

ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.07.18.1b

TO: ICANN New gTLD Program Committee
TITLE: Reconsideration Request 14-10
PROPOSED ACTIONS: For Committee Consideration and Approval

EXECUTIVE SUMMARY:

Dot Sport Limited (the “Requester”) and SportAccord both applied for .SPORTS; SportAccord objected to the Requester’s application and prevailed. The Requester has filed Reconsideration Request 14-10 asking the Board (or here the NGPC) to reconsider: (i) the Expert Determination, and ICANN’s acceptance of that Determination; (ii) the ICC’s¹ appointment of the expert who presided over the objection; and (iii) the BGC’s² Determination denying Reconsideration Request 13-16.³

Initially, the Requester filed Request 13-16, which the BGC denied on 8 January 2014. The Requester then filed Request 14-10 on 2 April 2014 claiming that it discovered additional evidence on 25 March 2014 allegedly indicating that the Expert had a conflict of interest, which the Requester claims the Expert should have disclosed during the objection proceeding, but did not disclose.

The BGC has recommended that Request 14-10 be denied because: (i) it is untimely; and (ii) the allegedly newly discovered information relating to a purported conflict of interest does not support reconsideration.

BOARD GOVERNANCE COMMITTEE RECOMMENDATION:

The BGC recommends that Reconsideration Request 14-10 be denied and that no further action be taken in response to the Request. As set forth below and detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that the Requester has not stated proper grounds for reconsideration.

¹ International Centre for Expertise of the International Chamber of Commerce

² Board Governance Committee

³ Request 13-16 was the first Reconsideration Request that the Requestor submitted, which was denied.

PROPOSED RESOLUTION:

Whereas, dot Sport Limited filed Reconsideration Request 14-10 asking the New gTLD Program Committee (“NGPC”) to reconsider: (i) the Expert Determination, and ICANN’s acceptance of that Determination, upholding SportAccord’s Objection to the Requester’s application for .SPORTS; (ii) the International Centre for Expertise of the International Chamber of Commerce’s designation of the Expert Panelist who presided over the objection proceedings; and (iii) the Board Governance Committee’s (“BGC’s”) Determination denying Reconsideration Request 13-16.

Whereas, the BGC considered the issues raised in Reconsideration Request 14-10.

Whereas, the BGC recommended that the Request be denied because the Requester has not stated proper grounds for reconsideration and the NGPC agrees.

Resolved (2014.07.18.xx), the NGPC adopts the BGC Recommendation on Reconsideration Request 14-10, which can be found at

<https://www.icann.org/en/system/files/files/recommendation-sport-21jun14-en.pdf>.

PROPOSED RATIONALE:

I. Brief Summary

SportAccord filed a Community Objection against Dot Sport Limited’s (the “Requester”) application for .SPORTS and prevailed. The Requester then filed Request 13-16, suggesting that, among other reasons, the Expert Panel (“Expert” or “Panel”) allegedly violated established policy or process by failing to disclose material information relevant to his appointment. On 8 January 2014, the BGC denied Request 13-16, finding, among other things, that the Requester had provided no evidence demonstrating that the Expert had failed to follow the applicable ICC procedures for independence and impartiality.

The Requester, in this second Reconsideration Request for the same matter, now claims that on 25 March 2014, it discovered additional evidence that the Expert had a conflict of interest. Specifically, the Requester claims that it recently discovered that the Expert now has, and previously has had, financial and professional relationships with an entity that is “related” to

SportAccord. The Requester claims the Expert should have but did not disclose those relationships in the objection proceeding.

The Requester's claims are unsupported. First, the Request is untimely. Request 14-10 challenges Board and staff actions that occurred on or prior to 13 January 2014, yet was received on 2 April 2014, well past the 15-day deadline to file a reconsideration request. While the Requester claims that this second Reconsideration Request is appropriate because the Requester only recently discovered the Expert's alleged conflict of interest, as is discussed below, the Requester's claim does not justify an untimely reconsideration request. Second, the allegedly newly discovered information relating to a purported conflict of interest does not support reconsideration. Therefore, the BGC has recommended that Reconsideration Request 14-10 be denied. The NGPC agrees.

II. Facts

A. Relevant Background Facts

Both dot Sport Limited (the "Requester") and SportAccord applied for .SPORTS and are in the same contention set.

On 13 March 2013, SportAccord filed a Community Objection ("Objection") to the Requester's application, asserting that there was "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Applicant Guidebook ("Guidebook"), § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2e.)

On 29 July 2013, the ICC appointed Dr. Guido Santiago Tawil as the expert ("Expert" or "Panel") to consider SportAccord's Objection. On 23 October 2013, the Panel rendered an Expert Determination in favor of SportAccord ("Expert Determination")⁴.

On 8 November 2013, the Requester filed Request 13-16⁵, seeking reconsideration of the Expert Determination, claiming that the Panel applied the wrong standard in contravention of established ICANN policy or process and the Expert failed to disclose material information

⁴ <https://www.icann.org/en/system/files/files/request-annex-sport-1-08nov13-en.pdf>

⁵ <https://www.icann.org/en/system/files/files/request-sport-08nov13-en.pdf>

relevant to his appointment in violation of established policy or process. On 8 January 2014, the Board Governance Committee (“BGC”) denied Request 13-16⁶.

On 25 March 2014, the Requester purportedly discovered additional facts regarding an alleged commercial relationship between the Expert and the International Olympic Committee (“IOC”), an entity that the Requester contends “effectively control[s]” SportAccord.⁷ (Request, § 8, Pg. 5.) Specifically, the Requester claims that it discovered that: (i) one of the Expert’s clients, DirecTV, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (but only after the Expert Determination and the BGC’s Determination on Request 13-16 were issued); and (ii) a partner in the Expert’s law firm is the president of Torneos y Competencias S.A. (“TyC”), a company which has a history of securing Olympic broadcasting rights and of which DirecTV Latin America is the principal shareholder.⁸ The Requester forwarded that information to the Ombudsman, with whom it had filed a complaint.

On 31 March 2014, the Ombudsman issued a draft report on the Requester’s complaint, which was later withdrawn pending consultation with other relevant parties.

On 2 April 2014, the Requester filed Request 14-10⁹, seeking reconsideration of: (i) the denial of Request 13-16; (ii) the Expert Determination and ICANN’s acceptance of it; and (iii) the ICC’s appointment of the Expert.¹⁰

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, the Ombudsman advised ICANN that he sought confirmation from the Requester as to whether it was aware of these Bylaws parameters and

⁶ <https://www.icann.org/en/system/files/files/determination-sport-08jan14-en.pdf>

⁷ In support of its contention, the Requester offers only that: (a) two of the six members of SportAccord’s Executive Council are also members of the IOC; and (b) “[f]ive of the eight members of the Council of SportAccord are directly appointed by three out of the only four sport associations officially recognized by the IOC on their website.” (Request, § 8, Pg. 5.) The Requester also points out that SportAccord’s website states that SportAccord enjoys a “close collaborative relationship” with the IOC. (*Id.*)

⁸ <https://www.icann.org/en/system/files/files/request-sport-02apr14-en.pdf>

⁹ <https://www.icann.org/en/system/files/files/request-sport-02apr14-en.pdf>

¹⁰ Although the Requester only requests reconsideration of the ICC’s appointment of the Expert, it also appears to object to the ICC’s response to the Requester’s newly-discovered information, stating that the Requester’s representative “wrote to the ICC on two occasions to request that the ICC question [the Expert]” about the alleged conflict of interest, but that the ICC “repeatedly declined to do so.” (Request, § 8, Pg. 5.) However, this claim is untimely, and the Requester has not identified any policy or procedure that the ICC allegedly violated that would support reconsideration.

asked how the Requester wished to proceed. ICANN was advised on or about 13 May 2014 that the Requester confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this Reconsideration Request rather than the Ombudsman's request.

B. Requester's Claims

The Requester makes three claims. First, the Requester claims that the BGC failed to consider material information in rejecting Request 13-16, namely the allegedly newly-discovered information regarding the Expert's alleged conflict of interest. Second, the Requester claims the Expert violated ICANN policy and process by failing to reveal his alleged conflict of interest. Third, the Requester claims that the ICC violated ICANN policy and process in appointing the Expert.

III. Issues

The issues for reconsideration are as follows:

1. Whether the Board failed to consider material information in rejecting Reconsideration Request 13-16, namely the allegedly newly-discovered information regarding the Expert's alleged conflict of interest;
2. Whether the Expert violated any ICANN policy and process by failing to disclose his alleged conflict of interest; and
3. Whether the ICC violated any ICANN policy and process in appointing the Expert.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-10 and finds the analysis sound.¹¹

¹¹ Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue

V. Analysis and Rationale

A. The Request is Untimely.

The BGC concluded, and the NGPC agrees, that Reconsideration Request 14-10 is untimely and does not support reconsideration. Reconsideration requests must be submitted within 15 days of either “the date on which information about the challenged Board action is first published in a resolution [including rationale]” or “the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action.” (Bylaws, Art. IV, § 2.5.) The Requester seeks reconsideration of: (i) the appointment of the Expert, which occurred on 29 July 2013; (ii) the Expert Determination, which was issued on 23 October 2013; and (iii) the BGC’s determination on Reconsideration Request 13-16, which was issued on 8 January 2014 and posted on 13 January 2014.

Reconsideration Request 14-10¹², however, was received on 2 April 2014, which is: (i) over six months after the Expert was appointed; (ii) nearly six months following the issuance of the Expert Determination; and (iii) nearly three months following the BGC’s determination on Request 13-16.

The Requester claims that on 25 March 2014 it discovered new evidence 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 the 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 sum, the Requester 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.” (Request, § 8, Pg. 5-8.)

Based upon this belated discovery of new evidence, the Requester claims the 15-day deadline for reconsideration requests should be tolled. (Request, § 5, Pg. 2.) The Requester, however,

for the community to ensure that staff and the Board are acting in accordance with ICANN’s policies, Bylaws, and Articles of Incorporation.

¹² <https://www.icann.org/en/system/files/files/request-sport-02apr14-en.pdf>

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 Requester 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 Requester's only other evidence for an alleged conflict is the TyC Relationship, a business relationship that appears to be decades old. In addition, all of the Requester'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 long prior to 25 March 2014.

Because the Requester could have become aware of the alleged conflicts earlier, the Requester's belated discovery of publicly available information does not justify tolling the 15-day time limit. (Bylaws, Art. IV, § 2.5; *see also, id.* at Art. IV, § 2.2 (reconsideration based on alleged failure to consider material information is inappropriate where the requester could have submitted, but did not submit, the information for the Board's consideration).)

B. The “Newly-Discovered” Evidence Does Not Support Reconsideration.

The Requester cites to two pieces of “newly-discovered” evidence that allegedly establish the Expert's conflict of interest: (1) the DirecTV Contract; and (2) the TyC Relationship. Separate and apart from the timeliness issue, the BGC concluded, and the NGPC agrees, that the “newly-discovered” evidence of an alleged conflict of interest does not support reconsideration.¹³

1. The DirecTV Contract is Not Evidence of a Conflict of Interest Sufficient to Support Reconsideration.

¹³ In support of its Request, the Requester references a 31 March 2014 communication the Ombudsman sent to the Board regarding the Expert's alleged conflict of interest, in which the Ombudsman expressed concern and recommended “a rehearing of the objection with a different expert appointed.” (Request, § 8, Pg. 11.) However, the Ombudsman's communication, by itself, does not support reconsideration because it does not constitute Board action. Moreover, the Ombudsman's communication has subsequently been withdrawn. As such, it would be premature for the NGPC to consider the Ombudsman's comments on any alleged conflict of interest.

In support of its claim that there is a “direct commercial relationship” between the IOC and the Expert, the Requester relies on the 7 February 2014 DirecTV Contract, stating that: “just 3 months after [the Expert’s Determination on the SportAccord Objection,] Direct TV[, one of the Expert’s clients,] secured a highly lucrative and sought after broadcasting rights deal covering Latin America for the 2014 winter Olympic Games in Sochi, Russia and the 2016 summer Olympic Games in Rio de Janeiro, Brazil.” (Request, § 8, Pg. 7.) The Requester concedes that the purported “direct commercial relationship” arose more than three months *after* the Expert Determination, and does not even attempt to establish that the belated 7 February 2014 DirecTV Contract somehow affected the Expert’s 23 October 2013 Determination.

