



Draft Applicant Guidebook

Module 3

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

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Module 3

Dispute Resolution Procedures

This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging an objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each DRSP will apply in its decisions.

All applicants should be aware of the possibility that an objection may be filed against their applications, and of the options available in the event of such an objection.

3.1 Purpose and Overview of the Dispute Resolution Process

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows certain parties with standing to have their objections considered before a panel of qualified experts. A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept this gTLD dispute resolution process. Similarly, an objector accepts the gTLD dispute resolution process by filing its objection.

3.1.1 Grounds for Objection

An objection may be filed on any one of the following four grounds:

String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string.

Legal Rights Objection – The applied-for gTLD string infringes existing legal rights of the objector.

Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

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

The rationales for these grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm>.

3.1.2 *Standing to Object*

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by panelists designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection Ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round
Legal rights	Rightsholders
Morality and Public Order	To be determined
Community	Established institution

3.1.2.1 *String Confusion Objection*

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may also file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4). If an objection by a gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.

3.1.2.2 *Legal Rights Objection*

Only a rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming are infringed by the applied-yes-for gTLD must be included in the filing.

3.1.2.3 *Morality and Public Order Objection*

Standing requirements for morality and public order objections remain under study. In the case of morality and public order objections, it may be appropriate to grant standing only to parties who have recognized authority in the arena of morality or public order, such as governments, or it may be appropriate to make this option available to any interested parties who assert harm due to an applied-for gTLD string.

3.1.2.4 *Community Objection*

Established institutions associated with defined communities are eligible to file a community objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a defined community that consists of a restricted population – Factors that may be considered in making this determination include:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

3.1.3 Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can file a response to the objection and enter the dispute resolution process (refer to subsection 3.3); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2 Procedure for Filing an Objection

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date. Objections must be filed directly with the appropriate DRSP for each objection ground.

The **International Centre for Dispute Resolution** has agreed in principle to administer disputes brought pursuant to string confusion objections.

The **Arbitration and Mediation Center of the World Intellectual Property Organization** has agreed in principle to administer disputes brought pursuant to legal rights objections.

The **International Chamber of Commerce** has agreed in principle to administer disputes brought pursuant to Morality and Public Order and Community Objections.

3.2.1 Objection Filing Procedures

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. These procedures are provided to applicants for reference and are intended to cover dispute resolution procedures generally. Each provider has its own rules and procedures that also must be followed when filing an objection.

Should an applicant wish to file a formal objection to another gTLD application, it would follow these procedures.

- All objections must be filed by the posted deadline date. Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. That is, if any objector wishes to object to several applications at the same time, the objector must file an objection and pay a filing fee for each application that is the subject of an objection. If an objector wishes to object to one application on different grounds, the objector must file an objection and pay a filing fee for each objection ground.
- All objections must be filed with the appropriate DRSP. If an objection is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the objector of the error. The objector then has 5 calendar days after receiving that notification to file its objection with the appropriate DRSP.
- Objections must be filed electronically and all interactions with the DRSPs during the objection process must be conducted online.

Each objection filed by an objector must include:

- The name and contact information, including address, phone, and email address, of all parties submitting an objection.
- The basis for standing; that is, why the objector believes it has the right to object.
- A statement of the nature of the dispute, which should include:
 - A statement giving the specific ground under which the objection is being filed.
 - A detailed explanation of how the objector's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
 - A detailed explanation of the validity of the objection and why the application should be denied.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 2500 words, excluding attachments.

The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.

Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another, and to ICANN.

ICANN will publish a document on its website identifying all objections shortly after the deadline for filing objections has passed (refer to Item 1 above). Objections will not be published before that deadline.

3.2.2 Objection Filing Fees

At the time an objection is filed, the objector is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

3.3 Filing a Response to an Objection

3.3.1 Filing Procedures

These procedures are intended to cover dispute resolution procedures generally. Each DRSP will have its own rules that also must be followed.

