTION**

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Supplemental Memorandum (“Supplemental Brief”) in support of the Request for Independent Review Process (“IRP Request”) submitted by claimant Donuts Inc. (“Donuts”) on 20 August 2015.

1. This Independent Review Process (“IRP”) is conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, which creates a non-binding method of evaluating certain actions of ICANN’s Board of Directors.<sup>1</sup> An IRP Panel has only one responsibility: to “declar[e] whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>2</sup> Absent Board action, there is literally nothing for an IRP Panel to evaluate.

2. Donuts’ Supplemental Brief purports to offer new precedent and facts that it argues could support a basis for independent review, but Donuts is wrong for one overarching reason: Donuts does not challenge any Board action, much less any Board action that violates any provision of ICANN’s Articles of Incorporation (“Articles”) or Bylaws. Instead, Donuts challenges determinations rendered by an independent third party dispute resolution provider that are not reviewable in an IRP, as another IRP panel recently concluded. As such, this IRP must be resolved in ICANN’s favor.

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<sup>1</sup> ICANN’s Bylaws, Cl. App. A, *also available at* <http://www.icann.org/en/about/governance/bylaws>.

<sup>2</sup> *Id.* § 3.4.

## II. BACKGROUND FACTS

3. To briefly reiterate the pertinent facts, ICANN is administering the “New gTLD Program” pursuant to the New gTLD Applicant Guidebook (“Guidebook”), which ICANN adopted following years of consideration and extensive public input.<sup>3</sup>

4. Donuts’ IRP Request relates to its applications to operate the .SPORTS and .RUGBY gTLDs (“Applications”). Those Applications were filed as “standard” (not “community”) applications, meaning that any person or entity could obtain a name in that gTLD as opposed to limiting the distribution to persons/entities within the “community.”

5. SportAccord, an entity that submitted a community application to operate the .SPORT gTLD, filed a community objection against Donuts’ Application for the .SPORTS gTLD, arguing that it should be rejected because Donuts does not propose to operate the .SPORTS gTLD only on behalf of a community. Similarly, the International Rugby Board<sup>4</sup> (“IRB”) filed a community objection against Donuts’ Application for the .RUGBY gTLD, claiming that the “Rugby Community” would suffer material detriment should Donuts’ Application proceed. Pursuant to the terms of the Guidebook, the objections were referred to the International Center of Expertise of the International Chamber of Commerce (“ICC”), which selected experts to resolve the objections.

6. The ICC is the independent dispute resolution provider that ICANN selected to administer community objections.<sup>5</sup> Expert panels selected by the ICC are tasked with determining whether “[t]here is substantial opposition to the gTLD application from a significant

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<sup>3</sup> New gTLD Applicant Guidebook, Cl. App. C (“Guidebook”), *also available at* <http://newgtlds.icann.org/en/applicants/agb>.

<sup>4</sup> The International Rugby Board is an affiliate of applicant IRB Strategic Developments Limited, which submitted a standard application for the .RUGBY gTLD.

<sup>5</sup> Guidebook § 3.2.3.

portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>6</sup>

Under the terms of the Guidebook, if an expert panel determines that a community objection has merit, the objected-to gTLD application may not proceed. With respect to Donuts’ Applications for .SPORTS and .RUGBY, the expert panels tasked with making this determination (“Expert Panels”) upheld the community objections. As a result, Donuts’ Applications are not proceeding.

### III. ARGUMENT

7. IRPs are unique proceedings that ICANN established and set out in its Bylaws in order to create an accountability mechanism for certain persons or entities to challenge decisions of the ICANN Board. Accordingly, the terms set forth in the Bylaws are critical in defining the scope of an IRP. The Bylaws provide that an IRP is available only to persons “materially affected by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”<sup>7</sup> Here, however, no Board action took place, let alone any Board action that contravenes the Articles or Bylaws.

8. Donuts’ Supplemental Brief fails to provide a basis for independent review for three reasons. *First*, Donuts cites extensively (and misleadingly) to the declaration issued by the IRP panel in *DotConnectAfrica Trust v. ICANN* (“DCA”), but the reasoning of that declaration (the “DCA Final Declaration”) actually confirms why Donuts’ IRP Request lacks merit. *Second*, none of Donuts’ three main arguments in support of their IRP withstand scrutiny, which is confirmed by the final declaration recently issued by the IRP panel in *Booking.com v. ICANN* (“*Booking.com*”), which Donuts references but does not discuss. *Third*, Donuts’ Supplemental Brief alludes to Bylaws provisions that are wholly inapplicable and to events that *postdate* the

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<sup>6</sup> *Id.* § 3.2.1.