Likewise, the BGC could not have considered this information on 8 January 2014, when it rendered its determination on Request 13-16, because the DirecTV Contract had not yet been executed.

As a result, the Requester has failed to demonstrate that the Expert or the ICC violated established policies or procedures or that the BGC failed to consider material information. Therefore, reconsideration is not appropriate. (Bylaws, Art. IV, § 2.)

2. The TyC Relationship Does Not Support Reconsideration.

The Requester also alleges a “newly discovered” conflict of interest based on the TyC Relationship. (Request, § 8, Pgs. 7-8.) Specifically, the Requester claims that DirecTV Latin America is the principal shareholder of TyC, another sports broadcasting firm in the Latin American region. (*Id.*, § 8, Pg. 7.) The Requester states that TyC is “a major client of M&M Bomchil law firm,” where the Expert is a partner. (*Id.*) The Requester further states that the President of TyC is also a Senior Partner in M&M Bomchil and “is therefore a business partner of [the Expert].” (*Id.*) The Requester alleges a conflict of interest based on its claim that TyC “has a longstanding business relationship with IOC having secured broadcasting rights on 5 consecutive occasions since the Atlanta Games in **1996**,” and that TyC “most recently won the Argentinean television rights for the Vancouver 2010 Winter Olympics and London 2012 Olympic Games.” (*Id.* at § 8, Pg. 8 (emphasis added).) In this regard, the

Requester claims that the Expert should have disclosed the TyC Relationship and, having failed to do so, has violated ICANN policy and process.

Section 3.4.4 of the Guidebook governs the selection of expert panels for purposes of the objection procedures at issue here. Section 3.4.4 provides that the ICC will “follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.” (Guidebook, Section 3.4.4.) The ICC Rules of Expertise would therefore govern any challenges to the independence of experts appointed to evaluate community objections. Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment or that the ICC failed to require the Expert to do so. As the BGC noted in its determination on Request 13-16, the 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. (13-16 Determination at Pgs. 12-13.) As such, reconsideration is not appropriate with respect to the Expert’s disclosure.

Reconsideration is also unwarranted with respect to the BGC’s failure to consider the TyC Relationship in its determination on Request 13-16. Reconsideration is appropriate for “actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, *except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of the action or refusal to act.*” (Bylaws, Art. IV, § 2.2(b)) (emphasis added). As discussed above, the TyC Relationship appears to be decades-old, and the Requester gives no explanation for why it did not submit, or could not have submitted, the information regarding the relationship to the BGC at the time the BGC considered Request 13-16.

The Requester’s failure to submit the evidence for the BGC’s consideration with Request 13-16 does not constitute a failure on the part of the BGC to consider material evidence and does not constitute a basis for reconsideration of Request 13-16.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Request 14-10. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 14-10, which shall be deemed a part of this Rationale. The full text of Recommendation can be found at <https://www.icann.org/en/system/files/files/recommendation-sport-21jun14-en.pdf> and is attached to the Reference Materials to the NGPC Submission on this matter.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 2 May 2014. Due to the Requester's invocation of multiple accountability mechanisms on parallel tracks, including the complaint the Requester lodged with the Ombudsman and the instant Reconsideration Request, additional time was required for the Ombudsman to confer with the Requester and to clarify which accountability mechanism the Requester intended to pursue, delaying the BGC's consideration of this matter. Moreover, due to the volume of Reconsideration Requests received within recent months, the first practical opportunity for the BGC to make a decision on this Request was on 21 June 2014; it was impractical for the BGC to do so sooner. Accordingly, the NGPC meeting on 18 July 2014, was the first NGPC meeting that has been scheduled following the BGC's action on Request 14-10 with sufficient time to evaluate and consider the BGC's Recommendation.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Dated Noted: 14 July 2014
Email: amy.stathos@icann.org

1b-NGPC Ref Mat-Reconsideration Request 14-10.docx

REFERENCE MATERIALS TO NEW gTLD PROGRAM COMMITTEE
SUBMISSION 2014.07.18.1b

TITLE: **Reconsideration Request 14-10**

Summary Background

While the full background can be found in the documentation attached to these Reference Materials, Reconsideration Request 14-10 filed by dot Sport Limited (“Requester”) on 2 April 2014 asks the Board (or here the NGPC) to reconsider: (i) the 23 October 2013 Expert Determination, and ICANN’s acceptance of that Determination, upholding SportAccord’s Community Objection to the Requester’s application for .SPORTS; (ii) the appointment of Dr. Guido Santiago Tawil as the expert (“Expert” or “Panel”) by the International Centre for Expertise of the International Chamber of Commerce (“ICC”) on 29 July 2013, who presided over the underlying objection; and (iii) the BGC’s Determination denying Reconsideration Request 13-16, which was issued on 8 January 2014 and posted on 13 January 2014.

The BGC considered Reconsideration Request 14-10 at its 21 June 2014 meeting and concluded that the Requester has not stated proper grounds for reconsideration. As detailed in the Recommendation and the documents attached to these Reference Materials, the BGC concluded that Reconsideration Request 14-10 is untimely and the allegedly newly discovered information relating to a purported conflict of interest does not support reconsideration. The BGC recommended to the NGPC that Reconsideration Request 14-10 be denied without further consideration. The NGPC agrees with the BGC and is adopting the BGC Recommendation and denying Reconsideration Request 14-10.

Document/Background Links

The following attachments are relevant to the BGC’s recommendation regarding Reconsideration Request 14-10.

Attachment A is [Reconsideration Request 14-10](#), submitted on 2 April 2014.

Attachment B is the [Attachments to Request 14-10](#), submitted on 2 April 2014.

Attachment C is the [Letter from Howard M. Stupp to Board Governance Committee Members](#), submitted on 30 April 2014.

Attachment D is the [Letter from SportAccord to the Board Governance Committee Chair](#), submitted on 15 May 2014.

Attachment E is the [BGC's Recommendation on Reconsideration Request 14-10](#), issued on 21 June 2014.

Attachment F is the [Expert Determination on SportAccord's Community Objection](#), issued on 23 October 2013.

Attachment G is the [BGC's Determination on Reconsideration Request 13-16](#), issued on 8 January 2014.

Submitted by: Amy A. Stathos
Position: Deputy General Counsel
Date Noted: 14 July 2014
Email: amy.stathos@icann.org

1b-Ref Mat-Attachment-A-Reconsideration Request 14-10.pdf

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: dot Sport Limited

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

- (i) Board Rejection of Reconsideration Request 13-16 on 8 January 2014 available at <https://www.icann.org/en/groups/board/governance/reconsideration/13-16/determination-sport-08jan14-en>; and/or
- (ii) Community Objection Determination by expert Guido Tawil ("Expert") a Senior Partner of M&M Bomchil on 23 October 2013 available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/expertise/icann-new-gtld-dispute-resolution/expert-determination/> as a result of his failure to disclose his conflict of interest through his direct commercial interest in the broadcast rights of the Objector and the International Olympic Committee ("Conflict") during his acceptance of the appointment as Expert on 25 July 2013 and his appointment as Expert by the ICC under false circumstances on 29 July 2013, attached as Exhibit 1 and Exhibit 2. The failure to disclose is a failure to follow multiple ICANN policies both pursuant to the Applicant Guidebook and ICANN Bylaws; and/or
- (iii) Decision of International Chamber of Commerce ("ICC") of 29 July 2013 to appoint Guido Tawil as Expert on the basis of false information provided to the ICC by Guido Tawil.¹

4. Date of action/inaction:

As set out above.

5. On what date did you become aware of the action or that action would not be taken?

In respect of the conflict of interest, we discovered the existence of such on 25 March 2014.

6. Describe how you believe you are materially affected by the action or inaction:

We believe we have lost the Community Objection as a direct result of a lack of impartiality of the appointed Expert, Guido Tawil.

As an innocent party, acting in good faith, we have lost large amounts of money: application fees, legal fees, Dispute Resolution Procedures ("DRP") fees, as a result of our good faith adherence to the rules set out in the Applicant Guide Book.

We have lost the right to an impartial community objection hearing.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

- The entire ICANN community is angered by the lack of consistency and the obvious unfairness of many of the determinations ostensibly conducted under the DRP. Innocent parties, acting in good faith, have lost large amounts of money: application fees, legal fees, DRP fees, etc. In addition, they have unfairly lost the right to participate

¹ ICANN has already determined that the reconsideration process can be properly invoked for challenges to the actions of the DRSP.

in the auction process lined up for Contention Sets.

- The ICANN Board will be adversely affected by inaction and could lose credibility due to the behavior of the ICC and the Expert. Transparency, accountability and the disclosure and proper handling of conflict of interests is one of the sacred tenets of ICANN Board practice. The NGPC was created precisely because of conflicts of interest.
<http://www.icann.org/en/news/in-focus/accountability/expected-standards>

See No. 2 on the list of expected standards for the Board to:

- **Act** in accordance with ICANN's Bylaws. In particular, participants undertake to act within the mission of ICANN and in the spirit of the values contained in the Bylaws.
- **Adhere** to ICANN's conflict of interest policies.
<http://www.icann.org/en/groups/board/governance/coi>

This conflict of interest policy applies to the ICC (and by extension, Guido Tawil) because it applies to the Board.

- Stakeholders in the .sport registry have lost the opportunity of the registry being operated by us.
- Our shareholders have lost the business opportunity of the .sport registry being operated by us.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board.

Information provided at Annex 1.

If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

The information in Annex 1 was not known to the Requester before 25 March 2014.

If your request is in regards to a Board action or inaction that you believe is based upon

inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act. No such prior opportunity existed, as the Expert deliberately presented inaccurate, false, or misleading materials to the Board designate (ICC) the falseness of which the Requester asked the ICC to investigate, without success, but which the Requester has itself now investigated, with success.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

The information presented in Annex 1 is not new information. It is information which was in existence at the time of the actions/inactions set out in points 3(i) to 3(iv), above

Provide the Required Detailed Explanation here:

Background

On 23 October 2013 the Panelist Dr. Guido Tawil, partner in M&M Bomchil Abogados, appointed by the International Centre for Expertise in the case of SportAccord v dot Sport Limited EXP 471/ICANN/88 ("Determination"), found in favour of the Objector, SportAccord in a community objection by SportAccord to the gTLD registry application of dot Sport Limited. The International Olympic Committee was specifically named as a party interested in the proceedings, and is a supporter of the SportAccord community application for the .sport string.

Famous Four Media were not alone in finding the Determination irregular in a number of respects. For example, Dr. Tawil re-interpreted a key ICANN standard, inexplicably turning the ordinary meaning of the term "likelihood" to "possible" in the context of deciding the 'likelihood of material detriment' to the community in question.

Reconsideration Request 13-16

Dot Sport Limited submitted a Reconsideration Request to ICANN on 8 November 2013 in which, amongst other matters, we raised the question of whether Dr. Guido Tawil had any connection to the Objector or any of its constituent member organisations.

Furthermore, we requested that ICANN ask the relevant Dispute Resolution Service Provider, the International Chamber of Commerce ("ICC"), to review its appointment of Dr. Tawil. ICANN rejected the Reconsideration Request on 8 January 2014.

Furthermore, Famous Four Media wrote to the ICC on two occasions to request that the ICC question Dr. Tawil directly about his links with SportAccord or the International Olympic Committee ("IOC"). The ICC repeatedly declined to do so.

SportAccord and IOC

It should be noted that the IOC was named as an interested party in the Objection.

SportAccord is effectively controlled by the IOC. The IOC and SportAccord are inextricably linked. Two of the six members of the Executive Council (Marisol Casado and Franco Kasper) are also members of the IOC. Five of the eight members of the Council of SportAccord are directly appointed by three out of the only four sport associations officially recognised by the IOC on their website: ASOIF, AIOWF, ARISF²; the fourth sport association officially recognised by the IOC being SportAccord itself

"International Sports Federations seeking IOC recognition must ensure that their statutes, practice and activities conform with the Olympic Charter." However, conformity is not limited to just abstract documentary and/or legal conformity. The IOC is deeply entwined in the day to day operations and mission of SportAccord. On its own website Sport Accord states that it enjoys "a close collaborative relationship with the IOC". The IOC plays a key supporting role to several project areas of SportAccord: "The sharing of values and knowledge allows for a more complex approach in addressing a wide range of topics such as anti-doping, illegal betting, match-fixing, sustainable sports events, sports for all and IF recognition".³ The relevant portion

³ <http://www.sportaccord.com/en/what-we-do/dfsu/?idContent=16323>

of the SportAccord website is abstracted below. More at:

<http://www.sportaccord.com/en/what-we-do/dfsu/?idContent=16323#sthash.G6CFf0Wu.dpuf>

INTERNATIONAL OLYMPIC COMMITTEE

SportAccord holds a **close collaborative relationship** with the International Olympic Committee (IOC).

