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**ICDR CASE NO. 01-15-0002-9483**

**BETWEEN**

**DOT SPORT LIMITED**

**Claimant**

**-and-**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

**Respondent**

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**FINAL DECLARATION**

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**Independent Review Panel**

**Prof. Dr. Klaus Sachs**

**Dr. Brigitte Joppich**

**Wendy Miles QC (Chair)**

**Dated 31 January 2017**

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**TABLE OF CONTENTS**

<b>1.</b>	<b>OVERVIEW</b>	<b>2</b>
<b>2.</b>	<b>THE PARTIES AND THEIR LAWYERS</b>	<b>2</b>
<b>3.</b>	<b>THE PANEL</b>	<b>3</b>
<b>4.</b>	<b>PROCEDURAL HISTORY</b>	<b>3</b>
<b>5.</b>	<b>OVERVIEW OF ICANN’S NEW GTLD PROGRAM AND DISPUTE RESOLUTION PROCESS</b>	<b>4</b>
<b>6.</b>	<b>FACTUAL BACKGROUND TO .SPORT GTLD</b>	<b>7</b>
	A. Claimant’s .SPORT Application .....	7
	B. SportAccord’s .sport Application.....	8
	C. SportAccord’s Community Objection.....	8
	D. The .sport Expert Determination .....	9
	E. Claimant’s First Reconsideration Request.....	10
	F. Claimant’s Complaint with ICANN’s Ombudsman .....	12
	G. Claimant’s Second Reconsideration Request.....	15
	H. Cooperative Engagement Process.....	17
	I. IRP Request .....	18
<b>7.</b>	<b>IRP PANEL’S ANALYSIS</b>	<b>18</b>
	A. Overview .....	18
	B. Timeliness.....	19
	C. Alleged Grounds for Review.....	20
	D. Standard of Review .....	22
	E. Analysis.....	24
<b>8.</b>	<b>COSTS</b>	<b>45</b>
<b>9.</b>	<b>DECLARATION</b>	<b>46</b>

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**1. OVERVIEW**

- 1.1. This Final Declaration is issued in an Independent Review Process (“**IRP**”) under Article IV, Section 3 of the Bylaws for Internet Corporation for Assigned Names and Numbers (“**ICANN**”) as amended 30 July 2014 (“**Bylaws**”), which stipulates that an IRP is “a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws”. In accordance with Article IV, Section 3.7 of the Bylaws, this IRP is administered by the International Centre for Dispute Resolution (“**ICDR**”).
- 1.2. The dispute arises out of alleged actions or decisions by the ICANN Board: (i) to permit and uphold a third-party community objection to the Claimant’s application for the .sport gTLD; and (ii) to fail to take into account the alleged lack of independence and impartiality of the Expert appointed pursuant to the ICANN dispute resolution procedures finally to determine that community objection. The Claimant alleges that the ICANN Board failed to assure compliance with ICANN’s Articles of Incorporation (“**Articles**”) and Bylaws as well as secondary rules created by ICANN, such as the Applicant Guidebook, in dealing with the community objection.

**2. THE PARTIES AND THEIR LAWYERS**

- 2.1. The Claimant is dot Sport Limited (“**dSL**”), a subsidiary of Famous Four Media. The Claimant and Famous Four Media are offering services in the Internet’s Domain Name System (“**DNS**”).
- 2.2. The Claimant is represented by:  
Mr. Flip Petillion  
Crowell & Moring LLP  
7, rue Joseph Stevens  
B-1000 Brussels  
Belgium
- 2.3. The Respondent is ICANN, a non-profit public-benefit corporation organised and existing under the laws of the State of California with its principal place of business at:  
  
12025 Waterfront Drive  
Suite 300  
Los Angeles

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CA 90094-2536

USA

- 2.4. The Respondent is represented by:

Messrs. Jeffrey LeVee and Eric Enson and Ms. Rachel Zernik

Jones Day

555 South Flower Street

50<sup>th</sup> Floor

Los Angeles

CA 90071-2300

USA

### **3. THE PANEL**

- 3.1. On 9 September 2015, the full IRP Panel was confirmed, in accordance with the ICDR International Arbitration Rules (the “**ICDR Rules**”) and its “Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process” issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the “**Supplementary Rules**”).

- 3.2. The members of the IRP Panel are:

Professor Dr. Klaus Sachs

Dr. Brigitte Joppich

Ms. Wendy Miles QC (Chair)

### **4. PROCEDURAL HISTORY**

- 4.1. On 19 March 2015, the Claimant filed a Request for IRP (the “**Request**”) with the ICDR. The Claimant alleged that ICANN had accepted the decision of an Expert in an Expert Determination “that is contrary to its policies” and that in so doing it had “failed both to act with due diligence and to exercise independent judgment.”
- 4.2. On 8 May 2015, the Respondent filed ICANN’s Response to the Request (the “**Response to Request**”).
- 4.3. On 28 September 2015, the Parties and the Panel conducted by telephone the first procedural hearing.

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- 4.4. On 5 October 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 setting out the procedural stages and timetable for the proceedings and page limits for the Parties' respective submissions.
  - 4.5. On 9 November 2015, the Claimant submitted its Reply (the "**Reply**").
  - 4.6. On 21 December 2015, the Respondent submitted its Sur-Reply (the "**Sur-Reply**").
  - 4.7. On 3 May 2016, the IRP hearing proceeded by three-way video link with the Panel convened in Cologne, Germany, counsel for the Claimant convened in Brussels, Belgium and counsel for ICANN convened in Los Angeles. ICANN sought to use PowerPoint with its oral submissions. Following the Claimant's objection to further written submissions in the form of PowerPoint slides, the Panel directed that ICANN could use PowerPoint during its oral presentation but that the Panel would not retain hard copy slides as part of the record.
  - 4.8. On 11 May 2016, ICANN sent a further written communication to the Panel regarding two issues raised at the hearing in relation to the Ombudsman process. ICANN submitted two further documents as Respondent Exhibits 25 and 26. Also on 11 May 2016, the Claimant (without objecting to the new communication and exhibits) submitted comments in response.
  - 4.9. On 10 January 2017, the ICDR notified the Parties that the Panel had determined that the record for this matter had been closed as of 15 December 2016 and that the Panel should have the Final Declaration issued by no later than mid-January 2017.

## **5. OVERVIEW OF ICANN'S NEW GTLD PROGRAM AND DISPUTE RESOLUTION PROCESS**

- 5.1. The Claimant raises fundamental procedural fairness issues arising out of two aspects of the program administered by ICANN for the allocation of new generic Top-Level Domain ("**gTLD**") names from 2012: (i) the community objection procedure; and (ii) the Expert Determination procedure. This IRP relates to the ICANN Board's alleged actions or decisions arising out of an Expert Determination that upheld the community objection against the Claimant, including its decision on the Claimant's two Requests for Reconsideration.
- 5.2. ICANN is the administrative body responsible for allocating Internet Protocol address space and assigning protocol identifiers and generic ("**gTLD**") and country-code

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("ccTLD") TLDs and managing the DNS. TLDs exist at the top of the DNS naming hierarchy and consist of two or more letters.

- 5.3. The main policy-making body for gTLDs is the Generic Names Supporting Organization ("**GNSO**"). In 2005, the GNSO started a policy development process aimed at introducing new gTLDs. Representatives were consulted from a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community. They considered the demand, benefits and risks of new gTLDs, selection criteria to be applied, allocation procedures for new gTLDs, and contractual conditions for new gTLD registries going forward.
- 5.4. As of 2011, TLDs were limited in number to 22 gTLDs, and around 250 ccTLDs. Based on the GNSO recommendations, ICANN introduced a new gTLD Program, further opening up gTLDs in order to foster diversity, encourage competition, and enhance the utility of the DNS.
- 5.5. In June 2011, again based on the GNSO consultation, ICANN's Board approved and adopted a new Applicant Guidebook (the "**Applicant Guidebook**"). The ICANN Board further authorized the launch of the 2012 New gTLD Program (the "**New gTLD Program**") in accordance with ICANN's Bylaws, Articles and the new Applicant Guidebook.
- 5.6. The New gTLD Program application round, launched in 2012, permitted interested applicants to compete for the right to operate new gTLDs. The Applicant Guidebook preamble states that:

"The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS."