<sup>7</sup> Bylaws, Art. IV, § 3.2 (emphasis added).

community objection determinations, both of which are irrelevant to the claims underlying Donuts' IRP Request.

**A. THE *DCA* FINAL DECLARATION CONFIRMS THAT DONUTS' ARGUMENTS CANNOT FORM A BASIS FOR AN IRP.**

9. The *DCA* Final Declaration demonstrates why Donuts' claims fail to support independent review. In that IRP, claimant DCA Trust ("DCA") requested independent review of ICANN's decision not to proceed with DCA's application for the new gTLD .AFRICA.<sup>8</sup> This decision was made following the issuance of "consensus advice" issued by an ICANN constituent body known as the Governmental Advisory Committee ("GAC"), which stated that DCA's application should not proceed. Pursuant to the terms of the Guidebook, the ICANN Board was obligated to consider (and did consider) the GAC's advice.<sup>9</sup> The crux of that IRP was whether the Board's action in accepting the GAC's advice conformed to the terms of the Articles and Bylaws.<sup>10</sup> The IRP panel declared that the particular Board action accepting the GAC's advice about DCA's application did not comport with the Bylaws, and thus declared DCA as the prevailing party. However, the *DCA* Final Declaration strongly confirms why Donuts' claims are not reviewable in an IRP because Donuts' claims relate to a decision of a third party vendor, not a decision of the ICANN Board (as in the *DCA* matter).

10. There are two features of the *DCA* Final Declaration in particular that demonstrate that it is inapplicable to Donuts' claims and, in fact, confirm that Donuts' claims do not involve Board action at all, much less Board action that is even arguably reviewable in an IRP. First, the *DCA* IRP panel suggested that the Bylaws require that the GAC, as a constituent body of ICANN, "operate to the maximum extent feasible in an open and transparent manner and consistent with

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<sup>8</sup> *DCA* Final Declaration ¶¶ 3, 5, available at <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf>.

<sup>9</sup> Guidebook § 1.1.2.7.

<sup>10</sup> *DCA* Final Declaration ¶¶ 82-84.

procedures designed to ensure fairness.”<sup>11</sup> The *DCA* IRP panel suggested that although the Board bears the responsibility of ensuring the GAC complies with this mandate, it did not do so in that instance.<sup>12</sup>

11. Here, we are not dealing with a constituent body of ICANN. Neither the ICC, nor the expert panels it established to preside over the two objection proceedings at issue here are, or can be considered, constituent bodies of ICANN. Specifically, the ICC was not created by ICANN’s Bylaws; instead, ICANN merely selected the ICC to administer certain objection proceedings asserted pursuant to the terms of the Guidebook. Accordingly, the Bylaws do not establish any obligations of Board oversight of the ICC. Thus, while the *DCA* Final Declaration suggested that the Board “was bound to conduct a meaningful review” of the GAC’s advice and “investigate the matter further,”<sup>13</sup> the same cannot even be suggested here because the relevant Bylaws do not apply to the ICC, a third party dispute resolution service provider,<sup>14</sup> or the expert panels it establishes.

12. Second, under ICANN’s Bylaws as well as the Guidebook, the Board is *required* to consider GAC consensus advice in conjunction with an application for a new gTLD.<sup>15</sup> There was no dispute in the *DCA* IRP that the Board had “acted,” because the Bylaws required the Board to act once the GAC issued consensus advice relative to *DCA*’s application.

13. Here, the Board did not conduct any review of the expert determinations that Donuts complains of, nor do the Bylaws or the Guidebook require the Board to conduct such a

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<sup>11</sup> Bylaws, Art. III, § 1; *see also* Guidebook § 3.1.

<sup>12</sup> *DCA* Final Declaration ¶ 105.

<sup>13</sup> *Id.* ¶¶ 107, 113.

<sup>14</sup> To be clear, Donuts fails to identify any irregularity in the ICC’s administration of the objection proceedings; had Donuts filed a reconsideration request claiming irregularities in the ICC’s administration of the objection proceedings, the Board (through its Board Governance Committee) would have investigated those claims. To the extent Donuts alleges a lack of transparency on the part of the ICC, no Board action occurred that could form the basis for independent review.