SportAccord fully recognises the IOC and the Olympic Movement's authority, it is and will remain a loyal partner in the achievements of the Olympic Movement objectives.

The IOC plays a **key supporting role** to several project areas of SportAccord. The sharing of values and knowledge allows for a more complex approach in addressing a wide range of topics such as anti-doping, illegal betting, match-fixing, sustainable sports events, sports for all and IF recognition.

The SportAccord Doping-Free Sport Unit's (DFSU) **strategic alliance** with the International Olympic Committee (IOC) began in 2009. The IOC and World Anti-Doping Agency's (WADA) funding for the DFSU enables the DFSU to provide expert advice and support its members, signatories of the Code, in becoming Code compliant, maintaining this status and implementing best practices in anti-doping.

An advisory board composed of three representatives (SportAccord, WADA and IOC), provides guidance, advice and recommendations on the global vision, strategies and operational plans of the DFSU. This board meets at least once a year.

The IOC plays a vital role in the work of the Sports' Social Responsibility Unit. Its financial support enables the development of specific services for SportAccord members as well as assistance, training and support in harnessing the power of sport to contribute to the positive social change. This contribution ranges across six special projects utilising sport for: child & youth development, the environment, gender, health, persons with disabilities, peace.

Specifically in the Sport and Health project, SportAccord collaborates with the IOC in the World Conference on Sport for All. The **15th World Conference** held in Peru in April 2013, aimed at promoting health, fitness and well-being as well as encouraging people of all ages and abilities to participate in sports activities and experience the Olympic values.

Additionally, the IOC is fully in line with SportAccord's commitment to develop a Sustainable Event Management Strategy. Currently under development, an IOC-SportAccord education tool, to be released November 2012, will contribute to overcoming the knowledge gap regarding sustainability within the sports movement. This service will complement the **Online Reporting Tool** which provides a sustainability summary report used not only for communication and marketing purposes but also as basis for a solid sustainability policy.

Through this instrumental partnership, the IOC insures the continuous improvement of SportAccord's support in sports' social responsibility issues. The members obtain a case specific attention to their demands as SportAccord becomes increasingly relevant for each and every member, independently of its sport, size or location.

Commercial relationship between Guido Tawil and the IOC

The Requester has uncovered evidence of direct commercial relationships between Guido Tawil, the M&M Bomchil law firm and the IOC. Guido Tawil is a Senior Partner of the law firm M&M Bomchil.

1. Guido Tawil, DirecTV and IOC broadcasting rights

One of Guido Tawil's 'significant clients' (according to the Chambers & Partners law directory) is **DirectTV** (<http://www.chambersandpartners.com/19/572/editorial/9/1>). On 7 February 2014, just 3 months after having provided his decision in SportAccord v dot Sport Limited EXP 471/ICANN/88 DirecTV secured a highly lucrative and sought after broadcasting rights deal covering Latin America for the 2014 winter Olympic Games in Sochi, Russia and the 2016 summer Olympics in Rio de Janeiro, Brazil. DirecTV will broadcast the Olympics in Argentina, Chile, Colombia, Ecuador, Peru, Uruguay and Venezuela. The deal covers television, online and mobile platforms.

2. DirectTV, Torneos y Competencias S.A. and Guido Tawil

Direc TV Latin America is the principal shareholder in Torneos y Competencias S.A. ("TyC", also referred as "Torneos"). TyC is another sports broadcasting firm in the Latin American region and is headquartered in Buenos Aires. (http://en.wikipedia.org/wiki/Torneos_y_Competencias

TyC is also a major client of M&M Bomchil law firm. What is more, the President of TyC is Marcelo Bombau, who is also a Senior Partner in M&M Bomchil and is therefore a business partner of Guido Tawil. (Source: m.chambersandpartners.com/firm/2373/9; see also http://en.wikipedia.org/wiki/Torneos_y_Competencias page last modified on 8 February 2014.) In other words, Guido Tawil's business partner in the same law firm, has a direct commercial interest in a direct recipient of IOC broadcasting rights. Guido Tawil's own legal practice and business is built around a company for whom IOC broadcasting rights are a core aspect of its business.

In the M. & M. Bomchil Attorneys Firm Brochure from 2008, the Executive Director of TyC, Luis Nofal, endorses M&M Bomchil. Marcelo Bombau is also a Board Member of the Fundacion

Torneos y Competencias along with the son and daughter of the Founder, Luis Nofal. TyC shareholders include DirecTV Latin America (33.2%) and Luis Nofal Sports Holding SA (by Luis Nofal, 23.53%).

3. TyC and IOC broadcasting rights

TyC has a long standing business relationship with IOC having secured broadcasting rights for the Olympics on 5 consecutive occasions since the Atlanta Games in 1996. It most recently won the Argentinian television rights for the Vancouver 2010 Winter Olympics and London 2012 Olympic Games http://www.sportspromedia.com/news/new_broadcast_deals_for_tyc.

4. Summary of Interests

4.1 TyC, is a major client and source of income of Guido Tawil. IOC broadcasting rights are a core aspect of its business

4.2 TyC is run by a business partner of Guido Tawil. IOC broadcasting rights are a core aspect of his business

4.3 Guido Tawil's firm was involved in TyC obtaining IOC broadcasting rights.

4.4 DirecTV is a major client and source of income of Guido Tawil. IOC broadcasting rights are a core aspect of it business

4.5 DirecTV Latin America acquired Olympic broadcasting rights 3 months following the decision made by Guido Tawil

4.6 DirecTV is the principal shareholder in TyC.

4.7 It is understood that Guido Tawil's firm was involved in DirecTV Latin America obtaining IOC broadcasting rights.

5. Falsifying declaration in the Conflicts of Interest form

We extract from the Statement of Impartiality and Independence which Giudo Tawil signed on 25 July 2013 (N°: EXP/471/ICANN/88)

**ICC EXPERT
DECLARATION OF ACCEPTANCE AND AVAILABILITY,
STATEMENT OF IMPARTIALITY AND INDEPENDENCE**

Family Name(s): Tawil

Given Name(s): Guido Santiago

Please tick all relevant boxes.

1. ACCEPTANCE

I agree to serve as expert under and in accordance with ICANN's gTLD Applicant Guidebook, including the New gTLD Dispute Resolution Procedure ("**Procedure**"), the Rules for Expertise of the ICC ("**Rules**") including Appendix III to the ICC Rules and supplemented by the ICC Practice Note on the Administration of Cases. I confirm that I am familiar with these rules and documents. I accept that my fees and expenses will be fixed exclusively by the ICC International Centre for Expertise ("**Centre**") (Article 3 Appendix III to the ICC Rules).

NON-ACCEPTANCE

I decline to serve as expert in this case.
(If you tick here, simply date and sign the form without completing any other sections.)

2. AVAILABILITY

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this proceeding diligently, efficiently and in accordance with the time limits provided in the Procedure, subject to any extensions granted by the Centre pursuant to Article 21(a) of the Procedure.

3. **INDEPENDENCE AND IMPARTIALITY**

(Tick one box and provide details below and/or, if necessary, on a separate sheet.)

In deciding which box to tick, you should take into account, having regard to Article 11(1) of the Rules and Article 13(c) of the Procedure, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

Nothing to disclose: I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

Acceptance with disclosure: I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

Date: July 25, 2013

Signature:



We note that the duty of disclosure includes any:

- i. **Relationship whether financial, professional or of any other kind**
- ii. That is either **past or present** and that is
- iii. **direct or indirect** between
- iv. **you** [Guido Tawil] and any **parties their related entities or their lawyers**

We further note that the standard of disclosure is so high that

- a. **any doubt must be resolved in favour of disclosure**
- b. Disclosure includes anything that **might be called into question**
- c. Guido Tawil was required to have made due enquiry and that
- d. Guido Tawil is a jurist and can not argue ignorance as to the meaning or standard of this duty

The research we have provided in this section would have clearly necessitated that Guido Tawil tick the box "Acceptance with Disclosure". Guido Tawil had and has multiple financial and professional relationships both direct and indirect with the IOC which is clearly a related entity to SportAccord. By ticking the box "nothing to disclose", he has provided false statement that:

- there are no facts of circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and
- no circumstances that could give rise to reasonable doubts as to my impartiality.
- clearly he knew that his key client would benefit from IOC rights; and he either knew and withheld the information (or made no due enquiry as to whether or not) any member of his law firm would have stood to gain by this.

Recommendation of the Ombudsman

On 31 March 2014, the Ombudsman (with whom we shared the new material discovered on 25 March 2014) advised the Board as follows:

"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."

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

- (i) Revoke the designation of authority of Guido Tawil as Expert for undisclosed conflict of

interest and/or obvious bias in deciding the Determination.

- (ii) Reject the finding of the Expert Determination, dismiss the Objection and provide a refund of the fees of the ICC to dot Sport Limited
- (iii) Instruct the ICC to give a full account of how the Expert's resume came to be considered by the ICC and what the consideration process was.
- (iv) Instruct the Expert to give an account of why he failed to disclose his deep professional involvement in two major clients involved in multi-million deals for broadcast rights to the Olympic games over the last decade, which would clearly indicate his professional alignment with SportAccord interests.

Alternatively, dot Sport Limited would request that the matter be referred, at no cost to dot Sport Limited, to a new fully independent panel of **THREE** Experts selected under an entirely transparent process, for a de novo review and determination⁴. This matter should not be reheard by a single Expert alone, since this has repeatedly proven (not just in the .SPORT decision) to be unreliable and lead to inconsistent decision making; or

Refer the community objections against dot Sport's .SPORT application back to an accountability mechanism established by ICANN to deal with incorrect, inconsistent or otherwise improper determinations.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements:

a. there must be a loss or injury suffered (financial or non-financial):

- (i) Loss of gTLD application fee
- (ii) Loss of Objection fee
- (iii) Loss of opportunity to participate in an impartial and fair hearing
- (iv) Loss of opportunity to participate in a Contention Set Auction for the .SPORT top level domain ("TLD")

b. that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration.

- (i) Guido Tawil provided false information at the time of submitting his conflict of interest form.

⁴ Indeed, this is a likely consequence of paragraph 2.4.3.2 of the AGB: *"In a case where ICANN determines that a Panelist has failed to comply with the Code of Conduct, the results of that Panelist's review for all assigned applications will be discarded and the affected applications will undergo a review by new panelists."*

This is a clear breach of ICANN policy⁵ and the Applicant Guidebook. The AGB provides extensive guidance, at paragraph 2.4.3, in the Code of Conduct for Panelists:

*Panelists shall conduct themselves as thoughtful, competent, well prepared, and impartial professionals throughout the application process. Panelists are expected to comply with equity and high ethical standards while assuring the Internet community, its constituents, and the public of objectivity, integrity, confidentiality, and credibility. Unethical actions, **or even the appearance of compromise, are not acceptable.***

Dr Tawil has fallen short of the requirements in a number of respects. First, there is obvious apparent bias, as has been found by the Ombudsman. Second, as we stated in our previous Reconsideration Request, the determination was received within the ICANN community as a poorly decided one, lacking in appropriate reasoning and imposing new standards for a community objection not defined in the AGB. This exacerbates the appearance of bias in this case.

- (ii) The Requester would not have approved Guido Tawil as Expert under any circumstances, had he disclosed his alignment of both direct and indirect interests with the IOC and SportAccord.
 - (iii) The Board may not have rejected the previous Reconsideration Request had the information about Dr. Guido Tawil's bias been known at the time.
 - (iv) The Ombudsman has specifically recommended to the Board that the decision of the Expert should be disregarded and there be a rehearing.
- c. *The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details.*

See point 10(a)(i) - (iii) above.