- 5.7. The Applicant Guidebook describes the New gTLD Program application process in six modules. The objection procedures are dealt with in Module 3, followed by an attachment containing the New gTLD Dispute Resolution Procedure for resolving disputes arising out of objections.
- 5.8. The application process specifically permits public comment and formal objection. Within the Module 3 objection procedures, Section 3.2.1 of the Applicant Guidebook

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sets out the grounds for objections. The formal objection procedures ensure full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits.

5.9. The four stated grounds for formal objections are:

***“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.”

5.10. The Applicant Guidebook provides that community objections may be made by “[e]stablished institutions associated with clearly delineated communities”. However, “[t]he 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”.

5.11. A community objection must show:

- (a) “that the community expressing opposition can be regarded as a clearly delineated community” taking into account various identified factors;
  - (b) “substantial opposition within the community it has identified itself as representing” taking into account various identified factors;
  - (c) “a strong association between the applied-for gTLD string and the community represented by the objector” taking into account various identified factors;
- and

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(d) “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” taking into account certain identified factors.

5.12. Following a formal community objection the applicant may file a response to the objection and enter the dispute resolution process within 30 days of notification. The designated Dispute Resolution Service Provider (“**DRSP**”) for disputes arising out of community objections is the International Centre for Expertise of the International Chamber of Commerce (the “**ICC Centre for Expertise**”). Through the ICC Centre for Expertise, any objection is resolved by Expert Determination.

5.13. Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN’s Board Governance Committee (the “**BGC**”) through a request for reconsideration (“**Reconsideration Request**”); (ii) involvement of the Ombudsman; and/or (iii) independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles or Bylaws through the IRP.

5.14. ICANN has designated the ICDR to administer the IRP. The Supplementary Rules apply, which incorporate by reference the ICDR Rules.

5.15. The current IRP arises out of the Claimant’s dispute with ICANN arising out of the community objection to its application, the Expert Determination that followed, two Reconsideration Requests and involvement of the Ombudsman.

## **6. FACTUAL BACKGROUND TO .SPORT GTLD**

6.1. This IRP arises out of the Claimant’s application for the .sport gTLD in the New gTLD Program. The background to the Claimant’s application is summarized below.

### **A. Claimant’s .SPORT Application**

6.2. On 13 June 2012, the Claimant filed Application No. 1-1174-59954 to operate the new gTLD called .sport (the “**Application**”).

6.3. According to the Application, the Claimant applied for .sport to:

“create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more



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targeted, secure and stable environment. Its aim is to become the premier online destination for such creators and their wide range of users.”

6.4. The Claimant further submitted in its Application that:

“... the aim of .sport is to create a blank canvas for the online sports sector set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space for the sport sector. As the new space is dedicated to those within this affinity group the Applicant will ensure that consumer trust is promoted. Consequently consumer choice will be augmented as there will be a ready marketplace specifically for sports-related enterprises to provide their goods and services. ...”

**B. SportAccord’s .sport Application**

6.5. On 13 June 2012 a separate applicant, SportAccord, also applied for the .sport gTLD (the “**SportAccord Application**”). SportAccord described itself in the SportAccord Application as a “Not-for-profit Association” that:

“serves as the umbrella organization for all (Olympic and non-Olympic) international sports federations as well as organizers of multi-sports games and sport-related international associations ... [comprising] 90 international sports federations governing specific sports and 15 organizations which conduct activities closely related to the international sports federations.”

**C. SportAccord’s Community Objection**

6.6. On 13 March 2013, the same SportAccord that had submitted the SportAccord Application for the .sport gTLD also opposed the Claimant’s Application by way of community objection.

6.7. On 21 May 2013, the Claimant filed a response to SportAccord’s objection. In its response, the Claimant alleged that the objector failed to prove that it had: “an on-going relationship” with a “clearly delineated Sport community”; that the alleged community was “clearly delineated”; “substantial opposition” to the application in the alleged community; a strong association between the applied-for gTLD string and alleged community represented by the objector; and a likelihood of material detriment

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to the rights or legitimate interests of a significant portion of the alleged community to which the string might be explicitly or implicitly targeted.

**D. The .sport Expert Determination**

- 6.8. ICANN subsequently submitted the .sport community objection to a third-party Expert appointed by the ICC Centre for Expertise in accordance with Section 3.4.4 of the Applicant Guidebook. Section 3.4.4 provides, among other things, that:

“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.”

- 6.9. On 25 June 2013, the ICC Centre for Expertise notified the parties that it had appointed Mr. Jonathan P. Taylor as Expert. In his Statement of Impartiality and Independence, Mr. Taylor indicated that he had nothing to disclose. In his accompanying curriculum vitae, he indicated that he had previously been involved with organizations and federations that are members of the objector SportAccord.
- 6.10. On 27 June 2013, the Claimant objected to the appointment of Mr. Taylor on the grounds that: (i) the issues at stake did not require sports law expertise and any sports lawyer would likely prefer a sports organization or federation over a commercial registry operator; and (ii) Mr. Taylor’s career appeared to have been intertwined with and depend heavily upon the entities involved with the community objection.
- 6.11. On 25 July 2013, the ICC notified the parties that it had decided not to confirm the appointment of Mr. Taylor.
- 6.12. On 30 July 2013, the ICC Center for Expertise informed the parties that it had proceeded with the appointment of Prof. Dr. Guido Santiago Tawil instead (the “**Expert**”). In his Statement of Impartiality and Independence, the Expert stated that he had nothing to disclose. There is nothing to suggest that the ICC Centre for Expertise took additional steps to ensure that the Expert was not also “intertwined with” or dependent upon the entities involved with the community objection. Nor is

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there anything to suggest that the Claimant made any further or particular enquiries in that regard at the time of the Expert's appointment.

6.13. On 23 October 2013, the Expert issued his decision (the "**Expert Determination**") upholding SportAccord's community objection. In the Expert Determination, the Expert determined, inter alia, that:

- (a) "SportAccord is an established institution which has an ongoing relationship with a clearly delineated community";
- (b) SportAccord has "proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts";
- (c) "the Appointed Expert shares Objector's argument that all domain registrations in a community based '.sport' gTLD will assure sports acceptable use policies" and "this cannot be warranted by Applicant in the same way in the event that the application for the '.sport' gTLD is approved by ICANN"; and
- (d) "... even though SportAccord has not proved that dot Sport Limited will not act (or will not intend to act) in accordance with the interests of the Sport Community, the Appointed Expert considers that this is only one factor, among others, that may be taken into account in making this determination."

6.14. The ICANN Board accepted the Expert Determination. Upon receipt of the Expert Determination, however, the Claimant says it started to investigate the Expert's links with the sports industry based on what the Claimant considered to be the "surprising" outcome of the Expert Determination. The Claimant's findings prompted it to submit a Request for Reconsideration.

#### **E. Claimant's First Reconsideration Request**

6.15. On 8 November 2013, pursuant to Article IV, Section 2 of the Bylaws, the Claimant filed a first Reconsideration Request with the BGC. The BGC is responsible for assisting the ICANN Board to enhance its performance and, among other things, to consider and respond to Reconsideration Requests submitted to the Board pursuant to the Bylaws. The Claimant sought reconsideration of the ICANN Board's acceptance of the Expert

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Determination upholding the community objection regarding its .sport gTLD Application.

- 6.16. The Claimant raised two primary grounds for review: (i) failure to observe ICANN’s procedure by the Expert when applying the relevant standard (likelihood of material detriment to a community); and (ii) breach of ICANN’s policy on transparency based on the Expert’s failure to disclose material information relevant to his appointment.
- 6.17. In relation to the second ground, the Claimant alleged that the Expert had not disclosed his attendance at a conference of the International Bar Association in Rio de Janeiro, Brazil, on 22 February 2011 entitled “Olympic-Size Investments: Business Opportunities and Legal Framework”, where he co-chaired a panel entitled “The quest for optimising the dispute resolution process in major sport-hosting events”.
- 6.18. On 8 January 2014, the BGC denied the Claimant’s first Reconsideration Request. The BGC concluded that the Expert did not apply the wrong standard in contravention of established policy or process and did not appear to have proceeded inconsistently with the standards set forth in the Applicant Guidebook. In particular, the BGC concluded that the Claimant failed to demonstrate that the Expert had applied the wrong standards in that: (i) the Expert did not create a new standard for determining the likelihood of material detriment; (ii) the Expert did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and (iii) the Expert did not create a new test for examining the alleged material detriment.
- 6.19. The BGC further concluded that the Expert’s purported failure to disclose a possible conflict of interest did not support reconsideration, as a matter of process. In particular, the BGC noted that:

“[I]t does not appear that the [Claimant] has sought to challenge the Expert’s independence under the ICC Rules of Expertise. Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support

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reconsideration - *i.e.*, reconsideration is not the appropriate mechanism to raise the issue for the first time.”