Upon notification that ICANN has published the list of objections filed (refer to subsection 3.2.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, if an applicant wishes to respond to several objections, the applicant must file a response and pay a filing fee to respond to each objection.
- All responses must be filed with the appropriate DRSP. If a response is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the applicant of the error. The applicant then has 5 calendar days after receiving the notification to file its objection with the appropriate DRSP.

- Responses must be filed electronically and all interactions with the DRSPs during the dispute resolution process must be conducted online.
- Each response filed by an applicant must include the name and contact information, including address, phone, and email address, of all parties submitting the response.
- Each responding applicant's response must contain a point-by-point confirmation or denial of the claims made by each objector. The applicant also should attach any copies of documents that it considers to be a basis for the response.
- Responses are limited to 2500, excluding attachments.
- The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.
- Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another and to ICANN.

3.3.2 Response Filing Fees

At the time an applicant files its response, it is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded.

3.4 Dispute Resolution Procedure

3.4.1 Preliminary Objection Processing

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's submission of a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for submitting an objection.

3.4.2 Consolidation of Objections

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.

An example of circumstances in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

3.4.3 Negotiation and Mediation

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in a cooling off period to determine whether the dispute can be resolved by the parties. Each DRSP has panelists who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel to resolve the objection.

There are no automatic extensions of time associated with any cooling off period. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. The parties must limit their requests for extension to 30 calendar days.

3.4.4 Selection and Number of Panelists

Appropriately qualified panelists will be appointed to each proceeding by the designated DRSP.

Panelists must be independent of the parties to an objection resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing a panelist for lack of independence.

There will be one panelist in proceedings involving a **string confusion objection**.

There will be one panelist with relevant experience in intellectual property rights disputes in proceedings involving an existing **legal rights objection**.

There will be three panelists recognized as eminent jurists of international reputation, in proceedings involving a **morality and public order objection**.

There will be one panelist in proceedings involving a **community objection**.

Neither the panelists, the DRSP, ICANN, nor their respective employees, Board members, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5 Adjudication

At its discretion, the panel appointed by the DRSP may request further statements or documents from the parties, although such requests will be limited and infrequent.

To keep costs down and limit delays, the panel will discourage and, if practicable, not permit any document production or other discovery-style requests from the parties.

Without its being requested by the parties, the panelists may appoint experts to be paid for by the parties, request live or written witness testimony, or request limited exchange of documents.

Any party may request a hearing; however, it is within the panel's discretion whether to allow such a hearing. The presumption is that the panel will render decisions based on written submissions and without a hearing.

If a request for a hearing is granted, videoconferences are to be used if possible. If not possible, then the DRSP panel will select a place for hearing if the parties cannot agree. The panel will determine whether the hearings are to be public or private. Hearings will last no more than one day, except in the most exceptional circumstances.

Typically, dispute resolution proceedings will be conducted in English, but may be conducted in another language in accordance with the rules of the provider.

3.4.6 Decision

The DRSPs' final decisions will be in writing and will include:

- A summary of the dispute and findings; and
- The reasoning upon which the decision is based.

Each DRSP will develop a single format for all final decisions that its panelists render. The DRSP will notify the parties of the decision via email.

ICANN will strongly encourage DRSPs to use reasonable efforts to issue all final decisions within 45 days of the panel appointment date unless, after both parties have completed their initial submissions, the parties jointly request a short postponement of their adjudication date to accommodate negotiation or mediation or to accommodate other aspects of the proceedings, and the panel agrees.

When the panel is composed of three panelists, the decision will be made by a majority of the panelists.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

A dispute resolution panel decision will be considered an expert determination, and will be considered by ICANN in making a final decision regarding the success of any application.

3.4.7 Dispute Resolution Fees

Before acceptance of objections, each DRSP will publish a schedule of costs for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while morality and public order and community objection proceedings will involve hourly rates charged by the panelists.

Within 7 business days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant.

Each party must make its advance payment within 15 calendar days of receiving the DRSP's request for payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the 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 decision, the DRSP will refund any costs paid in advance to the prevailing party.

3.5 *Dispute Resolution Principles (Standards)*

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 *String Confusion Objection*

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion.