<sup>15</sup> Bylaws, Art. XI, §§ 1, 2.1; Guidebook §§ 1.1.2.7, 3.1

review. Donuts tries to obscure this distinction by arguing that ICANN must “accept” the expert determinations issued by the panelists appointed by the ICC<sup>16</sup>; however, this “acceptance” involves no conduct – affirmative or otherwise – by the Board.

14. The Guidebook expressly provides that the ICC (not the Board) will administer the community objection resolution process.<sup>17</sup> Nothing in the Guidebook provides for the Board to be involved in any way in the panel selection process, and the Guidebook does not provide any procedure by which ICANN (or anyone else) is to conduct a substantive review of the expert panels’ results. Donuts’ generalized reference to the Board’s “ultimate authority over the new gTLD program”<sup>18</sup> cannot mask the fact that the Bylaws do not require the Board to consider expert determinations resulting from objection proceedings administered by the ICC—in stark contrast to the Bylaws’ clear requirement that the Board consider GAC advice.

15. In some IRPs involving third party expert determinations (such as the *Booking.com* IRP discussed below), the claimant first submitted a request for reconsideration of the underlying objection determination, which the Board Governance Committee (“BGC”) would evaluate,<sup>19</sup> and then filed an IRP challenging the BGC’s review. Donuts, however, did not file requests for reconsideration, instead opting to proceed directly to an IRP. As a result, there literally was not a single time that the ICANN Board (or any of its committees) evaluated, or was required to evaluate, the expert determinations that are at issue in this IRP.

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<sup>16</sup> Suppl. Br. ¶ 28.

<sup>17</sup> Guidebook § 3.2.3.

<sup>18</sup> Suppl. Br. ¶ 28.

<sup>19</sup> Bylaws, Art. IV, § 15. The nature of the BGC’s review is to determine whether ICANN’s policies or procedures were followed; the BGC is not tasked to, and does not, conduct a substantive evaluation of a third party expert’s determination.

**B. DONUTS' IRP REQUEST SHOULD BE DENIED BECAUSE IT DOES NOT CHALLENGE ANY BOARD ACTION.**

16. In its Supplemental Brief, Donuts reiterates its three primary arguments as to why it contends an IRP is warranted: First, Donuts claims that the .SPORTS determination “resulted from the objection panelist’s conflict of interest[.]”<sup>20</sup> Second, Donuts argues that the Board had an “obligation” to ensure consistent application by the ICC and its expert panels of ICANN’s Bylaws and the Guidebook.<sup>21</sup> Third, Donuts asserts that independent review is warranted with respect to the Board’s “inaction” in failing to create a “review process” for objection determinations.<sup>22</sup> In fact, none of these arguments comprises a basis for independent review, as confirmed by the final declaration in the *Booking.com* IRP (“*Booking.com* Final Declaration”).

17. *First*, Donuts argues that ICANN breached its Bylaws because the expert determination upholding the community objection against its .SPORTS Application purportedly “resulted from the objection panelist’s conflict of interest.”<sup>23</sup> But there is no provision in the Articles or Bylaws that requires the ICANN Board to evaluate third party expert panelists for conflicts of interest. To the contrary, the Guidebook specifically states that vetting expert panelists for conflicts is the ICC’s job (not the Board’s job).<sup>24</sup>

18. The findings of the *Booking.com* Final Declaration are instructive on this point, because that panel found that challenges to the “implementation and supervision” of the third party dispute resolution providers fail because neither the Articles nor the Bylaws mandate that the Board must be involved in such matters.<sup>25</sup> Indeed, the *Booking.com* IRP panel noted that the

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<sup>20</sup> Suppl. Br. ¶ 20.

<sup>21</sup> *Id.* ¶ 26.

<sup>22</sup> *Id.* ¶ 36.

<sup>23</sup> *Id.* ¶ 20.

<sup>24</sup> Guidebook § 3.4.4.

<sup>25</sup> *Booking.com* Final Declaration ¶ 142, available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>. Moreover, the *Booking.com* IRP Panel found that to the extent *Booking.com* challenged the terms

Guidebook provides the third party objection resolution providers with “discretion,” and that the “determination is entirely a matter of ‘the [third party expert]’s judgment.”<sup>26</sup> That the *Booking.com* Final Declaration concerned string confusion objections and not community objections does not dilute the import of this Declaration because the Guidebook provides similar guidance as to the ICC’s role and implementation of the community objection procedures.<sup>27</sup> As the *Booking.com* IRP panel reasoned, where it is conceded that the relevant Guidebook objection procedures were followed, the argument that there is a Board action “reviewable” in an IRP “fail[s].”<sup>28</sup>

19. *Second*, Donuts claims that the Board had a duty to oversee the ICC’s application of the relevant policies and standards,<sup>29</sup> but this argument also fails because, pursuant to the Guidebook, “each DRSP will follow its adopted procedures . . . [for selecting panelists], including procedures for challenging and replacing an expert for lack of independence.”<sup>30</sup> But nothing in the Articles, Bylaws or Guidebook requires the ICANN Board to interfere with the ICC’s judgment in this regard, nor does Donuts cite any such requirement.