6.20. In its determination, the BGC also stated that in accordance with Article IV, Section 2.15 of the Bylaws its determination would be final and did not require Board consideration.

6.21. On 15 January 2014, following the first Reconsideration Request decision, the Claimant wrote to the ICC Centre for Expertise to notify it of the Expert’s failure to disclose his involvement in the conference in Rio de Janeiro. On 21 January 2014, the ICC Centre for Expertise responded that:

“[T]he Expert is no longer in place in this matter and does not have any current functions in connection with this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert.”

6.22. The ICC Centre for Expertise concluded therefore that the Expert, having rendered his determination, was *functus officio* and that the ICC Centre for Expertise’s role as DRSP in the New gTLD Dispute Resolution Procedure in this matter was therefore at an end.

#### **F. Claimant’s Complaint with ICANN’s Ombudsman**

6.23. On 6 February 2014, the Claimant filed a complaint with ICANN’s Ombudsman pursuant to Article V, Section 2 of the Bylaws. The Ombudsman’s role is to make sure that ICANN community members are treated fairly. It acts as an impartial mediator to help resolve disputes on issues involving the ICANN Board or supplementary organisations.

6.24. Article V, Section 3 of the Bylaws describes the Ombudsman’s role as follows:

“The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;

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2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations ... .”

6.25. The Claimant, meanwhile, continued its investigation into the Expert’s links to the sports industry and discovered new information that it considered further heightened the appearance of bias. In particular, the Claimant discovered that: (i) the Expert’s law firm represented a client, DirecTV, in negotiations with the International Olympic Committee (“**IOC**”) concerning broadcasting and sponsorship rights to the Olympic Games, which resulted in an agreement concluded 7 February 2014; and (ii) a senior partner in the Expert’s law firm acted as president of one of those clients, TyC.

6.26. On 26 March 2014, the Claimant informed ICANN and the Ombudsman about this additional information, as well as the ICC Centre for Expertise on 27 March 2014. On 29 March 2014, the ICC Centre for Expertise responded that there was a specific time limit to object to or challenge Experts within the ICC Expert Determination process, that an Expert Determination had been rendered and this case was closed, and that there was no procedure for re-opening the matter or making a challenge to the Expert within the Rules after closure of the matter.

6.27. On 31 March 2014, the Ombudsman issued a recommendation to members of the ICANN Board. The Ombudsman described the scope of inquiry before him as follows:

“I have been asked to consider whether new material, which has just come to hand, justifies a recommendation by me to the New gTLD Committee, that they not accept the decision of the expert, Dr. Guido Tawil, in the matter of the .sports objection.”

6.28. The Ombudsman took the view that the Expert should have disclosed the new information and that a reasonable appearance of bias might have been created by the ICC Centre of Expertise’s stance that it was too late for the Claimant to challenge the Expert Determination on the basis of that material. The Ombudsman recommended

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to the ICANN Board that there should be a rehearing of the objection with a different Expert appointed:

“I am concerned that in this case, there has been no direct comment from Dr. Tawil. I am also concerned that the ICC have taken a stance that it is too late for Famous Four Media to challenge the decision on the basis of material recently disclosed. My concern is, that this may create a reasonable appearance of bias. My view is that the commercial relationship ought to have been disclosed, to give the applicant Famous Four Media an opportunity to make a considered choice as to the suitability of this appointment. Transparency is the best way to ensure that parties are able to make the best choices.

It is therefore my recommendation to the board, that there should be a rehearing of the objection with a different expert appointed.”

- 6.29. On 1 April 2014, the ICC Centre for Expertise sent a letter to ICANN objecting that the Ombudsman had never contacted the ICC for comment regarding the issue of the Expert. According to the ICANN, “the Ombudsman clarified for the Claimant that his email was not a final report and recommendation, and offered the ICC a chance to comment”.
- 6.30. On 2 April 2014, the Claimant filed a second Reconsideration Request with the BGC, as described in more detail below.
- 6.31. On 7 May 2014, the Ombudsman reported to ICANN that he had spoken to the Claimant’s representative “explaining that his [second request for] reconsideration would need to be withdrawn if he was to progress any complaint to me.” There is no other contemporaneous record of that conversation taking place or the Claimant’s reaction to it.
- 6.32. On 21 June 2014 in the second Reconsideration Request recommendation discussed further below, ICANN concluded in relation to the Ombudsman review as follows:

“Recognizing that pursuant to Article V, Section 2 of the ICANN Bylaws, a complaint lodged with the Ombudsman cannot concurrently be pursued while another accountability mechanism on the same issue is ongoing, ICANN has

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been advised that the Ombudsman sought confirmation from the [Claimant] as to whether it was aware of these limitations in the Bylaws and how it wished to proceed. ICANN was advised on or about 13 May 2014 that the [Claimant] confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this [second] Reconsideration Request rather than the Ombudsman's request."

- 6.33. Subsequently, on 5 May 2015, in connection with the current IRP application, ICANN wrote to the Ombudsman stating that:

"I understand that in March of last year, you sent a draft report to Cherine, but that report was subsequently withdrawn pending a response from the ICC. Then, around April/May of last year, the Ombudsman investigation was placed on hold because [the Claimant] elected to pursue its reconsideration request. This request was considered and denied by the NGPC on 18 July 2014. Can you tell me what happened with the [Claimant's] complaint after the NGPC's 18 July 2014 decision? Did you finalize your report? Please let me know."

- 6.34. On the same day the Ombudsman responded by email:

"I did not take any steps at all after the draft report, and have not been asked to do so by any party. So I closed the file. After the NGPC rejected their complaint I think they decided not to continue with me, but I just never heard again. When I realised they had sought IRP that explained the lack of contact I think, as they had decided to review this differently. Does that help?"

**G. Claimant's Second Reconsideration Request**

- 6.35. On 2 April 2014, the Claimant filed its second Reconsideration Request with the BGC pursuant to Article IV, Section 2 of the Bylaws. In its second Reconsideration Request, the Claimant requested reconsideration of: (i) the Expert Determination and ICANN's acceptance of it; (ii) the ICC Centre for Expertise's designation of the Expert; and (iii) the BGC's determination denying the Claimant's first Reconsideration Request, in the light of the Expert's apparent bias (having attended an International Bar Association conference in February 2011 and as a consequence of the Expert's law firm's involvement with interested parties) and violation of ICANN policy and process.



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- 6.36. On 21 June 2014, the BGC recommended that the second Reconsideration Request be denied on the grounds that: (i) the Reconsideration Request was untimely; and (ii) even if it were timely, the “newly-discovered” evidence did not support reconsideration because neither the DirecTV contract nor the TyC relationship was evidence of a conflict of interest sufficient to support reconsideration.
- 6.37. The BGC found all three claims to be untimely pursuant to Article IV, Section 2.5 of the Bylaws as follows:

“The [Claimant] claims that its belated discovery of new evidence of a conflict of interest on the part of the Expert justifies a tolling of the 15-day deadline for reconsideration requests. Specifically, [the Claimant] claims that on 25 March 2014 it discovered that: (i) one of the Expert’s clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination (‘DirecTV Contract’); and (ii) a partner in the Expert’s law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder (‘TyC Relationship’). In other words, the [Claimant] suggests that an alleged connection between the Expert (or his law firm) and DirecTV, a ‘recipient of IOC broadcasting rights,’ creates a conflict of interest because SportAccord and the IOC enjoy a ‘close collaborative relationship.’