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

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO Recommendation 3 (“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law”), a DRSP panel presiding over a legal rights objection will determine whether the potential use of the applied-for TLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s trademark or service mark (“mark”), or unjustifiably impairs the distinctive character or the reputation of the objector’s mark, or otherwise creates an impermissible likelihood of confusion between the applied-for TLD and the objector’s mark, by considering the following non-exclusive factors:

1. Whether the applied-for TLD is identical or similar, including in appearance, phonetic sound or meaning, to the objector’s existing mark.
2. Whether the objector’s acquisition and use of rights in the mark has been bona fide.
3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the TLD, as the mark of the objector, of the applicant or of a third party.
4. Applicant’s intent in applying for the TLD, including whether the applicant, at the time of application for the TLD, had knowledge of the objector’s mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.
6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the TLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the TLD by the applicant is consistent with such acquisition or use.
7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the TLD, and if so, whether any purported or likely use of the TLD by the applicant is consistent therewith and bona fide.
8. Whether the applicant's intended-use of the TLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3 Morality and Public Order Objection

This section is under construction. ICANN expects to implement a standard for morality and public order objections in accordance with international legal principles. Accordingly, ICANN has reviewed legal systems in all ICANN regions. ICANN has also consulted with judges, attorneys, and legal experts in many jurisdictions. The general principles guiding ICANN in the establishment of dispute resolution standards are: (1) everyone has the right to freedom of expression; and (2) such freedom of expression may be subject to certain narrowly interpreted exceptions that are necessary to protect other important rights. See Articles 19 and 20 of the International Covenant on Civil and Political Rights. ICANN continues to address the challenge of identifying standards appropriate for the global namespace.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a defined community;
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- There is a likelihood of detriment to the community named by the objector if the gTLD application is approved.

Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a well-defined community. A panel could balance a number of factors to determine this, including:

- Level of public recognition of the group as a community at a local and/or global level;
- Level of formal boundaries around the community and what elements are considered to form the community;
- How long the community has been in existence;
- How globally distributed is the community (breadth, level of importance)(this may not apply if the community is territorial); and
- How many people make up the community.

If opposition by a number of people is found, but the group claiming opposition is not determined to be a distinct community, the objection will fail.

Substantial Opposition – The objector must prove substantial opposition within the community it has identified. A panel could balance a number of factors to determine whether there is substantial opposition, including:

- Number of expressions of opposition relative to the composition of the community;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community

- Leadership of community
- Membership of community
- Nature/intensity of opposition; and
- Costs incurred by objector in expressing opposition, including what other channels they have used to convey their opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove an association between the applied-for gTLD string and the community expressing opposition. Factors that could be balanced by a panel to determine this include:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no clear connection between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community. Factors that could be used by a panel in making this determination include:

- Damage to the reputation of the community that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; and
- Dependence of the community on the DNS for its core activities.

Defenses – Satisfaction of the standing requirements for filing a Community Objection (refer to paragraph 3.1.2.4) by the applicant is a complete defense to an objection filed on community grounds.

DRAFT - New gTLD Program – Objection and Dispute Resolution



An applicant may face anywhere from zero objections to multiple objections in any of the four areas

Objection filing phase opens

Party with standing files objection directly with DRSP for these grounds:

- **String Confusion**
- **Legal Rights**
- **Morality and Public Order; and/or**
- **Community**

Objector pays filing fee directly to DRSP

Objection filing phase closes

Applicant responds to objection by paying filing fee and responding to claims made by objector

Once the DRSPs receive all objections, at their discretion, the DRSPs may elect to consolidate certain objections if there are multiple objections to the same application based on the same ground

Panel reviews parties' submissions and renders decision

Prior to the commencement of proceedings, the objector and the applicant will both submit fees directly to the DRSPs to cover the estimated cost of proceedings. After decision is rendered, the prevailing party will be refunded any costs paid in advance

Does applicant clear ALL objections?

No → Application denied

Yes

Applicant proceeds to subsequent steps