20. Just as Donuts argues here, *Booking.com* argued that ICANN’s Board should have intervened with respect to the third party expert report determining that the .HOTELS

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(continued...)

of the Guidebook, such a claim was time-barred, because a claimant must file an IRP “within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.” Bylaws, Art. IV, § 3.3; *Booking.com* Final Declaration ¶ 129. Donuts essentially seeks to do the same thing here, and to the extent its claims challenge the Guidebook’s provisions, they are time-barred.

<sup>26</sup> *Booking.com* Final Declaration ¶¶ 124, 125 (quoting Guidebook § 2.2.1.1.2).

<sup>27</sup> Guidebook § 3.2.2.4 (“The panel will perform a balancing of the factors listed above, as well as other relevant information, in making *its determination*.”) (emphasis added).

<sup>28</sup> *Booking.com* Final Declaration ¶ 139.

<sup>29</sup> Suppl. Br. ¶ 26.

<sup>30</sup> Guidebook § 3.4.4 (emphasis added).

gTLD was “confusingly similar” to the .HOTEIS gTLD,<sup>31</sup> which pursuant to the terms of the Guidebook meant that only one of those applications could proceed.<sup>32</sup> Booking.com had applied for the gTLD .HOTELS. A different applicant applied for the gTLD .HOTEIS. Like Donuts, Booking.com challenged both the selection of the third party expert panelist that made the determination and the procedures set forth in the Guidebook that establish how the expert panelist would make its determination.<sup>33</sup>

21. In the *Booking.com* Final Declaration (dated 3 March 2015), the IRP panel unanimously rejected Booking.com’s claims, determining that Booking.com was not challenging an action or inaction of ICANN’s Board. The *Booking.com* Final Declaration declared that IRP panels are expressly limited to “compar[ing] contested actions of the *Board* to ICANN’s Articles [] and Bylaws” and are “neither asked to, nor allowed to, substitute [their] judgment for that of the Board.”<sup>34</sup> The same is true here. Indeed, as the Panel stated in the *Booking.com* Final Declaration: “the Board is neither required nor entitled to intervene . . . to accept or not accept the [expert panel’s] determination.”<sup>35</sup>

22. *Third*, Donuts asserts that independent review is warranted with respect to the Board’s “inaction” in failing to create a “review process” for these objection determinations because the Board did so with respect to two “string groups” unrelated to this dispute.<sup>36</sup> Donuts is correct that, although there have been hundreds of objections and determinations that have been resolved pursuant to the terms of the Guidebook, the ICANN Board intervened with respect to just two string confusion objection expert determinations. Specifically, the .COM/.CAM

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<sup>31</sup> *Booking.com* Final Declaration ¶ 80; Guidebook §§ 3.2.1, 3.5.1.

<sup>32</sup> Guidebook § 1.1.5.

<sup>33</sup> *Booking.com* Final Declaration ¶¶ 71-78.

<sup>34</sup> *Id.* ¶¶ 110, 115.

<sup>35</sup> *Id.* ¶ 138.

<sup>36</sup> Suppl. Br. ¶¶ 34, 36.

and .SHOP/.通販 strings were the subject of *inconsistent* expert determinations on string confusion objections by different expert panels, which, following public comment, the Board eventually elected to send back for further expert review (i.e., not a decision by the Board).<sup>37</sup>

23. For example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert panel overruled two separate string confusion objections asserting that .CAM was confusingly similar to .COM. Given what were perceived *inconsistent* determinations, the BGC requested that ICANN staff draft a report for the ICANN Board’s New gTLD Program Committee (“NGPC”), “setting out options for dealing . . . [with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes. . . .”<sup>38</sup> The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.<sup>39</sup> ICANN staff then initiated a public comment period regarding framework principles such a potential review mechanism.<sup>40</sup> Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that the inconsistent string confusion objection expert determinations regarding .COM/.CAM and .SHOP/.通販 were “not [] in the best interest of the New gTLD Program and the Internet community” and passed a resolution directing ICANN staff to establish a process whereby the

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<sup>37</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.