“The [Claimant’s] argument does not support reconsideration. The [Claimant] does not explain how it suddenly became aware of this information on 25 March 2014, or explain why it could not reasonably have become aware of the information at an earlier date. The only recent event that the [Claimant] claims creates an alleged conflict of interest is the DirecTV Contract, but that contract was signed on 7 February 2014, almost two months prior to the filing of the instant Request (and nearly five months after the Expert issued the Determination). [The Claimant’s] only other evidence for an alleged conflict is the TyC Relationship, a business relationship that appears to be decades old. Further, all of the [Claimant’s] evidence regarding the DirecTV Contract and the TyC Relationship is based on publicly available information from Internet sites such as Wikipedia, Chambers and Partners, and a public sports website, which could have been discovered prior to 25 March 2014.

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“The [Claimant] does not explain why it failed to discover the alleged conflicts earlier. Because the [Claimant] could have become aware of the alleged conflicts earlier, the [Claimant’s] belated discovery of publicly-available information does not justify tolling the 15-day time limit.”

- 6.38. Following consideration of all relevant information provided, on 18 July 2014, the New gTLD Program Committee (“**NGPC**”) reviewed and adopted the BGC’s recommendation and denied the second Request for Reconsideration as being untimely, and on the further basis that the allegedly “newly-discovered” information relating to a purported conflict of interest did not support reconsideration.
- 6.39. On the record, neither the BGC’s recommendation nor the NGPC’s decision took into account the substantive findings or recommendations of the Ombudsman, noting merely that the Ombudsman process had been discontinued when the second Reconsideration Request was commenced in accordance with the ICANN dispute resolution procedures.

#### **H. Cooperative Engagement Process**

- 6.40. The Claimant subsequently filed a Cooperative Engagement Process (“**CEP**”) Request pursuant to Article IV, Section 3.14 of the Bylaws.
- 6.41. The cooperative engagement process is published on ICANN.org and is incorporated into Section 3 of the Bylaws. The Cooperative Engagement Process description provides that:

“[P]rior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review.”

- 6.42. In accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended.

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**I. IRP Request**

- 6.43. On 19 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.
- 6.44. In its Notice and Request for IRP, the Claimant seeks review of ICANN’s actions or decisions on the alleged grounds that:
- (a) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias;
  - (b) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in the selection of the Expert;
  - (c) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in allowing the Expert to develop and perform an unfair and arbitrary review process:
    - (i) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord’s community objection, while other objections with identical characteristics were denied;
    - (ii) the dispute resolution process was unfair and non-transparent because of the Expert’s disregard of ICANN’s policy;
    - (iii) the dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning; and
  - (d) the ICANN Board failed to correct the mistakes in the dispute resolution process and denied the Claimant its right to be heard by an independent and impartial Expert.

**7. IRP PANEL’S ANALYSIS**

**A. Overview**

- 7.1. This IRP is the final stage in the ICANN New gTLD Dispute Resolution Procedure. The process is governed by the ICANN Bylaws, Articles, Applicant Guidebook and “Core Values”. The IRP requires the Claimant to show that: (i) it was materially affected by a decision or action by the Board; (ii) the decision or action is inconsistent with the Articles or Bylaws; and (iii) the request for IRP was made within 30 days of the posting of the Board minutes recording that decision or action.

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7.2. The essence of the Claimant’s complaint has been consistent throughout the New gTLD application, objection and dispute resolution process. The Claimant alleges that it: (i) satisfied the necessary criteria for the application process for .sport, which, unlike .olympic, was subject to an unrestricted, open and competitive application process; (ii) was treated less favourably than SportAccord during the community objection process as a result of SportAccord’s (a competitor’s) community objection; and (iii) was treated unfairly in the Expert Determination process by which SportAccord’s community objection was upheld because of the Expert’s apparent bias.

7.3. The Claimant contends that throughout the Reconsideration Requests, the Ombudsman procedure and the CEP, ICANN failed properly to take into account the Claimant’s concerns and reconsider and reject the Expert Determination in light of those concerns. According to the Claimant, it remains for this IRP Panel to determine whether or not the ICANN Board acted inconsistently with its Articles, Bylaws and other governing instruments in finding that the Expert Determination was not subject to reconsideration by ICANN, including as a result of apparent lack of independence or impartiality on the part of the Expert.

**B. Timeliness**

7.4. ICANN’s Bylaws, Article IV, Section 3.3 provides that:

“A request for independent review must be filed ***within thirty days of the posting of the minutes*** of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”

7.5. ICANN accepts that the Claimant’s request for IRP in relation to the first and second Reconsideration Requests is timely. ICANN does not accept that earlier decisions or actions by the ICANN Board, including its adoption of the Applicant Guidebook and/or the Expert Determination itself, are timely or otherwise open to review.

7.6. It is not necessary, however, for this IRP Panel to determine whether or not the Claimant is out of time to seek review of the Applicant Guidebook or the Expert Determination. The ICANN Board decisions or actions that the Claimant seeks to review are all contained within the scope of the first and second Reconsideration Requests. Some of those decisions and actions pertain to the ICANN Board’s

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interpretation and application of the Applicant Guidebook and its response to and treatment of the Expert Determination. However, the decisions and actions themselves were taken within the scope of the Reconsideration Requests and therefore within the timely scope of the current IRP.

**C. Alleged Grounds for Review**

7.7. The Claimant has raised four separate grounds for review of the ICANN Board’s adoption of the BGC’s and NGPC’s decisions on the first and second Reconsideration Requests.

7.8. **First**, the Claimant relies on an overriding principle of good faith, which it claims “is considered to be the foundation of all law and all conventions”. The Claimant refers specifically to ICANN’s Core Values as requiring ICANN, among other things, “to obtain informed input from those entities most affected by ICANN’s decisions.”

7.9. Article I, Section 2 of the Bylaws further provides that the Core Values are “deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances”. The Bylaws state that:

“Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”

7.10. **Second**, the Claimant relies on ICANN’s requirement of accountability. In particular, ICANN’s Core Values require that it must “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.” It further relies upon Article VI, Section 1 of the Bylaws, which requires ICANN to “be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.”

7.11. **Third**, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3 provides that:

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“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

- 7.12. **Fourth**, the Claimant relies on ICANN’s “Core Values” set out in the ICANN Bylaws, Article I, Section 2, together with ICANN’s mission statement, in respect of transparency. The Bylaws “should guide the decisions and actions of ICANN” when it is “performing its mission”, include, the Claimant submits, to “employ[] open and transparent policy development mechanisms”.
- 7.13. In general, ICANN’s Core Values, as set out in full in the ICANN Bylaws, Article I, Section 2, describe the overall goals and objectives that govern ICANN’s decision-making. Specifically, the 11 Core Values that “should guide the decisions and actions of ICANN” when it is “performing its mission” are:
- (a) to preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;
  - (b) to respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to matters within ICANN’s mission;
  - (c) to the extent feasible and appropriate, to delegate coordination functions;
  - (d) to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;
  - (e) where feasible and appropriate, to promote and sustain a competitive environment;
  - (f) to introduce and promote competition in the registration of domain names;
  - (g) to employ open and transparent policy development mechanisms;
  - (h) to make decisions by applying documented policies neutrally and objectively, with integrity and fairness;
  - (i) to act with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected;

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- (j) to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness; and
  - (k) to recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

7.14. As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions or decisions asserted by an affected party to be inconsistent with the Articles or Bylaws. In particular, Section 3.2 provides that:

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

7.15. For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being “the implementation of Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.” It is described in the IRP Final Declaration in *Booking.com v ICANN* as “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”

**D. Standard of Review**

7.16. The standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules.

7.17. Article IV, Section 3.4 of the Bylaws provides that:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of

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those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?"

7.18. Article 8 of the Supplementary Rules reiterates those three questions and further provide as follows:

"8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

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

7.19. The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the business judgement rule standard is "to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct." Where the Board's action or inaction may be compared against relevant provisions of ICANN's governing documents, the IRP Panel's task is to *compare* the Board's action or inaction to the governing documents and to *declare* whether they are consistent.



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7.20. Unlike the IRP Requests in *Booking.com v ICANN* and *VistaPrint v ICANN*, which were determined effectively to be untimely challenges to the underlying process that had been established by the ICANN Board, this IRP Request concerns the review of the ICANN Board’s adoption of the two Reconsideration Request decisions.