The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

⁵ <http://www.icann.org/en/news/in-focus/accountability/expected-standards>

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

N/A

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Signature

2 April 2014
Date

1b-Ref Mat-Attachment-B-Reconsideration Request 14-10.pdf

EXHIBIT 1



International Chamber of Commerce

The world business organization

International Centre for Expertise □ Centre international d'expertise

Case N°: EXP/471/ICANN/88

ICC EXPERT DECLARATION OF ACCEPTANCE AND AVAILABILITY, STATEMENT OF IMPARTIALITY AND INDEPENDENCE

Family Name(s): Tawil

Given Name(s): Guido Santiago

Please tick all relevant boxes.

1. ACCEPTANCE

I agree to serve as expert under and in accordance with ICANN's gTLD Applicant Guidebook, including the New gTLD Dispute Resolution Procedure ("**Procedure**"), the Rules for Expertise of the ICC ("**Rules**") including Appendix III to the ICC Rules and supplemented by the ICC Practice Note on the Administration of Cases. I confirm that I am familiar with these rules and documents. I accept that my fees and expenses will be fixed exclusively by the ICC International Centre for Expertise ("**Centre**") (Article 3 Appendix III to the ICC Rules).

NON-ACCEPTANCE

I decline to serve as expert in this case.
(If you tick here, simply date and sign the form without completing any other sections.)

2. AVAILABILITY

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this proceeding diligently, efficiently and in accordance with the time limits provided in the Procedure, subject to any extensions granted by the Centre pursuant to Article 21(a) of the Procedure.

.../...

ICC International Centre for ADR □ Centre international d'ADR de la CCI

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 30 52 Fax +33 (0)1 49 53 30 49

E-mail expertise@iccwbo.org Website www.iccexpertise.org

3. INDEPENDENCE AND IMPARTIALITY


(Tick one box and provide details below and/or, if necessary, on a separate sheet.)

In deciding which box to tick, you should take into account, having regard to Article 11(1) of the Rules and Article 13(c) of the Procedure, whether there exists any past or present relationship, direct or indirect, between you and any of the parties, their related entities or their lawyers or other representatives, whether financial, professional or of any other kind. Any doubt must be resolved in favour of disclosure. Any disclosure should be complete and specific, identifying *inter alia* relevant dates (both start and end dates), financial arrangements, details of companies and individuals, and all other relevant information.

Nothing to disclose: I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality.

Acceptance with disclosure: I am impartial and independent and intend to remain so. However, mindful of my obligation to disclose any facts or circumstances which might be of such a nature as to call into question my independence in the eyes of any of the parties or that could give rise to reasonable doubts as to my impartiality, I draw attention to the matters below and/or on the attached sheet.

Date: July 25, 2013

Signature: 

The information requested in this form will be considered by the ICC International Centre for Expertise solely for the purpose of your appointment. The information will remain confidential and will be stored in a case management database system. It may be disclosed solely to the parties and their counsel in the case referenced above for the purposes of that proceeding. According to Article 32 and, in particular, Article 40 of the French law "Informatique et Libertés" of 6 January 1978, you may access this information and ask for rectification by writing to the Centre.

EXHIBIT 2



International Chamber of Commerce

The world business organization

International Centre for Expertise • Centre international d'expertise

EXP/471/ICANN/88

SPORTACCORD (SWITZERLAND) vs/ DOT SPORT LIMITED (GIBRALTAR)

SPORTACCORD
Mr. Pierre Germeau
Contact Information Redacted

By email: Contact Information Redacted

FAMOUR FOUR MEDIA LIMITED
Mr. Peter Young
Contact Information Redacted

By e-mail: Contact Information Redacted

30 July 2013

Dear Sirs,

The Centre writes to you with reference to our dated 25 July 2013.

We inform you that the Centre has now proceeded with the appointment in replacement of the previous Expert, pursuant to Articles 7 and 11(5) of the Rules and has appointed

Mr. Guido Santiago Tawil
M. & M. BOMCHIL
Suipacha 268, 12th Floor
C1008AAF Buenos Aires
Argentina

Tel: Contact Information Redacted
Email:

as the sole member of the Panel in accordance with Article 13 of the Procedure.

.../...

ICC International Centre for ADR • Centre international d'ADR de la CCI

38 Cours Albert 1er, 75008 Paris, France

Tel +33 (0)1 49 53 30 52 Fax +33 (0)1 49 53 30 49

E-mail expertise@iccwbo.org Website www.iccexpertise.org

Chairman of the Standing Committee of the Centre

The Chairman of the Standing Committee appointed the Expert on 29 July 2013, pursuant to Article 7 of the Rules and Article and 3(3) of Appendix I to the Rules.

Expert's Availability and Independence

We enclose the Expert's ICC *curriculum vitae*, his professional *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

Please be advised that the Expert has declared that he is available and able to serve as sole member of the Panel in this matter.

Transfer of the File

The Centre will proceed with the transfer of the file to the Expert shortly.

Should you have any further questions, please do not hesitate to contact us.

Yours faithfully,



Špela Košak
Deputy Manager
ICC International Centre for Expertise

Enclosures:

- Expert's ICC *curriculum vitae*
- Expert's professional *curriculum vitae*
- Expert's Declaration of Acceptance and Availability, Statement of Impartiality and Independence

c.c. (*without enclosures*):

Mr. Guido Santiago Tawil

By email: Contact Information Redacted

1b-Ref Mat-Attachment-C-Reconsideration Request 14-10.pdf



INTERNATIONAL
OLYMPIC
COMMITTEE

Legal Affairs Department

Ref. No. ICA/2014/HMS/mlb
By e-mail only

To:
ICANN Board Governance
Committee
Members of the Board Governance
Committee

Lausanne, 30 April 2014

Request for Reconsideration 14-10 dot Sport Limited

Dear Members of the Board Governance Committee,

On April 2, 2014, dot Sport Limited, a division of Famous Four Media, filed with ICANN a Request for Reconsideration (“RFR”) concerning the International Chamber of Commerce (“ICC”) panel’s decision denying dot Sport Limited’s application for the .SPORT gTLD.¹ The International Olympic Committee (“IOC”), in support of SportAccord, respectfully requests that the Board Governance Committee recommend that dot Sport’s RFR be denied.

I. INTRODUCTION

In October 2013, SportAccord, a non-profit entity charged with overseeing multiple sports federations, prevailed in a Community Objection over competing commercial applicant Famous Four for the .SPORT gTLD.² The decision is well-reasoned, and followed the standards provided by ICANN for such determinations.³

Now, nearly six months after the decision, and having already been denied in a related RFR,⁴ Famous Four again seeks to undermine that decision. Famous Four cannot substantively appeal the decision through a RFR, so it has spent the ensuing months devising an argument alleging that the expert panelist who rendered the decision was not “impartial” and therefore that his decision cannot stand. Famous Four’s RFR should be denied for the following reasons.

¹ See Request 14-10: dot Sport Limited, *available at* <http://www.icann.org/en/groups/board/governance/reconsideration/14-10>.

² See SportAccord v. dot Sport Limited, ICC Case No. EXP/471/ICANN/88 (Oct. 23, 2013), *available at* <http://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-1174-59954-en.pdf>.

³ See *id.*

⁴ See Request 13-16: dot Sport Limited.

II. REASONS THE REQUEST FOR RECONSIDERATION SHOULD BE DENIED

A. *The Objection Should Have Been Raised Earlier In The Proper Forum, But Was Not, And Is Waived*

The ICC has impartiality rules in place, as required by the Applicant Guidebook. In particular, Article 7 of the ICC's Rules of Expertise, requires all potential experts to "sign a statement of independence and disclose in writing . . . any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties."⁵ From there, the ICC's rules give the parties an opportunity to comment on, or object to, the selected expert based on potential conflicts of interest.⁶

Here, as Famous Four acknowledges, the Panelist signed a statement of independence in compliance with Article 7 of the ICC's Rules of Expertise.⁷ Famous Four was provided with the Panelist's curriculum vitae when he was assigned to the case.⁸ Famous Four had previously objected to the appointment of another Panelist – demonstrating that it understood how and when to do so under ICC rules.⁹ In this case, even though it had the information necessary and a demonstrated ability and opportunity to raise its concerns, Famous Four did not object to the Expert based on any potential conflict of interest. Only now, after a decision unfavorable to it, and long after it has waived its ability to object under ICC rules, does Famous Four object to the appointed Panelist's ability to impartially render a decision. This untimely objection has been waived under ICC Rules, as reinforced by ICANN New gTLD Dispute Resolution Procedure, Article 13(d) ("The applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.").

B. *The Objection Lacks Sufficient Substantive Grounds*

Even if Famous Four had properly raised its objection, the objection would not be well-taken. As in Request 14-8, where the Requestor challenged the

⁵ See ICC Rules of Expertise, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_11.

⁶ See *id.*

⁷ See Request 14-10, pp. 8-10.

⁸ See ICC Case No. EXP/471/ICANN/88, p. 4 ("On July 30, 2013, the ICC Centre notified the Parties of the Expert's appointment. **It further sent the Parties the Expert's curriculum vitae** as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.") (emphasis added).

⁹ See *id.*, pp. 3-4 ("On June 21, 2013, the ICC Centre appointed Mr. Jonathan P. Taylor as expert in accordance with Article 13 of the Rules of Procedure and Article 9(5)(d) of the Rules for Expertise. On July 16, 2013, the ICC Centre acknowledged receipt of Applicant's objection to Mr. Taylor's appointment. On July 25, 2013, the ICC Centre informed the Parties that it had decided not to confirm the appointment of Mr. Taylor as Expert in the present case and, therefore that it would proceed with the appointment of another Expert.").

impartiality of the Expert Panelist assigned to the underlying Community Objection, any relationship between the Panelist and the prevailing Objector in this case is tenuous at best. In Request 14-8, the Requester claimed that the Expert had a “potential appearance of bias” because he “worked for Samsung,” which is a “strategic business partner” of Google, one of the Requestor’s competing applicants for .MUSIC.¹⁰

The BGC noted as follows:

[T]he Expert was retained by Samsung as an expert in an International Trade Commission investigation involving Samsung and Ericsson Inc. relating to electronic devices. The fact that Samsung and Google may have an agreement relating to the licensing of patents – which was entered into on January 26, 2014, six months after this matter was assigned to the Expert and a mere three-weeks before the Expert Determinations were issued simply fails to suggest that the Expert had a bias in favor of Google or against Requester.¹¹

In this case, according to Famous Four: the Expert Panelist works for a law firm that has a client that entered into an agreement with the IOC involving television broadcasting rights. Consequently, the Panelist is, at least, four times removed from any indirect connection:

Panelist → Law Firm → DirecTV → IOC → SportAccord.

The Panelist had no direct connection to or interest in SportAccord or the IOC, and Famous Four does not allege such a connection; rather, it alleges an indirect connection between the Panelist and the IOC, which is not a party to the underlying Community Objection. Further, the .SPORT Community Objection decision does not have any material effect on DirecTV.

The causal connection claimed by Famous Four is thus far too speculative and attenuated. If this little was sufficient to undermine a well-reasoned decision on the merits, almost all civil attorneys would be disqualified from practicing as expert panelists.

C. *Granting This Objection Would Undermine The Finality Of New gTLD Dispute Resolution Decisions*

In addition, the finality of all decisions would be threatened if losing parties like Famous Four were permitted to raise such tenuous RFRs long after a decision was rendered. Reconsideration is not a mechanism for direct, *de novo* appeal of

¹⁰ Request 14-8, p. 11.

¹¹ *Id.*, p. 12.

panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN.¹²

III. CONCLUSION

For these reasons, the IOC respectfully requests that the Board Governance Committee recommend that the RFR be denied. Should the BGC require any additional information or submissions from the IOC regarding this matter, please contact the undersigned.

Yours sincerely,



Howard M. Stupp
Director of Legal Affairs

¹² See, e.g., Request 13-7: DISH DBS Corp.

1b-Ref Mat-Attachment-D-Reconsideration Request 14-10.pdf

15 May 2014

Dr. Bruce Tonkin
Chair, ICANN Board Governance Committee

Re: Reconsideration Request 14-10 (Dot Sport Limited)

Dear Dr. Tonkin,

I am the Director General of SportAccord, and I am writing in response to Reconsideration Request (14-10) filed by Famous Four Media's subsidiary Dot Sport Limited (hereinafter FFM). It is my duty to respond on the behalf of the Sport community and explain why this latest FFM Reconsideration Request should be summarily dismissed along the same lines that the ICANN Board Governance Committee (BGC) properly dismissed FFM's first Reconsideration Request.