<sup>38</sup> *Id.*; see also BGC Recommendation on Reconsideration Request 13-10, at 11, available at <https://www.icann.org/en/system/files/files/recommendation-commercial-connect-10oct13-en.pdf>.

<sup>39</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

<sup>40</sup> See <https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en>.

ICDR would appoint a three-member panel to re-evaluate those expert determinations.<sup>41</sup>

24. In passing that resolution, the Board specifically considered whether this limited review mechanism should also address community objections (such as those at issue in this IRP) and limited public interest objections.<sup>42</sup> The Board, in its discretion, determined that it should not.<sup>43</sup>

25. Donuts has not identified an Article or Bylaws provision that the ICANN Board violated by exercising its independent judgment to intervene with respect to these inconsistent string confusion objection expert determinations, much less by exercising its independent judgment not to intervene with respect to the community objection expert determinations on Donuts' Applications. Inasmuch as the Board had no obligation to address any of these matters, the fact that the Board elected to act in a very limited situation, but not to act with respect to Donuts' Applications, is not a violation of the Articles or Bylaws.

26. The *Booking.com* Final Declaration also addressed this argument head-on: "the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant]."<sup>44</sup>

27. Moreover, Donuts here seeks to *overturn* expert determinations rendered against its Applications.<sup>45</sup> In none of these unrelated proceedings did that occur. Instead, with respect

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<sup>41</sup> NGPC Resolution 2014.10.12.NG02, *also available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>. The expert determinations reached with respect to .CAR/.CARS, which were at issue when the Board began considering a final review mechanism for this limited set of string confusion objection expert determinations, they were not at issue by this time because the contention set was resolved by the applicants themselves.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Booking.com* Final Determination ¶ 138.

<sup>45</sup> Suppl. Br. ¶ 37.

to .CAM/.COM and .SHOP/.通販, the Board merely ensured that the inconsistent expert determinations would be reconsidered by new, three-member expert panels.

28. In sum, each of Donuts' arguments fails to show that any IRP is warranted, and this position is supported by the findings of the *Booking.com* Final Declaration.

**C. INAPPLICABLE BYLAWS PROVISIONS AND FACTUAL DEVELOPMENTS SUBSEQUENT TO THE OBJECTION DETERMINATIONS CANNOT FORM THE BASIS FOR INDEPENDENT REVIEW.**

29. Donuts raises three other issues that purportedly support its request for independent review; however none, in fact, supports Donuts' position. First, Donuts invokes Bylaws provisions that are related to the Board's retention of experts for policy guidance, but those provisions are wholly inapplicable here. Second, Donuts contends that the objector in the .SPORTS community objection proceeding "has fallen into complete disarray[.]"<sup>46</sup> but Donuts does not explain why such a factual development, if true, signals that any Board action violated the Articles or Bylaws. Third, Donuts erroneously asserts that ICANN has withheld relevant documents when responding to its document requests, but ICANN complied with this IRP Panel's directives as to the scope of the requests and produced hundreds of pages of responsive materials.

30. As to the first issue, Donuts cites Article XI-A of the Bylaws as support for the notion that the ICANN Board enjoys the sole authority to authorize the appointment of experts.<sup>47</sup> However, Article XI-A of the Bylaws applies to external expert advice sought for the express purpose of "allow[ing] the policy-development process within ICANN to take advantage of

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<sup>46</sup> Suppl. Br. ¶ 6(b).

<sup>47</sup> *Id.* ¶ 28.

existing expertise that resides in the public or private sector but outside of ICANN.”<sup>48</sup> This “policy development process” is the process by which ICANN’s various Supporting Organizations develop policy recommendations for ICANN (such as the recommendation by ICANN’s Generic Names Supporting Organization to permit a broad expansion of the number of gTLDs<sup>49</sup>). This provision of the Bylaws has nothing whatsoever to do with the retention of experts for objections under the Guidebook for the New gTLD Program or ICANN’s decision to delegate the objection process to third party providers such as the ICC. The ICC engages qualified and experienced experts to resolve objections asserted against individual gTLD applications so that neither the ICANN staff, nor the ICANN Board (neither of which have such experts), are involved in the process. There is no document that suggests that ICANN retained the ICC pursuant to Article XI-A of the Bylaws, and that provision is wholly irrelevant to this IRP proceeding.