**E. Analysis**

7.21. The Panel considers below whether the Board acted consistently with ICANN’s Articles, Bylaws and the procedures established in the Applicant Guidebook, comparing the Board’s decisions to Article II, Section 3 of the Bylaws, then to the standard set out in Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules and considers other relevant Bylaws and ICANN governing documents, including the Applicant Guidebook and ICANN’s Core Values.

7.22. The primary issues, once distilled, are as follows:

- (a) Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process:
  - (i) in failing to remedy apparent bias?
  - (ii) in the selection of the Panel?
  - (iii) in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?
- (b) Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Panel?

7.23. Each of these issues is considered in relation to the two ICANN Board decisions to reject the Claimant’s Reconsideration Requests.

- (i) *Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias, in the selection of the Panel and/or in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?*

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1. Claimant's Position

- 7.24. The Claimant's first complaint arises out of the process that led to the appointment of the Expert and the lack of any opportunity to take into account the Expert's alleged lack of independence or impartiality and/or apparent bias if discovered only after the Expert Determination had been rendered.
- 7.25. The Claimant points out that "ICANN's community objection dispute resolution rules are silent on the discovery of apparent bias after an expert determination has been rendered." In its first Request for Reconsideration, the BGC concluded that the ICC Rules of Expertise would still govern the Expert's independence and impartiality; that was plainly not the case. The Claimant considers that the ICANN Board's decision to accept the Expert Determination knowing that there was no recourse to deal with the discovery of the Expert's apparent bias was in breach of ICANN's obligations to act in good faith, transparently, and without discrimination.
- 7.26. The Claimant further alleges that ICANN failed to provide the appointed panels with adequate training and to ensure that they were familiar with the industry, and that this violation resulted in ICANN's failure to provide due process.
- 7.27. As to the international law standard of good faith, the Claimant alleges that this encompasses an obligation to ensure procedural fairness and due process which was not discharged in this case. In particular, the Claimant alleges that the ICANN Board "allowed a community objection that was (i) arbitrary and discriminatory, (ii) not a fair application of ICANN's policy, and (iii) lacking in meaningful reasoning."
- 7.28. In particular, the Claimant alleges that:
- (a) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord's community objection in circumstances where other objections with "identical characteristics" such as for .basketball, .gay, and .islam were all rejected;
  - (b) the ICANN Board permitted a dispute resolution process that was unfair and non-transparent because the Expert disregarded ICANN's policy by failing to make the necessary disclosures in his Declaration of Acceptance and Statement of Independence and Impartiality and "made an erroneous and unfair application of ICANN's policy on community objections by reversing the

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burden of proof and using a divergent standard to assess the likelihood of material detriment to the community invoked by the objector”; and

- (c) the ICANN Board’s dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning in the Expert Determination.

## 2. ICANN’s Position

- 7.29. According to ICANN, “neither the appointment of the Expert nor the Expert Determination constitutes ICANN Board action.” Therefore, ICANN identifies the “only Board actions at issue here” as being “(1) the decisions by the Board to deny Claimants’ two Reconsideration Requests; and (2) the Board’s adoption of the Guidebook.”
- 7.30. ICANN submits that the Board properly denied reconsideration to the Claimant’s allegation concerning the Expert’s conflict of interest.
- 7.31. First, ICANN maintains that the Claimant “fails to demonstrate that the BGC or the NGPC violated ICANN’s Articles or Bylaws with respect to its determination on Claimant’s reconsideration requests” based on the Expert’s failure to disclose “his participation in the Dispute Resolution Conference” and “his law firm’s relationships with two companies with alleged ties to the IOC.”
- 7.32. In particular, ICANN submits that “[r]econsideration of the actions of a third-party service provider or expert in the New gTLD Program, such as the ICC (or its appointed expert), is appropriate only when its actions [contradicted] established ICANN policy(ies) or procedures”, in accordance with Article IV, Section 2.2(a) of the Bylaws. ICANN argues that:

“The Board (through the BGC and NGPC) properly denied both of Claimant’s reconsideration requests because, as the Board explained, the evidence reflects that: (1) both the ICC and the Expert followed the ICC’s established policies and procedures with respect to the Expert’s appointment (and thereby, followed ICANN’s established procedure that the ICC use its process for determining an expert’s impartiality); and (2) Claimant’s challenge to the Expert was untimely under the ICC’s Rules and Practice Note (and thereby

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ICANN's established procedure that challenges to experts must comport with the ICC's rules)."

7.33. Secondly, ICANN submits that the Board correctly found that the ICC and Expert had followed established procedures with respect to the Expert's appointment. In particular, ICANN refers to Article 7(4) of the ICC Rules for Expertise. In response to the Claimant's allegation that the Expert failed to disclose certain information in relation to DirecTV and TyC, ICANN submits that:

"[T]he BGC and NGPC correctly determined that the Expert had followed established policy and procedure in completing the Impartiality Statement required by the ICC. Disclosure requirements for neutrals are generally assessed in accordance with the guidelines set forth in the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ("**IBA Conflict Guidelines**"). Nothing in the IBA Conflict Guidelines, however, requires disclosure of the type of information identified by the Claimant."

7.34. ICANN goes on to argue that (i) there is no provision in the IBA Conflict Guidelines to require an Expert to disclose that he participated in a conference involving an area of law allegedly relevant to a party; (ii) IBA Conflict Guideline 2.3.6 requiring disclosure of a significant commercial relationship "does not apply to the DirecTV Contract or the TyC Relationship" because "[n]either ... involves a commercial relationship with the IOC"; and (iii) even if there were a commercial relationship with the IOC, "the IOC is not an affiliate of SportAccord" but instead is "an umbrella organization for all international sports federations (*Olympic and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations."

7.35. Thirdly, as to timeliness of the second Reconsideration Request, ICANN submitted that the Board was correct to find that the challenge to the Expert was untimely. ICANN cites Articles 7(4) and 11(4) of the ICC Rules for Expertise, and paragraph 9 of the ICC Practice Note, which provide that any objections to the Expert must be made within five days. ICANN relies upon this deadline as its basis for arguing that any challenge by the Claimant to the appointment of the Expert arising out of the DirecTV Contract and TyC Relationship is out of time. Moreover, after the Expert decision is delivered, the case is closed and cannot be reopened, i.e., the Expert is *functus officio* and cannot be subject to challenge.

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7.36. Finally regarding timeliness, ICANN argues that “all of the information Claimant cites to support its conflicts argument was publicly available and could have been discovered earlier with an exercise of due diligence.”

3. Panel’s Determination

7.37. In considering whether or not the ICANN Board failed to establish, implement and supervise a fair and transparent New gTLD application dispute resolution process, it is necessary for the IRP Panel to review the dispute resolution process and examine its implementation and supervision by the ICANN Board in the current application. Such review is limited to considering the role of the ICANN Board in remedying apparent bias, in ensuring fairness in the selection of a Panel and in preventing an unfair and arbitrary Expert Determination review process, specifically in the context of the Claimant’s application for the .sport gTLD.

7.38. As set out at paragraphs 5.6 to 5.14 above, based on the GNSO recommendations, ICANN organized a new gTLD application process as set out in the Applicant Guidebook. The Applicant Guidebook sets out in six modules the stages in the application process. Module 3 sets out the objection procedures and the New gTLD Dispute Resolution Procedure.

7.39. Section 3.2.1 of the Applicant Guidebook provides that “[a] formal objection may be filed on any one of ... four grounds”, including:

**“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.”

7.40. The Guidebook provides that community objections may be made by “[e]stablished institutions associated with clearly delineated communities”. However, “[t]he 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”. In particular Section 3.2.2.4 provides in relation to standing that only:

“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

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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.”

- 7.41. There is nothing in the objection procedure that prevents an objection by another applicant in the gTLD process, including for the same gTLD. The string confusion objection process specifically names other applicants in the gTLD process as having standing in respect of a string objection. Therefore, provided that the community

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objector satisfies the criteria outlined above, it is entitled to object irrespective of whether it is also an applicant in respect of the same gTLD.