The present filing is nothing more than misstatements of facts mixed with veiled innuendos seeking to undermine the credibility of an international recognized jurist and ICC Expert panelist Dr. Guido Tawil. SportAccord will seek to shed light on some of the veiled innuendoes which FFM has made by citing to public facts.¹ SportAccord would also like to address a number of troubling procedural issues in connection with FFM's recent actions, e.g. multiple Reconsideration Request filings; failure of FFM to allow the Ombudsman to issue his final report before filing this second Reconsideration Request; there being no legal/procedural basis for the relief FFM is seeking; and the lengthy delay between bring this second Reconsideration Request and the underlying allegations at issue.

BACKGROUND

Based on its charter and in coordination with 108 members and other international Sport Governing Bodies, SportAccord decided to proactively apply for a .SPORT TLD on behalf of the global Sport community. One of the key aspects of this initiative was a recognition that the operation of the TLD had to be based on a solid framework with built in community-based accountability mechanisms to advance the values and ideals of Sport.

¹ Since SportAccord has not engaged in any ex-parte communications with Dr. Tawil, we are unaware if any of these allegations have been communicated to him. In the interest of openness and transparency, we have copied Dr. Tawil on this communication as we believe he should have the opportunity to defend himself against the serious allegations made against him.

On this basis, SportAccord issued a public call for proposals among potential registry operators interested in operating the .SPORT TLD in collaboration with SportAccord. One of the participants in this RFP was FFM who was represented by Mr. Geir Rasmussen. FFM was included in a short list of candidates to provide an in person presentation at SportAccord's offices at the Maison du Sport International in Lausanne, Switzerland. In the end, SportAccord selected another candidate from the shortlist and FFM was immediately informed of the outcome. FFM did not communicate with SportAccord or make any public announcement before submitting an ICANN TLD application for .SPORT in May 2012.

SportAccord was surprised to learn of FFM's pursuit of the .SPORT string as well as several other sport themed TLDs in its portfolio of applications: .RUGBY, .BASKETBALL, .FOOTBALL, .CRICKET, .HOCKEY, and .SOCCER. This behavior is hard to reconcile with FFM's claims of it being "an innocent party" having "lost large amounts of money" as a result of its "good faith" when it knew about the Sport community's commitment to the .SPORT string since as early as 2011.

SportAccord objected to FFM's ".SPORT" application and Donuts' ".SPORTS" application on behalf of the global Sport community. The objections were supported by explicit letters of opposition by 50 international sport federations, the IOC and other global sport bodies. Both .SPORT(S) community objections prevailed, as did SportAccord's "' .SPORT/.SPORTS" string confusion objection.

Following these adverse decisions, FFM has engaged in a pattern of vexatious and dilatory tactics with the sole purpose of delaying SportAccord from moving forward with its single community application.² All the while, FFM has moved forward with multiple generic strings from its portfolio of applications. The ICANN Board needs to do the right thing and summarily dismiss FFM's Reconsideration Request *again*, and then direct ICANN staff to issue a CIR to SportAccord.

FFM'S SECOND BITE AT THE RECONSIDERATION REQUEST APPLE

In FFM's first Reconsideration Request (13-16) filed last year, FFM previously challenged the impartiality of Dr. Tawil based upon him co-chairing a panel on the use of dispute resolution in sport hosting events. The BGC in rejecting FFM's allegations stated "the Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality. Rather, the Requester is challenging the merits of the Expert's disclosure. Such challenges should be brought to the ICC under the ICC Rules of Expertise, not through the Reconsideration process."

As the BGC noted in its 13-16 decision, FFM is familiar with the ICC rules regarding challenges to the appointment of a panelist as they successfully exercised them in connection with the initial appointment of Mr. Taylor. However, FFM did not exercise these rights at the time Dr. Tawil was appointed probably because there was no real basis then, as there is none today, to block his selection.

² FFM's vexatious and dilatory tactics include but are not limited to: (i) FFM's original challenge to Mr. Taylor as a panelist; (ii) FFM's first Reconsideration Request (13-16); (iii) FFM's complaint to the Ombudsman during the Singapore ICANN meeting; and (iv) Failing to allow the Ombudsman to complete his investigation prior to filing this second Reconsideration Request (14-10).

SportAccord respectfully submits that FFM's second Reconsideration Request should be summarily denied by the BGC, once again, for being **procedurally inadmissible** on the following grounds:

- (i) This new Reconsideration Request is clearly untimely under ICANN's Bylaws; and
- (ii) FFM's claim that Dr. Tawil may have had a conflict of interest is not a basis for reconsideration; and any challenge to Dr. Tawil's impartiality should have been brought to the ICC under the ICC Rules of Expertise, not through a reconsideration process.

FFM's Reconsideration Request Is Untimely

The Bylaws make clear that Reconsideration Requests must be submitted within fifteen (15) days after "the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale." (Bylaws, Art. IV, § 2.5.) The specific actions that FFM requests to be reconsidered are:

Board's Rejection³ of Reconsideration Request 13-16 on _____ ;
Community Objection Determination by expert Dr. Tawil on **23 October 2013**; and/or
Decision of International Chamber of Commerce ("ICC") of **29 July 2013** to appoint Dr. Tawil as expert.

The Reconsideration Request was received on **2 April 2014**, significantly later than the maximum fifteen (15) days from the date upon which the challenged resolutions were first published, thereby rendering this filing untimely under the ICANN Bylaws. Aware of this deficiency, FFM's conveniently claims that they discovered the existence of such conflict on 25 March 2014.

This appears to a patently false assertion as all relevant information was publicly known and available long before Dr. Tawil's appointment, and any new information cited by FFM (namely the latest round of adjudications of Olympic broadcasting rights) simply match the previously known fact that some clients of M.&M. Bomchil Abogados need to negotiate sport broadcasting rights in the normal course of their business.

FFM's argument about possible expert bias is extremely attenuated and based on information that was in the public domain long before the Expert's appointment. It is therefore impossible to argue that there is any reasonably likelihood of Dr. Tawil providing a false declaration or any information of sufficient weight to justify an exceptional extension of the time frames allowable under the ICANN bylaws. In conclusion, FFM's Reconsideration Request is untimely and should be denied on this basis alone. Notwithstanding this, next we will discuss that even if exceptional allowances were made to accept FFM's Request as timely, the stated ground for the Request do not support reconsideration.

Dr. Tawil's Allegedly Conflict Of Interest Is Not a Basis for Reconsideration

³ <https://www.icann.org/en/groups/board/governance/reconsideration/13-16/determination-sport-08jan14-en>

Under Art. 13 (c) of Attachment to Module 3 of the ICANN Applicant Guidebook, “[a]ll Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.” Paragraph (d) of the same Article states that “[t]he applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.” According to Art. 4 (b) (iv) of Attachment to Module 3 of the ICANN Applicant Guidebook, “[f]or a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.” Thus, any challenge to Dr. Tawil’s impartiality should have been brought to the ICC under the ICC Rules of Expertise, not through a reconsideration process.

FFM is perfectly familiar with the ICC rules regarding challenges to the appointment of a panelist. It challenged the initial appointment of Mr. Taylor, arguing that “the panelist must not be a sport lawyer” - hardly a convincing argument for the choice of an expert about the Sport community. The ICC nevertheless went along and appointed Dr. Tawil.

FFM did not challenge the appointment of Dr. Tawil. Now, after losing the objection, FFM falsely alleges for the second time that its new Reconsideration Request is based on “new” information. There is no relevant new information. It was sufficiently clear at the time from readily available public information⁴ that M.&M. Bomchil Abogados has a TMT (Technology, Media and Telecoms) practice and that Mr. Marcelo Bombau is President of TyC, that TyC is partly owned by DirectTV, etc.

FFM itself mentions “M.&M. Bomchil Attorneys Firm Brochure from 2008” on page 7 of the Request. The long-term relationship between M.&M. Bomchil Abogados, Mr. Marcelo Bombau, TyC and DirectTV have been advertised so prominently and so for so long that nobody can reasonably argue to have just recently “discovered” them. These are companies with a necessary and obvious interest in sport broadcasting. Olympic live broadcasting occurs every two years, so it is not “new information” that they negotiate the required rights ahead of the respective games.

The fact that some customers of M.&M. Bomchil Abogados are strongly dependent on broadcasting rights has been public information long before Dr. Tawil was appointed. Bomchil customers have been assigned sport broadcasting rights before, not only for the Olympics, but also for other sports represented by many of the 50 international sport federations who explicitly opposed FFM’s bid for the .SPORT TLD.

The most pressing suspicion in this context is that FFM was keenly aware of M.&M. Bomchil Abogados’ sports-broadcasting-related client relationships at the time it decided not to challenge Dr. Tawil’s appointment. FFM’s previous challenge of Mr. Taylor⁵ on the grounds of him being a “sports

⁴ The ready availability of the information at the time is evidenced among other things by relevant Wikipedia articles’ version history prior to July 2013, such as http://en.wikipedia.org/w/index.php?title=Torneos_y_Competiciones&oldid=524791765 from December 2012. M.&M. Bomchil Abogados’ own web site not only described TMD as one of its the areas of specialization, but carried links to external reviews, such as <http://www.chambersandpartners.com> or <http://www.legal500.com/c/argentina> .

⁵ Mr Taylor’s response in the ICC questionnaire was identical to that of Dr. Tawil. When challenging Mr. Taylor’s appointment, FFM did not argue that Mr. Taylor failed to make a declaration. Now FFM pretends that

lawyer” was indeed at odds with FFM’s objection response arguments about the purported non-existence of a sport community.

MISSTATEMENTS OF FACTS

There are several misstatements of facts in FFM’s filing including but not limited to:

- (i) SportAccord is NOT controlled by the IOC.
- (ii) There is no direct relationship between DirecTV and the IOC.
- (iii) There are no irregularities in Dr. Tawil’s decision.

SportAccord Is a Separate and Independent Entity from the International Olympic Committee

One of the more egregious misstatement of fact in FFM’s Reconsideration Request is that the SportAccord is effectively controlled by the International Olympic Committee (IOC). SportAccord is a separate legal entity with its own offices, staff and budget. Although SportAccord and the IOC offices are both located in Lausanne, Lausanne is touted as the home of international sport and is home to over 30 International and European sports Federations. Unlike the IOC which represents a total 35 Olympic federations (28 summer and 7 winter), SportAccord has a much wider remit and obligation to the global sport community and its 108 members (92 federations and 16 organizations).

Another misstatement by FFM is the claim that the IOC appoints six (6) out of the eight (8) SportAccord Council members. The SportAccord Council is an executive body consisting of eight (8) members: the President which is selected by the General Assembly; two (2) members designated by the Association of Summer Olympic International Federations (ASOIF); one (1) member designated by the Association of International Olympic Winter Sport Federations (AIOWF); two (2) members designated by the Association of IOC - Recognized International Sports Federations (ARISF); one (1) member designated by the Full Members that do not belong to the above groups; and one (1) member designated by the Associate Members. The ASOIF, AIOWF and ARISF are separate legal entities which are independent of the IOC and each which have their own procedure to designate its representatives.

SportAccord does not deny that it has a collaborative working relationship with the IOC and other Sport governing bodies. However, SportAccord respectfully submits that this collaborative working relationship is no different than the common shared interest which many in the ICANN community have with other key internet stakeholders, e.g. IAB, IETF, RIRs, etc.⁶ ICANN’s own legal counsel and staff should be able to attest to the separation of SportAccord and the IOC based upon ICANN’s in-

Dr. Tawil failed to make a declaration although the circumstances are identical with respect to the respective law firms’ customer portfolio.

⁶ See for example the preliminary ICANN Board report from 27 March 2014, “the IETF is a good example of collaboration between ICANN and the IETF communities.”

<http://www.icann.org/en/groups/board/documents/prelim-report-27mar14-en.htm>

depth discussion with the IOC in connection with the reservation of the Olympic marks at both the top and second level domain.

In its disparaging choice of words, FFM describes SportAccord as “inextricably linked” to the IOC. This carries a deliberate innuendo designed to instill the suspicion of covert or undesirable ties. The essence of the relationship between the IOC and SportAccord is that both are accountable to the Sport community and have solid institutional governance to guarantee such accountability.