31. Second, Donuts contends that the prevailing party in the .SPORTS objection proceeding (SportAccord) “has now lost much of its support.”<sup>50</sup> Donuts argues that this purported development is relevant as “an example of the untoward consequences that can result from allowing the misconduct of the SPORTS panelist to go *un-reviewed and unchecked by the Board*[.]”<sup>51</sup> That statement, however, actually underscores the weakness of Donuts’ position: the Board did not review or check the third party expert’s determination, and the Articles and Bylaws do not provide that it should have done so. Moreover, the factual circumstances regarding SportAccord’s support base (which have absolutely no relationship with the outcome

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<sup>48</sup> Bylaws, Art. XI-A, Section 1.1.

<sup>49</sup> See 2007 GNSO Report: Introduction of New Generic Top-Level Domains, *available at* <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>.

<sup>50</sup> Suppl. Br. ¶ 12.

<sup>51</sup> *Id.*

of the community objection) have no bearing upon this IRP proceeding, which is limited to assessing whether the Board's actions comport with the Articles and Bylaws.<sup>52</sup>

32. Third, Donuts contends that ICANN “refuses to produce . . . directly relevant evidence.”<sup>53</sup> In fact, ICANN complied with the IRP Panel's directives with respect to document production at every turn. First, ICANN produced hundreds of pages to Donuts in response to two of its requests, despite the fact that those request onerous and submitted to ICANN quite late in the IRP proceedings. Then, ICANN complied with the IRP Panel's directive in its Procedural Order No. 3, dated 14 August 2015, to meet and confer with Donuts regarding three document requests ICANN contended were overbroad; the parties thereby resolved the dispute as to two of the requests, which Donuts agreed to narrow, and ICANN produced its responsive documents. In its Procedural Order No. 4, dated 7 September 2015, the IRP Panel resolved in ICANN's favor the parties' dispute as to the reasonableness of the last contested request, and determined that it was overly broad. ICANN will comply with Procedural Order No. 4's instruction to produce further documents in response to the IRP Panel's narrowed version of that final document request as soon as is practicable. In sum, Donuts' assertion that ICANN has improperly “refused” to produce documents is groundless, as it has amply complied with its production obligations and the IRP Panel's directives in this regard. Moreover, any argument over production of documents is a pure red herring in that the ICANN Board was not, as it should not have been, involved whatsoever in the parties' negotiations about the scope of the document requests, nor the document production process.

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<sup>52</sup> SportAccord continues to vigorously pursue its application to operate .SPORT, and it submitted a letter to the Panel asserting its interest in this IRP and its view that Donuts' challenges to the objection determinations at issue here lack merit. As of this writing, the Panel is still evaluating whether to accept SportAccord's letter to the Panel.

<sup>53</sup> Suppl. Br. ¶ 3.

**IV. CONCLUSION**

33. Neither the ICC's appointment of the third party experts to adjudicate the objection proceedings at issue here, nor the substantive outcomes thereof, involved any ICANN Board action. Further, ICANN's conduct was in all respects fully consistent with ICANN's Articles and Bylaws. There were no Board "actions or inactions" that are appropriately the subject of independent review under the express terms of ICANN's Bylaws, and ICANN urges this IRP Panel to so declare.

Dated: 21 September 2015

Respectfully submitted,

JONES DAY

By: /s/ Jeffrey A. LeVee

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## APPENDIX

### RESPONSE TO DONUTS' "SCHEDULE OF 'COMMON GROUND' MATTERS"

ICANN joins in Donuts' "Schedule of 'Common Ground' Matters." Donuts' description of the New gTLD Program and some of the provisions of the Applicant Guidebook are brief and somewhat incomplete, but these matters are not disputed and no fuller explanation is necessary except as set forth above in ICANN's brief. The only exception is Paragraph 23. In that paragraph, Donuts states that the ICC removed Mr. Jonathan Taylor as the expert panelist for the .SPORT community objection because his dealings with SportAccord "represented a conflict of interest." The ICC "decided not to confirm the appointment of Mr. Taylor" on 25 July 2013, but the ICC did not provide a reason for that decision, much less any pronouncement of a finding of bias or conflict of interest.<sup>54</sup> As such, ICANN joins in Paragraph 23 with the exception of its final clause, namely "based on his historical dealings with the objector, SportAccord, that represented a conflict of interest."

ICANN does not believe that any additions to the Schedule of "Common Ground" Matters are necessary; ICANN has included above certain additional relevant facts – such as the nature and role of the GAC and details regarding the .CAM/.COM and .SHOP/.通販 expert determinations – and has provided detailed citations supporting those facts.

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<sup>54</sup> Cl. Ex. 13.