- 7.42. Any complaint by the applicant arising out of a community objection is subject to the Applicant Guidebook, Module 3, New gTLD Dispute Resolution Procedure. The designated DRSP for community objections is the ICC Centre for Expertise. As indicated above, the Claimant in this IRP objected to the SportAccord community objection and the dispute was referred to the ICC Centre for Expertise for determination.
- 7.43. If the standing of a community objector is subject to challenge, it is for the Expert to determine whether or not the community objector has the necessary standing as a matter of fact. In the .sport Expert Determination, the Expert determined that SportAccord did have the necessary standing.
- 7.44. That said, it would appear that the Claimant's primary concern is not the standing of SportAccord to submit a community objection as such, but rather the treatment of the Claimant throughout the dispute resolution process in relation to that objection once it had been brought. In particular, the Claimant alleges that there was apparent bias on the part of the Expert insofar as he was, or appeared to have been, predisposed in favour of SportAccord in making his Expert Determination to uphold the community objection.
- 7.45. Thereafter, according to the Claimant, in failing to take any steps to deal with the apparent bias of the Expert, instead approving the Expert Determination, rejecting two Reconsideration Requests and failing to take into account the matters raised in the Ombudsman's report, the ICANN Board's own actions and decisions were inconsistent with the ICANN Articles, Bylaws and other governing instruments.
- 7.46. As set out above, the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules. Therefore, in examining whether the ICANN Board acted in good faith, was accountable, and acted in a non-discriminatory and transparent manner, this IRP Panel must focus on the (i) existence of any conflict of interest; (ii) exercise of due diligence and care; and (iii) exercise of independent judgment believed to be in the best interests of the community.

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7.47. **First**, in relation to conflict of interest, the Claimant has made no allegation in this respect on the part of the ICANN Board. The Claimant strongly suggests that potential conflicts of interest existed on the part of SportAccord in making its community objection and, potentially, on the part of the Expert due to his alleged apparent bias in favour of SportAccord. However, in order to meet the necessary standard of review for this IRP Panel, the Claimant would need to allege and establish that the ICANN Board, as opposed to a third-party objector or the Expert appointed pursuant to the dispute resolution procedure in the Applicant Guidebook, acted with a conflict of interest. Such conflict of interest may have been alleged on the part of the BGC, NGPC, or some other function of the ICANN Board, but it was not.

7.48. **Secondly**, the ICANN Board, including the BGC and NGPC, must have exercised due diligence and care in having a reasonable amount of facts in front of them in taking the decision or action under review. Accordingly, the IRP Panel must consider whether or not this standard was met in relation to:

- (a) the BGC's decision of 8 January 2014 to reject the first Reconsideration Request in light of the Claimant's concerns as to the Expert's apparent bias, the ICC Centre for Expertise's inability to take into account allegations of lack of independence and impartiality and the NGPC's acceptance of the Expert Determination despite these factors; and
- (b) the BGC's recommendation of 21 June 2014 and the NGPC's decision of 18 July 2014 to reject the second Reconsideration Request in light of the Claimant's new and additional concerns as to the Expert's apparent bias and in light of the content of the Ombudsman's recommendation to conduct a new Expert Determination.

7.49. Other IRP Panel Declarations have made clear that neither the NGPC acceptance of the Expert Determination nor the IRP itself is intended to be an appeal process or forum for substantive review of Expert Determinations. The IRP Panels in *Booking.com v ICANN* and *Vistaprint v ICANN* were asked to review the underlying Expert Determinations. Each concluded that a Reconsideration Request provides for procedural review and is not a substantive appeal:

- (a) in *Booking.com v ICANN*, the IRP Panel concluded that the Claimant was not challenging the validity or fairness of the process;



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- (b) in *Donuts v ICANN*, the IRP Panel stated that “whatever label one uses to describe the approach (e.g., ‘objective’, ‘de novo,’ or ‘independent’) that approach does not allow the Panel to base its determination on what it, itself, might have done, had it been the Board. The explicit standard of review—for better or for worse—is much narrower than that”;
  - (c) in *VistaPrint v ICANN* the IRP Panel characterized the claim of disparate treatment in the Expert Determination as “a close question”, recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged; and
  - (d) in *Dot Registry v ICANN*, the IRP Panel addressed primarily issues of adequacy and burden of proof in respect to the BGC’s denial of a Reconsideration Request.

7.50. In the next gTLD application round, it has been proposed that a new appeal procedure for Expert Determinations be considered; at present no such appeal process exists. Accordingly, it is not currently possible for the Claimant to seek or obtain substantive review of the Expert Determination.

7.51. In the current case, in addition to substantive issues, questions of fairness and validity of the process are directly engaged. It is the Claimant’s fundamental concern of bias, or apparent bias, on the part of the Expert towards SportAccord and the organisations it is connected with, in particular, which leads to a procedural fairness concern. In the Claimant’s view, the Expert’s perceived connections and affinity to the IOC and other bodies associated with SportAccord may render him more inclined to consider SportAccord, as a sporting body, to be better suited to administer the .sport gTLD than a commercial body such as the Claimant. By contrast, an Expert with no such sporting affiliations would be more likely to assess the Claimant against the applicant criteria without making a choice of a sport body over a commercial body.

7.52. The procedural fairness concern created by the alleged apparent bias was at the centre of the first Reconsideration Request. The BGC rejected that first Reconsideration Request after the Claimant had drawn to the BGC’s attention its concerns as to the Expert’s alleged apparent bias. In particular, in its first Request for Reconsideration, the Claimant raised its concern that:

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“[At] a major conference of the International Bar Association in Rio de Janeiro, Brazil entitled ‘Olympic-Size Investments: Business Opportunities and Legal Framework’, [the Expert] was co-chair of a panel entitled *‘The quest for optimising the dispute resolution process in major sport-hosting events’* in which the following was discussed:

*‘The panel will debate the trends and best practices of resolving disputes in challenging environments with time-sensitive deadlines. Panellists will address issues related to arbitration, dispute boards, expert determination, mediation and electronic discovery on infrastructure projects for big international sports events. The experiences of Atlanta, Barcelona and the London Olympic Games will be discussed. The panel will also address the unique aspects of sports disputes and the potential use of a fast-track dispute resolution process in this area.’”*

- 7.53. The Claimant submitted to the BGC that the Expert “failed in his obligation to disclose a material factor relevant to confirmation of his appointment, and for this reason the resulting Determination must now be considered invalid on the grounds of failure to disclose facts or circumstances that would have, in the eyes of the parties, given rise to doubts as to the arbitrator’s impartiality or independence, prior to accepting his or her appointment as Expert.” This, according to the Claimant, was an obvious breach of the ICANN policy on transparency.
- 7.54. In its decision to reject the first Reconsideration Request, dated 8 January 2014, the BGC applied the standard of review set out in the Bylaws, Article IV, Section 2. According to the BGC, a successful reconsideration requires that an action or inaction contradicts established ICANN policy, failed to take into account material information or resulted from the Board’s reliance on false or inaccurate information. It stated that:

“In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, here the BGC is not to evaluate the Panel’s conclusion that there is substantial opposition from a significant portion of the community to which the Requester’s applications for .sports may be targeted. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel

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‘derogated substantially’ from the applicable standard for evaluating community objections.”

- 7.55. The BGC found that the Expert had not derogated substantially from the applicable standard because:
- (a) the Claimant had failed to demonstrate that the Expert had applied the wrong standards in contravention of established policy or process in that the Expert:
    - (i) did not create a new standard for determining the likelihood of material detriment;
    - (ii) did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and
    - (iii) did not create a new test for examining the alleged material detriment; and
  - (b) the Expert’s purported failure to disclose a possible conflict of interest does not support reconsideration.
- 7.56. The basis for the BGC’s conclusion that the Expert’s purported failure to disclose a possible conflict of interest did not support reconsideration was that the Applicant Guidebook provides that the ICC Centre of Expertise will follow its adopted procedures for requiring independence and that “[t]he ICC Rules of Expertise would therefore govern any challenges to the independence of experts appointed to evaluate community objections,” and that the Claimant “provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment.”
- 7.57. The BGC’s conclusion in this respect is flawed. The duty of impartiality and independence is an ongoing one; the duty to disclose information that may, in the eyes of a party, give rise to concerns as to the impartiality or independence of the Expert continues throughout the dispute resolution process until a final decision is rendered. Accordingly, the fact that the Expert completed his Statement of Independence and Impartiality at the time of his appointment does not mean that no issue as to independence or impartiality can arise at a later stage.
- 7.58. This ongoing duty to disclose lies at the heart of ICC dispute resolution.