There Is No Direct Relationship Between the IOC And DirecTV

The underpinnings of FFM’s allegation that Dr. Tawil falsified his panelist declaration is an attenuated claim of a conflict of interest based on another lawyer in Dr. Tawil’s firm negotiating a deal on behalf of a firm client (DirecTV) for Olympic broadcast rights. The broadcast rights that DirecTV secured constitute sub-license through América Móvil.⁷

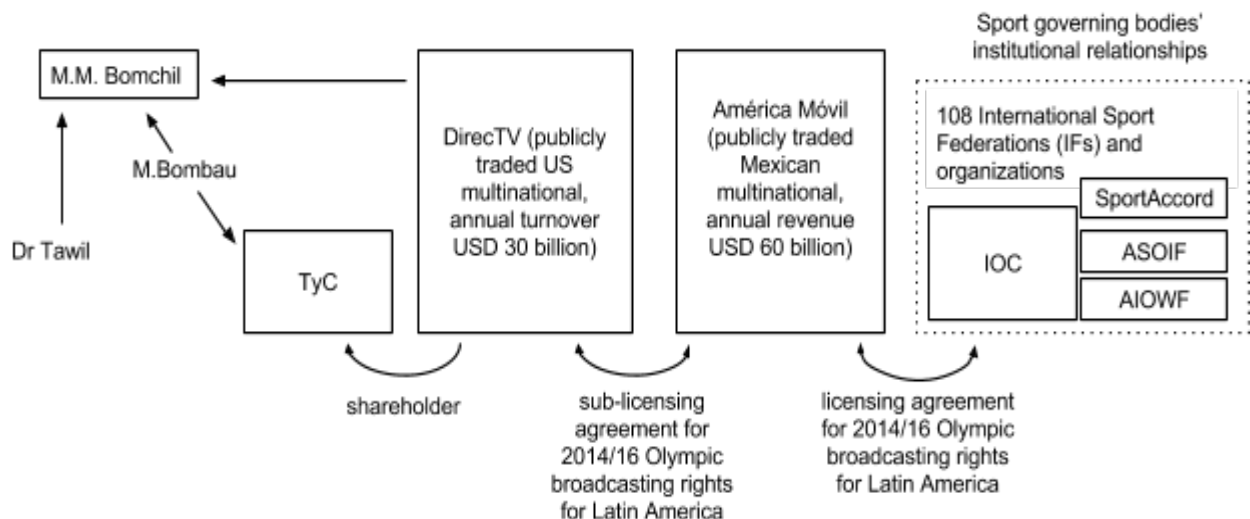


Diagram of relationships in which FFM purports to see new evidence of a potential conflict of interest linking Dr. Tawil to SportAccord. It is hard to imagine how Dr. Tawil, specialized in arbitration and administrative law, as one of 18 partners in an Argentinian law firm, could have been a factor in negotiations conducted by a Mexican multinational with the IOC over broadcasting rights in Latin America sublicensed to a large US company. FFM does not assert (despite such deliberate innuendo) that the Expert had any part in the broadcasting rights negotiations.

It is important to note that broadcasting rights licensing agreements are arms-length relationships in which a sports governing body (such as the IOC) acts on behalf of the sport community, or the given

⁷ The IOC announced the granting of the 2014 & 2016 Olympic broadcast rights to América Móvil on 22 March 2014, see <http://www.olympic.org/news/ioc-awards-2014-2016-broadcast-rights-in-latin-america/194907> . DirecTV was the *third* sub-license of these broadcast rights in a deal with América Móvil announced on 7 February 2014, see http://www.sportspromedia.com/news/america_movil_sells_more_olympics_rights/

subset of the Sport community based on an objective process. This is comparable to ICANN entering into a registry agreement with a registry operator, or contracting with a dispute resolution provider. If it was enough to show a chain of unrelated relationships as proof of likely bias, then most of ICANN's panels would be "biased" because ICANN itself has contracts with some parties pleading before those panels.

Give FFM's propensity to manufacture conflicts and controversy out of thin air. SportAccord would like to proactively identify the following issues. First, in the IOC's 30 April 2014 letter to the ICANN BGC, the IOC directly responded to FFM's allegation of the conflict being between DirecTV and the IOC and does not address the existence of América Móvil. Second, in the firm brochure which FFM previously cited, it appears that América Móvil is also a client of M.&M. Bomchil Abogados. Whether América Móvil or DirecTV are still clients of the firm or whether they represented them in the current Olympic broadcast rights deal is unknown. Only Dr. Tawil and his firm can answer these questions. Notwithstanding the status of these relationships, the link to Dr. Tawil being a panelist in a proceeding brought by SportAccord is so remote that there should be no basis for the BGC to grant the relief FFM is seeking.

There Were No Irregularities in Dr. Tawil's Determination

In a press release issued by FFM just before the filing of this Reconsideration Request, FFM in addition to raising claims about Dr. Tawil's impartiality also claimed that there were a number of irregularities in his decision.⁸ SportAccord respectfully submits that if the entire body of Community Objections involving SportAccord and related International Sport Federations is looked at, it will be clearly seen an established body of precedent and no irregularities as alleged by FFM.

SportAccord v Steel Edge, LLC⁹

SportAccord prevailed in a related ICC Community Objection filed against portfolio applicant Steel Edge, LLC regarding their .SPORTS application. In this complaint SportAccord raised the same issues to those raised in the FFM complaint. The Expert appointed by the ICC in this case was Jonathan Taylor, a partner in the international law firm Bird & Bird. In addition to co-chairing the firm's sport's law practice group, Mr. Taylor is widely recognized as one of the world's leading sports lawyers, advising nationally and internationally on cutting-edge commercial, regulatory and contentious issues across all major sports.

The International Rugby Board

The International Rugby Board (IRB) filed two ICC community objections against dot Rugby Limited¹⁰ (another FFM subsidiary) and Atomic Cross, LLC¹¹ (another Donuts subsidiary). The ICC in this case

⁸ See <http://www.famousfourmedia.com/2014/03/statement-concerning-sport/>

⁹ See <http://newgtlds.icann.org/sites/default/files/drsp/27jan14/determination-1-1-1614-27785-en.pdf>

¹⁰ See <http://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1206-66762-en.pdf>

¹¹ See <http://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1612-2805-en.pdf>

appointed the same expert Mark Kantor for both proceedings. Similar to the Experts in the .SPORT and .SPORTS proceedings, Mr. Kantor ruled in favor of the IRB finding that the rugby community was clearly delineated and that there was a likelihood of material detriment in connection with the respective applications. Mr. Kantor, as a former partner Milbank, Tweed, Hadley & McCloy's Corporate and Project Finance Groups appeared to have no direct or indirect ties to the sport community.

United States Polo Association v. Ralph Lauren Corporation¹²

The United States Polo Association (USPA) filed an ICC community objections against Ralph Lauren Corporation's .POLO application. The ICC appointed Professor Burkhard Hess as the Expert in this proceeding, who ruled that the USPA had successfully established the four necessary elements set forth in the Community Objection standard. Unlike the other sport related community objections in which the Objector was either directly or indirectly associated with a competing application, USPA appeared to have no association with any competing application. Similar to Mr. Kantor and Dr. Tawil, Professor Hess appears to have no direct relationship with the sports community.

Fédération Internationale de Ski v Wild Lake, LLC¹³

The Fédération Internationale de Ski (FIS) filed and prevailed in a Community Objection filed against Wild Lake, LLC (another subsidiary of Donuts). The Expert appointed by the ICC, Mr. Taylor, ruled in favor of FIS consistent with the principles cited in the other referenced ICC Community decisions.

Fédération Internationale de Basketball

The only sports International Federation to file an ICC Community Objection and lose was the Fédération Internationale de Basketball (FIBA). Similar to the .SPORT/.SPORTS and .RUGBY proceedings, FIBA filed objections against portfolio applicants Donuts (Little Hollow, LCC)¹⁴ and FFM (dot Basketball Limited)¹⁵. The ICC appointed a single Expert, Jennifer Kirby, for these two proceedings. Although Ms. Kirby appeared to have no direct association with the sport community, upon information and belief she had served as an Ad Hoc Clerk in The Court of Arbitration of Sport.

¹² See <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1125-1032-en.pdf>

¹³ See <http://newgtlds.icann.org/sites/default/files/drsp/27jan14/determination-1-1-1636-27531-en.pdf>

¹⁴ See <http://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1355-53565-en.pdf>

¹⁵ See <http://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1199-43437-en.pdf>

Summary of ICC Community Objections

There have been a total of seventy (70) ICC Community Objections decisions rendered by ICC Experts, of which only fifteen (15) Objectors prevailed.¹⁶ Out of these fifteen successful objectors, forty percent (40%) of these successful Community Objections involving four separate ICC Experts were associated with members of the global sport community. Therefore FFM's claims of irregularities in Dr. Tawil's decision is unfounded as the clear majority of Panelists have found in favor of global sport community members based on similar arguments regarding delineation and a material likelihood of detriment.

The entire underpinning of FFM's arguments is that the only explanation for the irregularities in Dr. Tawil decision is FFM's alleged conflict of interest. However, given that there are no irregularities with Dr. Tawil's finding, FFM's allegations of a conflict of interest are simply a Red Herring.

CONCLUSION

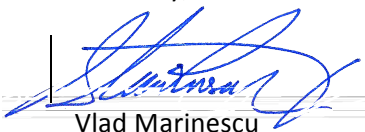
FFM's second Reconsideration Request should be summarily denied by the BGC, once again, on the basis of it being **procedurally inadmissible** as well as **baseless** and **frivolous**. It represents the latest strategy in a pattern of vexatious and abusive delaying actions by FFM.

SportAccord respectfully requests that the BGC, and or the New gTLD Program Committee, dismiss this Reconsideration Request.

Based on the foregoing, FFM's Application for .SPORT should not proceed. The same is true for the third application in the contention set, .SPORTS. Therefore, the contention set should be deemed resolved that the remaining community-based application for .SPORT should immediately proceed to the next relevant stage (Section 1.1.2.9 Guidebook).

Should any of the parties copied on this communication have any questions or comments please do not hesitate to contact me.

Sincerely,



Vlad Marinescu

CC: Ombudsman
ICC
Dr. Tawil

¹⁶ See <http://newgtlds.icann.org/en/program-status/odr/determination>

1b-Ref Mat-Attachment-E-Reconsideration Request 14-10.pdf

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-10

21 JUNE 2014

The Requester, dot Sport Limited, seeks reconsideration of: (i) the Expert Determination, and ICANN's acceptance of that Determination, upholding SportAccord's Community Objection to the Requester's application for .SPORTS; (ii) the ICC's¹ designation of the Expert Panelist who presided over the underlying objection; and (iii) the BGC's² Determination denying Reconsideration Request 13-16.

I. Brief Summary.

The Requester and SportAccord both applied for .SPORTS and are in the same contention set. SportAccord filed a Community Objection to the Requester's application. The Expert Panel ("Expert" or "Panel") rendered an Expert Determination in favor of SportAccord. The Requester then filed Reconsideration Request 13-16, suggesting that, among other reasons, the Expert allegedly violated established policy or process by failing to disclose material information relevant to his appointment. On 8 January 2014, the BGC denied Request 13-16, finding, among other things, that the Requester had provided no evidence demonstrating that the Expert had failed to follow the applicable ICC procedures for independence and impartiality.

The Requester, in this second Reconsideration Request for the same matter, now claims that on 25 March 2014, it discovered additional evidence that the Expert had a conflict of interest. Specifically, the Requester claims that it just recently discovered that the Expert now has, and

¹ International Centre for Expertise of the International Chamber of Commerce

² Board Governance Committee.

previously has had, financial and professional relationships, both direct and indirect, with an entity that is “related” to SportAccord. The Requester claims the Expert should have, but did not disclose those relationships in the underlying objection proceeding.

The Requester’s claims are unsupported. First, the Request is untimely. Request 14-10 challenges Board and staff actions that occurred on or prior to 13 January 2014, yet was received on 2 April 2014, well past the 15-day deadline to file a reconsideration request. While the Requester claims that this second Reconsideration Request is appropriate because the Requester only recently discovered the Expert’s alleged conflict of interest, as is discussed below, such a claim does not justify an untimely reconsideration request. Second, the allegedly newly discovered information relating to a purported conflict of interest does not support reconsideration. Therefore, the BGC recommends that the Request be denied.