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7.59. The second flaw in the BGC’s reasoning is its conclusion that:

“Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support reconsideration – *i.e.*, reconsideration is not the appropriate mechanism to raise the issue for the first time.”

7.60. The BGC further relied upon the Claimant’s successful challenge of the initial Expert, Mr. Taylor, in support of the Claimant having “demonstrated familiarity with the ICC Rules of Expertise by successfully challenging and replacing the first expert appointed to the matter.”

7.61. This reasoning is wrong and failed to take into account the fact that once the Expert has rendered a decision he is *functus officio* and the ICC as administering body similarly has no ongoing role.

7.62. Nevertheless, on 15 January 2014, immediately following the BGC’s decision to reject the Claimant’s first Reconsideration Request, the Claimant wrote to the ICC Centre for Expertise to request that it “reconsider whether in fact the appointment of [the Expert] was valid in light of the information at hand.” By response dated 21 January 2014, the ICC stated that:

“... the Expert has rendered the Expert Determination in case EXP/471/ICANN/88 and that it was notified to the parties by letter dated 25 October 2013.

Subsequently, this matter has been closed.

Accordingly, the Expert is no longer in place in this matter and does not have any current functions in connection to this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert.”

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7.63. According to the Applicant Guidebook, ICANN’s New gTLD Dispute Resolution Procedures “were designed with an eye toward timely and efficient dispute resolution” and “apply to all proceedings administered by each of the dispute resolution service providers (DRSP).” Moreover, “[e]ach of the DRSPs has a specific set of rules that will also apply to such proceedings.”

7.64. The scope of the dispute resolution procedure and role of the relevant DRSP is set out in more detail in the Applicant Guidebook as follows:

“(b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the “Procedure”).

(c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (“DRSP”) in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(d) By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.”

7.65. The purpose of delegating dispute resolution services to independent third-party providers, such as the ICC and the ICDR, is to create an independent process outside of the ICANN framework. In order to retain that independence, it is unsurprising that ICANN, through the BGC or otherwise, has very limited review power in respect of the substantive procedure conducted through a DRSP, such as an Expert Determination.

7.66. In the implementation of the New gTLD Program as a whole, occasionally a situation may arise where the New gTLD Dispute Resolution Procedure and the applicable DRSP’s Rules, applied according to established policy or process, nevertheless do not

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result in a fair, transparent or non-discriminatory outcome. One such example is the apparent inconsistency in several Expert Determinations arising out of string confusion objections, which led the ICANN Board to interfere with individual Expert Determinations which, on their face, appear to meet the necessary standard.

- 7.67. In the current situation, the Expert was appointed in accordance with the DRSP's Rules and rendered an Expert Determination. Subsequently, the Claimant raised an express concern that factors relating to the Expert's independence and impartiality became apparent only after the Expert Determination. The Claimant's concern appears to have at least facial validity.
- 7.68. As indicated above, as a matter of the ICC Centre for Expertise's procedure, as the ICC Centre for Expertise made clear in its letter of 21 January 2014, by the time these factors arose, the Expert Determination had been rendered and the Expert was *functus officio*. Accordingly, the ICC Centre for Expertise had no further function or role in relation to the Expert Determination. That power rested solely and exclusively with ICANN and its remaining procedures of Reconsideration Request, the Ombudsman and the IRP.
- 7.69. The BGC's decision to reject the first Request for Reconsideration on the basis that the Claimant "has not stated proper grounds for reconsideration" because "there is no indication that [the] Panel violated any policy or process in reaching the determination sustaining SportAccord's community objection" fails to take into account the following factors:
- (a) the Claimant reasonably became aware of the information concerning the independence and impartiality of the Expert after the Expert Determination had been rendered;
  - (b) such information may have impacted the integrity of the decision-making process and, therefore, the integrity of the Expert Determination;
  - (c) there was no "established process set forth in the Guidebook and the ICC Rules of Expertise" through which option "to challenge the Expert" at that time; and
  - (d) absent any "established process", any action or decision by the ICANN Board in response to a genuine complaint as to the Expert's impartiality or

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independence arising after the Expert is *functus officio*, must be guided by the Core Values in ICANN's Bylaws, including to:

- (i) preserve and **enhance the operational stability, reliability**, security, and global interoperability of the Internet;
- (ii) where feasible and appropriate, to **promote and sustain a competitive environment**;
- (iii) **introduce and promote competition** in the registration of domain names;
- (iv) employ **open and transparent policy** development mechanisms;
- (v) make decisions by **applying documented policies neutrally and objectively, with integrity and fairness**; and
- (vi) **remain accountable** to the Internet community through **mechanisms that enhance ICANN's effectiveness**.

7.70. ICANN's documented policies leave a Claimant with the options only of a Reconsideration Request, Ombudsman or an IRP in order to seek redress in the event of an arbitrator's apparent bias that only arises or becomes known after the Expert Determination is rendered. In those circumstances, the outsourced delegated role of the ICC Centre for Expertise is fulfilled and at an end.

7.71. Broadly, it is for the ICANN Board, through its NGPC, BGC and/or Ombudsman, to preserve **and** enhance the reliability of the system, the competitive environment of the registration process and the neutrality, objectivity, integrity and fairness of the decision-making system.

7.72. In the event that an Expert appointed in accordance with the Module 3 procedure were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias. In the current circumstances, it is plain that reconsideration is the only mechanism available to the Claimant to raise the issue of new information concerning independence and impartiality that has arisen only after the Expert Determination has been rendered and the DRSP process is at an end.

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7.73. Had the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable. However, the BGC simply refused to consider the new information and its refusal is in contravention of the BGC's obligation to exercise due care and diligence.

7.74. Immediately following the first Reconsideration Request decision, on 6 February 2014, the Claimant filed a complaint with ICANN's Ombudsman. According to the ICANN website:

"The ICANN Ombudsman is independent, impartial and neutral. The Ombudsman's function is to act as an informal dispute resolution office for the ICANN community, who may wish to lodge a complaint about ICANN staff, board or problems in supporting organizations. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly. The Ombudsman is impartial and will attempt to resolve complaints about unfair treatment, using techniques like mediation, shuttle diplomacy and if needed, formal investigation. The Ombudsman is not an advocate for you, but will investigate without taking sides in a dispute. The process is informal, and flexible.

...

"The Ombudsman cannot make, change or set aside a policy, administrative or Board decision, act, or omission, but may investigate these events, and to use ADR technique to resolve them and make recommendations as to changes."

7.75. Given the nature of the Ombudsman's role, as neutral mediator, the status of his recommendation to the ICANN Board as a draft as opposed to a final recommendation, as alleged by ICANN, is irrelevant. The Ombudsman was engaged in a process to "facilitate the fair, impartial, and timely resolution of problems and complaints" raised by the Claimant as an "affected member[] of the ICANN community."



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- 7.76. The existence of a written recommendation to the ICANN Board, and the fact that the ICANN Board appears wholly to have disregarded that recommendation, is a relevant factor for this IRP Panel's consideration as to whether or not the ICANN Board acted in accordance with its governing instruments.
- 7.77. As ICANN is at pains to point out, including in further and unsolicited post-hearing submissions and evidence, the Ombudsman did not proceed after the Claimant submitted its second Reconsideration Request. The ICANN Board accordingly did not follow or refer to his recommendation in considering the Reconsideration Request.
- 7.78. Nevertheless, the content of the Ombudsman's recommendation, including his neutral recommendation that a new expert determine the .sport community objection, was before the BGC when it received the Claimant's second Reconsideration Request. It had not been formally withdrawn or revoked by the Ombudsman and provided valuable information to the BGC. That recommendation suggested that the Board refer the Claimant's community objection to a new expert due to concerns regarding the Expert's apparent bias.
- 7.79. The second Reconsideration Request contained two additional items of information that were neither before the BGC during its first Reconsideration Request decision nor the Ombudsman when he made his recommendation. These were that:
- (a) one of the Expert's clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination; and
  - (b) a partner in the Expert's law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder.
- 7.80. The new allegations gave rise to a concern that the connection between the Expert (or his law firm) and DirecTV, a recipient of IOC broadcasting rights, created a conflict of interest because SportAccord and the IOC enjoy a close collaborative relationship.
- 7.81. In its recommendation on the second Reconsideration Request, commenced with the benefit of further allegations of apparent bias and following the Ombudsman's

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recommendation, the BGC did consider the “newly-discovered” evidence, but found that it did not support reconsideration. In particular:

- (a) in relation to the DirecTV Contract, the BGC deemed this to be irrelevant because the contract in question had not been executed at the time of the Expert Determination and the first BGC decision; and
- (b) in relation to the TyC Relationship, the BGC considered this to be “decades old” and not considered earlier because it had not been raised earlier.