II. Facts.

A. Background Facts.

Both dot Sport Limited (“Requester”) and SportAccord applied for .SPORTS and are in the same contention set.

On 13 March 2013, SportAccord filed a Community Objection (“Objection”) to the Requester’s application, asserting that there was “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2e.)

On 29 July 2013, the ICC appointed Dr. Guido Santiago Tawil as the expert (“Expert” or “Panel”) to consider SportAccord’s Objection and notified the parties of the appointment.

On 23 October 2013, the Panel rendered an Expert Determination in favor of SportAccord (“Expert Determination”).

On 2 November 2013, the Requester filed Reconsideration Request 13-16, seeking reconsideration of the Expert Determination on the grounds that: (i) the Panel applied the wrong standard in contravention of established ICANN policy or process; and (ii) the Expert failed to disclose material information relevant to his appointment in violation of established policy or process.

On 8 January 2014, the Board Governance Committee (“BGC”) denied Request 13-16.

On 25 March 2014, the Requester purportedly discovered additional facts regarding an alleged commercial relationship between the Expert and the International Olympic Committee (“IOC”), an entity that the Requester contends “effectively control[s]” SportAccord.³ (Request, § 8, Pg. 5.) Specifically, the Requester claims that it discovered that: (i) one of the Expert’s clients, DirecTV, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (after the Expert Determination and the BGC’s Determination on Request 13-16 were issued); and (ii) a partner in the Expert’s law firm is the president of Torneos y Competencias S.A. (“TyC”), a company which has a history of securing Olympic broadcasting rights and of which DirecTV Latin America is the principal shareholder. The Requester forwarded that information to the Ombudsman, with whom it had previously filed a complaint.

On 31 March 2014, the Ombudsman issued a draft report on the Requester’s complaint, which was later withdrawn pending consultation with other relevant parties.

³ In support of its contention, the Requester offers only that (1) two of the six members of SportAccord’s Executive Council are also members of the IOC, and (ii) “[f]ive of the eight members of the Council of SportAccord are directly appointed by three out of the only four sport associations officially recognized by the IOC on their website.” (Request, § 8, Pg. 5.) The Requester also points out that SportAccord’s website states that SportAccord enjoys a “close collaborative relationship” with the IOC. (*Id.*)

On 2 April 2014, the Requester filed Reconsideration Request 14-10, seeking reconsideration of: (i) the denial of Reconsideration Request 13-16; (ii) the Expert Determination; and (iii) the ICC's appointment of the Expert.⁴

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 been advised that the Ombudsman sought confirmation from the Requester 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 Requester confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this Reconsideration Request rather than the Ombudsman's request.

B. The Requester's Claims.

The Requester makes three claims. First, the Requester claims that the BGC failed to consider material information in rejecting Reconsideration Request 13-16, namely the allegedly newly-discovered information regarding the Expert's alleged conflict of interest. Second, the Requester claims the Expert violated ICANN policy and process by failing to reveal his alleged conflict of interest. Finally, the Requester claims that the ICC violated ICANN policy and process in appointing the Expert.

C. Relief Requested.

The Requester asks that ICANN: (i) revoke the designation of authority of Guido Tawil as Expert for undisclosed conflict of interest and/or obvious bias; (ii) reject the Expert

⁴ Although the Requester only requests reconsideration of the ICC's appointment of the Expert, it also appears to object to the ICC's response to the Requester's newly-discovered information, stating that the Requester's representative "wrote to the ICC on two occasions to request that the ICC question [the Expert]" about the alleged conflict of interest, but that the ICC "repeatedly declined to do so." (Request, § 8, Pg. 5.) However, this claim is untimely, and the Requester has not identified any policy or procedure that the ICC allegedly violated that would support reconsideration.

Determination and refund the Requester the ICC fees it paid; (iii) instruct the ICC to give a full account of how the Expert's resume came to be considered by the ICC and what the consideration process entailed; and (iv) instruct the Expert to give an account of why he failed to disclose his alleged conflict of interest. (Request, § 9, Pg. 12.)

Alternatively, the Requester asks that the Objection be referred for *de novo* review to a new panel composed of three experts. (*Id.*)

III. Issues.

In view of the claims set forth in Request 14-10, the issues are as follows:

- A. Whether the Board failed to consider material information in rejecting Reconsideration Request 13-16, namely the allegedly newly-discovered information regarding the Expert's alleged conflict of interest;
- B. Whether the Expert violated any ICANN policy and process by failing to disclose his alleged conflict of interest; and
- C. Whether the ICC violated any ICANN policy and process in appointing the Expert.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁵ (Bylaws, Art. IV, § 2.) Requester is challenging both Board

⁵ Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

and staff action or inaction. Dismissal of a request for reconsideration is appropriate if the BGC recommends, and the Board or the NGPC⁶ agrees, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws for challenges of a Board or staff action or inaction. (Bylaws, Art. IV, § 2.9.)

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁷

Reconsideration requests must be submitted within fifteen days of either “the date on which information about the challenged Board action is first published in a resolution [including rationale]” or “the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action.” (Bylaws, Art. IV, § 2.5.)

V. Analysis and Rationale.

A. The Request is Untimely

The Request is untimely. Reconsideration requests must be submitted within 15 days of either “the date on which information about the challenged Board action is first published in a resolution [including rationale]” or “the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action.” (Bylaws, Art. IV, § 2.5.) The Requester seeks reconsideration of the appointment of the Expert, and of the Expert Determination (which is to be evaluated as a staff action or inaction) that was issued on

⁶ New gTLD Program Committee.

⁷ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

23 October 2013. The Requester also seeks reconsideration of the BGC's determination on Reconsideration Request 13-16, which was issued on 8 January 2014 and posted on 13 January 2014. The instant Request, however, was received on 2 April 2014, over six months after the Expert was appointed, nearly six months following the issuance of the Expert Determination, and nearly three months following the BGC's determination on Request 13-16.

The Requester 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. (*Id.*, § 5, Pg. 2.) Specifically, Requester 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 the 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 Requester 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." (*Id.*, § 8, Pg. 5-8.)

The Requester's argument does not support reconsideration. The Requester 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 Requester 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). Requester'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 Requester'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.

The Requester does not explain why it failed to discover the alleged conflicts earlier. Because the Requester could have become aware of the alleged conflicts earlier, the Requester's belated discovery of publicly-available information does not justify tolling the 15-day time limit. (Bylaws, Art. IV, § 2.5; *see also id.* at Art. IV, § 2.2 (reconsideration based on alleged failure to consider material information is inappropriate where the requester could have submitted, but did not submit, the information for the Board's consideration).)

Notwithstanding the foregoing, which alone is sufficient basis to deny this Request, the allegedly newly-discovered information does not support reconsideration, for the reasons discussed below.

B. The “Newly-Discovered” Evidence Does Not Support Reconsideration.

The Requester cites to two pieces of “newly-discovered” evidence that allegedly establish the Expert's conflict of interest: (1) the DirecTV Contract; and (2) the TyC Relationship. Neither supports reconsideration.⁸

1. The DirecTV Contract is Not Evidence of a Conflict of Interest Sufficient to Support Reconsideration.

⁸ In support of its Request, the Requester references a 31 March 2014 communication the Ombudsman sent to the Board regarding the Expert's alleged conflict of interest, in which the Ombudsman expressed concern and recommended “a rehearing of the objection with a different expert appointed.” (Request, § 8, Pg. 11.) However, the Ombudsman's communication, by itself, does not support reconsideration because it does not constitute Board action. Moreover, the Ombudsman's communication has subsequently been withdrawn. As such, it would be premature for the BGC to consider the Ombudsman's comments on any alleged conflict of interest issues.

In support of its claim that there is a “direct commercial relationship” between the IOC and the Expert, the Requester relies on the DirecTV Contract, stating that “on 7 February 2014, just 3 months after having provided his decision in SportAccord v. dot Sport Limited EXP 471/ICANN/88[,] Direct TV[, one of the Expert’s clients,] secured a highly lucrative and sought after broadcasting rights deal covering Latin America for the 2014 winter Olympic Games in Sochi, Russia and the 2016 summer Olympic Games in Rio de Janeiro, Brazil.” (*Id.*, § 8, Pg. 7.) The Requester concedes that the purported “direct commercial relationship” arose more than three months *after* the Expert Determination was rendered on 23 October 2013. The Requester does not even attempt to establish that the belated 7 February 2014 DirecTV Contract somehow affected the Expert’s 23 October 2013 Determination. As a result, the Requester’s claim that the Expert or the ICC violated established processes or procedures by failing to disclose this information at the time of the Expert’s appointment is not supported because the DirecTV Contract did not exist until well after the Expert was appointed and after the Expert Determination was issued.

The BGC likewise could not have considered this information on 8 January 2014, when it rendered its determination on Request 13-16, because the DirecTV Contract had not yet been executed. Because the Requester has failed to demonstrate that the Expert or the ICC violated established policies or procedures or that the BGC failed to consider material information, reconsideration is not appropriate. (Bylaws, Art. IV, § 2.)

2. The TyC Relationship Does Not Support Reconsideration.

The Requester also alleges a “newly discovered” conflict of interest based on the TyC Relationship. (Request, § 8, Pgs. 7-8.) Specifically, the Requester claims that Direct TV Latin America is the principal shareholder of TyC, another sports broadcasting firm in the Latin

American region. (*Id.*, § 8, Pg. 7.) The Requester states that TyC is “a major client of M&M Bomchil law firm,” where the Expert is a partner. (*Id.*) The Requester further states that the President of TyC is also a Senior Partner in M&M Bomchil and “is therefore a business partner of Guido Tawil [the Expert].” (*Id.*) The Requester alleges the existence of a conflict of interest based on its claim that TyC “has a longstanding business relationship with IOC having secured broadcasting rights on 5 consecutive occasions since the Atlanta Games in **1996**,” and that TyC “most recently won the Argentinean television rights for the Vancouver 2010 Winter Olympics and London 2012 Olympic Games.” (*Id.* at § 8, Pg. 8 (emphasis added).)

In this regard, the Requester claims that the Expert should have disclosed the TyC Relationship and, having failed to do so, has violated Section 2.4.3 of the Guidebook. (*Id.* at § 10, P. 13.) The Requester’s claim does not support reconsideration. Section 2 of the Guidebook “describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.” Section 2.4.3 of the Guidebook, upon which the Requester relies, sets forth the “Code of Conduct Guidelines for Panelists” for purposes of the initial evaluation process for new gTLD applications. The Expert that the Requester challenges here was not appointed pursuant to Section 2.4.3 of the Guidebook. Instead, the Expert was appointed to hear a community objection filed by SportAccord. The selection of expert panels for purposes of an objection proceeding, such as the one invoked by SportAccord here, is governed by a different section of the Guidebook, namely Section 3, which discusses dispute resolution procedures.

Specifically, Section 3.4.4 of the Guidebook is the relevant provision that governs the selection of expert panels for purposes of the objection procedures at issue here. Section 3.4.4 provides that the ICC will “follow its adopted procedures for requiring such independence,

including procedures for challenging and replacing an expert for lack of independence.”

(Guidebook, Section 3.4.4.) The ICC Rules of Expertise would therefore govern any challenges to the independence of experts appointed to evaluate community objections. Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment or that the ICC failed to require the Expert to do so. As the BGC noted in its determination on Request 13-16, the 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. (13-16 Determination at Pgs. 12-13.) As such, reconsideration is not appropriate with respect to the Expert’s disclosure.

Reconsideration is also unwarranted with respect to the BGC’s failure to consider the TyC Relationship in its determination on Request 13-16. The Requester failed to submit evidence of the alleged conflict of interest based on the TyC Relationship to the BGC for consideration in support of Reconsideration Request 13-16. Reconsideration is appropriate for “actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, *except where the part submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of the action or refusal to act.*” (Bylaws, Art. IV, § 2.2(b)) (emphasis added). As discussed above, the TyC Relationship appears to be decades-old, and the Requester gives no explanation for why it could not have submitted information regarding the relationship to the BGC at the time the BGC considered Request 13-16. Because the Requester did not submit the evidence for the BGC’s consideration with Request 13-16, the BGC was not able to consider the alleged conflict in its determination of that request. The Requester’s failure to provide the evidence to the

BGC's consideration does not constitute a failure on the part of the BGC to consider material evidence and does not constitute a basis for reconsideration of Request 13-16.