7.82. As with the first Reconsideration Request decision, the BGC appeared to focus on the role of the ICC procedures and the Expert’s duty to disclose. In relation to the TyC Relationship in particular, the BGC concluded that:

“[T]he Expert submitted to the ICC, and to the parties, his *curriculum vitae*, as well as his Declaration of Acceptance and Availability and Statement of Impartiality and Independence in accordance with the ICC Rules of Expertise. ... As such, reconsideration is not appropriate with respect to the Expert’s disclosure.”

7.83. The BGC failed to take into account the problems that arise from what the Expert ***did not*** disclose in his Statement of Impartiality and Independence. He did not disclose the panel participation that gave rise to the first Reconsideration Request, nor any existing DirecTV relationship that ultimately gave rise to the DirecTV Contract or TyC Relationship. In relation to the DirecTV relationship, although the DirecTV Contract itself was executed after the Expert Determination, the Expert’s law firm was likely in the process of negotiating that contract prior to the Expert Determination. All or some of these matters may give rise to apparent bias and the fact that they were not disclosed cannot be preclusive of any reconsideration in relation to them.

7.84. As to the BGC’s finding that the Claimant’s challenge to the Expert was untimely, the IRP Panel considers that, provided the Claimant was not reasonably aware of the factors giving rise to concerns of apparent bias at the time of the disclosure, and it has submitted that it was not, then it simply was not in a position to have challenged the arbitrator earlier. It quite justifiably relied on the Expert’s disclosure in the carefully designed ICC standard forms. As the Ombudsman said in his report:

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“[T]he failure to undertake due diligence would in my view prevent any subsequent challenge to the appointment. In this case, there appears to have been both an adequate search, but also the entirely reasonable reliance upon the certificate of impartiality.”

7.85. As the Ombudsman recognized, a fair system of dispute resolution must allow for review of a decision by an impartial and independent decision-maker in the event that previously undisclosed information reasonably becomes available only after the final decision is rendered. The sole basis for the decision-maker’s mandate is the existence of his or her contracted-for independence and impartiality. If that falls away, the decision must be capable of reconsideration.

7.86. As to the BGC’s second finding that the “newly discovered” evidence did not support reconsideration, the Ombudsman, in contrast, looked to the IBA Conflict Guidelines 2004 to assess whether or not “in the eyes of the reasonable bystander, an appearance of bias” existed. In particular, the Ombudsman referred to the IBA Conflict Guidelines’ Waivable Red List, paragraph 2.3.7, which provides that “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.”

7.87. The Ombudsman referred further to the IBA Conflict Guidelines’ comment that:

“In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.”

7.88. Tellingly, the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding decision-making bodies. Instead, it repeatedly relied upon a very technical argument that the necessary forms were completed, no objection was made during the process, and no steps can be taken now with the ICC as its role is at an end, therefore all delegated DRSPs have been complied with and the BGC having reviewed that process is satisfied.

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- 7.89. In relying on this technical, procedural point, the BGC fails to engage with the substance of the concerns raised by the Claimant, i.e., the actual evidence that it alleges gives rise to apparent bias. Only the Ombudsman engaged in that analysis to any degree, and the BGC failed to take into account his analysis. If the BGC refuses to deal with apparent bias based on information arising only after an Expert Determination is rendered, then the question arises what other mechanism exists in the ICANN dispute resolution process to address it. It cannot be the case that there is no such mechanism, otherwise the process would risk extremely unfair and unjust results.
- 7.90. Accordingly, the IRP Panel is of the view that in order to have upheld the integrity of the system, in accordance with its Core Values, the ICANN Board was required properly to consider whether allegations of apparent bias in fact gave rise to a basis for reconsideration of an Expert Determination. It failed to do so and, consequently, is in breach of its governing documents.
- 7.91. This is a meaningful breach because several of the IBA Conflict Guidelines are invoked by the factors raised by the Claimant. In particular:
- (a) in relation to the panel, Guideline 3.5.2 refers to circumstances where “[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise” and identifies that as Orange List;
  - (b) in relation to the TyC Relationship, Guideline 2.3.6 (referred to by the Ombudsman) refers to circumstances where “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties” and identifies that as Waivable Red List; and
  - (c) in relation to the TyC Relationship and/or the DirecTV Contract, three Orange List Guidelines are applicable:
    - (i) Guideline 3.1.4: “The arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator”;

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- (ii) Guideline 3.2.1: “The arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator”; and
  - (iii) Guideline 3.2.3: “The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.”

7.92. In light of the direct applicability of the IBA Conflict Guidelines in repeated respects, it is highly possible that a proper review of the evidence of apparent bias against those Guidelines as a whole could result in the BGC – like the Ombudsman – ordering a rehearing with a different expert appointed.

- (ii) *Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Expert?*

7.93. The second limb of this IRP Request is that the Board failed to correct the mistakes in the process. In this respect, ICANN’s technical procedural argument is more compelling. That is, provided the process was followed to the letter, it is not subject to mistakes that require rectification.

7.94. The finding of the IRP Panel is that the process is not in fact at fault; it is implicit in the Bylaws, Articles and Applicant Guidebook that an apparent bias must be dealt with by the Board, if it arises after the Expert Determination has been rendered and no other recourse is available.

7.95. The process itself therefore does not contain mistakes; the mistake is in the implementation of the process. In particular, the BGC and NGPC failed to apply the necessary consideration to the new evidence of apparent bias, in substance, against a satisfactory standard such as the IBA Conflict Guidelines.

7.96. Accordingly, on this second limb, the IRP Panel finds no basis for review.

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**8. COSTS**

8.1. The Claimant seeks recovery of its costs in this IRP. Neither party has submitted any costs submission as to the amount of legal or other costs incurred by the parties.

8.2. The ICDR Rules, Article 34, provide in relation to the costs of arbitration that:

“The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the Administrator;
- (d) the reasonable legal and other costs incurred by the parties;
- (e) any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;
- (f) any costs incurred in connection with a request for consolidation pursuant to Article 8; and
- (g) any costs associated with information exchange pursuant to Article 21.”

8.3. The Panel fixes costs in respect of (i) fees and expenses of the Panel and (ii) fees and expenses of the ICDR acting as administrator of the proceedings in the sum of US\$152,673.26

8.4. Taking into account the specific circumstances of this case, in particular the concerns outlined above in particular at paragraph 7.70, the Panel allocates the costs at paragraph 8.3 in favour of the Claimant. Accordingly, ICANN must reimburse to the Claimant its share of fees and expenses of the Panel and fees and expenses of the ICDR acting as administrator of the proceedings.

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8.5. As to the reasonable fees and expenses of the Parties, the Panel makes no order for allocation to either Party and each shall be responsible for its own fees and expenses..

**9. DECLARATION**

9.1. In accordance with Article IV, Section 3.11 of the Bylaws, the Panel:

- (a) Declares that the action of the ICANN Board in failing substantively to consider the evidence of apparent bias of the Expert arising after the Expert Determination had been rendered was inconsistent with the Articles , Bylaws and/or the Applicant Guidebook;
- (b) Recommends that the Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines; and
- (c) Declares the ICDR fees and expenses totaling US\$5,750.00 and the fees and expenses of the Panelists totaling US\$146,923.26 shall be borne entirely by ICANN. Therefore, ICANN shall reimburse to the Claimant its share of fees and expenses of the Panel and ICDR in the sum of US\$79,211.64 upon demonstration by Claimant that these incurred fees and expenses have been paid.


9.2 This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Signed:



Prof. Dr. Klaus Sachs

Date: 31 January 2017



Dr. Brigitte Joppich

Date: 31 January 2017



Wendy Miles QC

Date: 31 January 2017