VI. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore recommends that Reconsideration Request 14-10 be denied without further consideration.

In terms of timing of the BGC's Recommendation, it notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (Bylaws, Art. IV, § 2.16.) To satisfy the thirty-day deadline, the BGC would have to have acted by 2 May 2014. Due to the Requester's invocation of multiple accountability mechanisms on parallel tracks, including the complaint the Requester lodged with the Ombudsman and the instant Reconsideration Request, additional time was required to confer with the Requester and to clarify which accountability mechanism the Requester intended to pursue, delaying of the BGC's consideration of this matter. Moreover, due to the volume of Reconsideration Requests received within recent months, the first practical opportunity for the BGC to take a decision on this Request was on 21 June 2014; it was impractical for the BGC to do so sooner. Upon making that determination, ICANN staff notified the Requester of the BGC's anticipated timing for its review of Request 14-10.

1b-Ref Mat-Attachment-F-Reconsideration Request 14-10.pdf

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/471/ICANN/88

SPORTACCORD

(SWITZERLAND)

vs/

DOT SPORT LIMITED

(GIBRALTAR)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**INTERNATIONAL CENTRE FOR EXPERTISE
INTERNATIONAL CHAMBER OF COMMERCE**

**SPORTACCORD
(Switzerland)**

v.

**DOT SPORT LIMITED
(Gibraltar)**

EXP/471/ICANN/88

EXPERT DETERMINATION

By

Prof. Dr. Guido Santiago Tawil

This document is an original of the Expert Determination rendered in conformity with Article 21 of the ICANN New gTLD Dispute Resolution Procedure

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TABLE OF ABBREVIATIONS

| | |
|-------------------------|--|
| Applicant | dot Sport Limited |
| Appointed Expert | The Appointed Expert as defined in Section II of this Expert Determination |
| DRSP | Dispute Resolution Service Provider |
| GNSO | ICANN Generic Names Supporting Organization |
| gTLD | generic Top-Level Domain |
| ICANN | The Internet Corporation for Assigned Names and Numbers |
| ICANN Guidebook | Module 3 of the ICANN's gTLD Applicant Guidebook, version dated June 4, 2012. |
| ICC | The International Chamber of Commerce |
| ICC Centre | The International Centre for Expertise of the International Chamber of Commerce |
| ICC Practice Note | ICC Practice Note on the Administration of Cases |
| ICC Rules for Expertise | The Rules for Expertise of the International Chamber of Commerce in force as from January 1 st , 2003 |
| Objector | SportAccord |
| Parties | SportAccord and dot Sport Limited |
| Rules of Procedure | The ICANN's Attachment to Module 3 – New gTLD Dispute Resolution Procedure |

EXPERT DETERMINATION

1. In accordance with Article 21 of the New gTLD Dispute Resolution Procedure (“Rules of Procedure”), the Appointed Expert renders this Expert Determination.

I. The Parties

A. Objector

2. Objector in these proceedings is SPORTACCORD (“SportAccord” or “Objector”), an association established according to the laws of Switzerland, domiciled at Contact Information Redacted

3. In these proceedings, Objector is represented by:

Mr. Pierre Germeau
SportAccord
Contact Information Redacted

4. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

B. Applicant

5. Applicant in these proceedings is DOT SPORT LIMITED (“dot Sport Limited” or “Applicant”), a company established according to the laws of Gibraltar, domiciled at :

Contact Information Redacted

6. In these proceedings, Applicant is represented by:

Mr. Peter Young
Contact Information Redacted

Contact Information Redacted

7. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

II. The Appointed Expert

8. On July 29, 2013, the Chairman of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the "ICC Centre") appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Articles 7 and 11(5) of the the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 (the "ICC Rules for Expertise"). The Appointed Expert contact details are:

Guido Santiago Tawil
M & M Bomchil
Contact Information Redacted

9. Managers of the ICC Centre who are in charge of the file are:

Hannah Tümpel (Manager)
Spela Kosak (Deputy Manager)
Contact Information Redacted

III. Summary of the Procedural History

10. On March 13, 2013, SportAccord filed an Objection pursuant to Module 3 of the gTLD Applicant Guidebook, version dated June 4, 2012 ("ICANN Guidebook"), the Attachment to Module 3 – New gTLD Dispute Resolution Procedure ("Rules of Procedure") and the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 ("ICC Rules for Expertise") supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice

Note”).

11. On March 16, 2013, the ICC Centre acknowledged receipt of the Objection and conducted the administrative review of it in accordance with Article 9 of the Rules of Procedure for the purpose of verifying compliance with the requirements set forth in Articles 5 to 8 of the Rules of Procedure.

12. On April 5, 2013, the ICC Centre informed the Parties that the Objection was in compliance with Articles 5 to 8 of the Rules of Procedure. Accordingly, the Objection was registered for processing.

13. On April 12, 2013, the Internet Corporation for Assigned Names and Numbers (“ICANN”) published its Dispute Announcement pursuant to Article 10(a) of the Rules of Procedure.

14. On the same date, the ICC Centre informed the Parties that it was considering the consolidation of the present case with the case No. EXP/486/ICANN/103 (SportAccord v. Steel Edge LLC; gTLD: “.sports”) in accordance with Article 12 of the Rules of Procedure. Therefore, the ICC Centre invited the Parties to provide their comments regarding the possible consolidation no later than April 16, 2013.

15. On April 15, 2013, Applicant filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Objector.

16. On April 16, 2013, Objector filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Applicant.

17. On April 22, 2013, the ICC Centre informed the Parties that it decided not to proceed with the consolidation. It further invited Applicant to file a Response to the Objection within 30 days of the ICC Centre’s transmission of such letter in accordance with Article 11(b) of the Rules of Procedure.

18. On May 21, 2013, dot Sport Limited filed its Response to SportAccord’s Objection.

19. On May 22, 2013, the ICC Centre acknowledged receipt of Applicant’s Response. It further informed the Parties that the Response was in compliance with the Rules of Procedure.

20. On June 21, 2013, the ICC Centre appointed Mr. Jonathan P. Taylor as expert in accordance with Article 13 of the Rules of Procedure and Article 9(5)(d) of the Rules for Expertise.

21. On July 16, 2013, the ICC Centre acknowledged receipt of Applicant’s objection to Mr. Taylor’s appointment.

22. On July 25, 2013, the ICC Centre informed the Parties that it had decided not to confirm the appointment of Mr. Taylor as Expert in the present case and, there-

fore, it would proceed with the appointment of another Expert.

23. On July 29, 2013, the Chairman of the Standing Committee of the ICC Centre appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Article 7 of the ICC Rules for Expertise and Article 3(3) of its Appendix I. On July 30, 2013, the ICC Centre notified the Parties of the Expert's appointment. It further sent the Parties the Expert's *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

24. On August 2, 2013, the ICC Centre reminded the Parties that the estimated costs had been paid in full by each party and confirmed the constitution of the expert panel.

25. On the same day, the electronic file was transferred by the ICC Centre to the Appointed Expert.

26. On August 5, 2013, the Appointed Expert issued Communication E-1 by means of which it informed the Parties that (i) based on their submissions and pursuant to Article 21 of the Rules of Procedure, it would render its Expert Determination, and (ii) at that stage, it did not consider necessary to request the Parties to submit any written statement in addition to the Objection and the Response, including their respective exhibits.

27. In accordance with point 6 of the ICC Practice Note on the Administration of Cases ("ICC Practice Note"), the requirement for the Expert Mission contained in Article 12(1) of the ICC Rules for Expertise has been waived.

28. Pursuant to Article 21(a) of the Rules of Procedure, the time-limit for rendering this Expert Determination expires on September 16, 2013.

29. The Expert Determination was submitted in draft form to the ICC Centre on August 23, 2013, within the 45 day time limit in accordance with Article 21(a) of the Procedure.

IV. Procedural Issues and Applicable Rules

30. SportAccord filed a "Community Objection", defined as "*a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted*" according to Article 3.2.1. of the ICANN Guidebook, against dot Sport Limited's application for the gTLD ".sport".

31. Pursuant to Article 5(a) of the Rules of Procedure, all submissions –including this Expert Determination– have been made in English. Further, all submissions and communications between the Parties, the Appointed Expert and the ICC Centre were filed electronically as stated in Article 6(a) of the Rules of Procedure.

32. In accordance with Article 4(d) of the Rules of Procedure, the seat of these proceedings is the location of the ICC Centre in Paris, France.

33. For the purpose of rendering this Expert Determination, the applicable rules are: the ICC Rules for Expertise, supplemented by the ICC Practice Note, the ICANN Guidebook and the Rules of Procedure.

V. Summary of the Parties' Positions

34. The issues to be addressed by the Appointed Expert shall be those resulting from the Parties' submissions and those which the Appointed Expert considers to be relevant to make a determination on the Parties' respective positions.

35. Based on the Parties' written submissions (SportAccord's Objection, dot Sport Limited Response and their respective exhibits), the main issues and claims under determination can be summarised as follows.

A. Objector's Position

36. SportAccord claims that it has standing to object to applications for the gTLD ".sport" on the grounds that it is an established international representative institution of the Sport Community,¹ which has been impacted by such gTLD application. Further, Objector states that it is a not-for-profit association constituted in accordance with the Swiss Civil Code and comprises several autonomous and independent international sports federations and other international organizations² which contribute to sport in various fields.³

37. Regarding the description of the basis for the Objection as established in Article 3.3.1 of the ICANN Guidebook, SportAccord states that the Sport Community

¹ According to Objector, the Sport Community is organized on local, national and international levels and is clearly delineated by way of its organizational structures and its values. See: Objection, page 6.

² SportAccord has 91 full members: international sports federations governing specific sports world-wide and 16 associate members: organizations which conduct activities related to the international sports federations. See: Exhibit Ap-2.

³ Indeed, Objector claimed that "*SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events*". See: Objection, page 6. Article 2 of SportAccord Statutes establishes several purposes of this association which, among others, include: "*a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports... d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport... j) to coordinate and protect the common interests of its Members... k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis*". See: Exhibit Ap-1. Objector states that its programs include, among others, "*International Federation (IF) recognition, IF relations, doping-free sport, fighting illegal betting, governance, sports' social responsibility, multi-sports games, the '.sport' initiative, the sports hub, the annual SportAccord Convention and the annual IF Forum*". See: Objection, page 7.

is organized, delineated, of long-standing establishment and impacted by sport-related domain names. In light of this statement, Objector expresses its substantial opposition to the application, claiming representation of a significant portion of the Sport Community. It further argues that there is no evidence of community support for any of the non-community-based applications.⁴

38. According to SportAccord, the Sport Community is both targeted implicitly and explicitly by the application for the “.sport” gTLD.⁵

39. Finally, Objector elaborates on the material “*detriment*” to the rights and legitimate interests of the Sport Community –and to users in general– if dot Sport Limited’s application is allowed to proceed or even finally approved.⁶

40. Based on these allegations, Objector requests that the Appointed Expert acknowledges that (i) the “.sport” gTLD string targets the Sport Community, (ii) there is a substantial opposition to such application from a significant portion of the Sport Community, and (iii) therefore, the application for the “.sport” gTLD is to be rejected.

B. Applicant’s Position

41. Applicant rejects SportAccord’s Objection. From the outset of its Response, Applicant alleges that the “.sport” gTLD is intended and designed to increase availability and access to create, produce and disseminate informative, creative and innovative sport-related content. It further alleges that mechanisms have been established to ensure that the gTLD “*operates and grows in a manner that is responsible, protects consumers and promotes consumer and industry trust and confidence*”.⁷

42. In addition, dot Sport Limited alleges that SportAccord has no standing to object on the ground that it fails to prove that it has “*an on-going relationship*” with a clearly delineated Sport Community as a whole.⁸

43. In relation to the “Community” argument, dot Sport Limited explains that the Sport Community is not “*clearly delineated*” because it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests. It also emphasizes that such “Community” lacks formal boundaries, which is also proved by the fact that there is a disagreement about the entities that make up such “Community”.⁹

⁴ See: Objection, page 8.

⁵ See: Objection, page 10.

⁶ See: Objection, page 11.

⁷ See: Response, page 4. In particular, Applicant claims that the objection process “*is not a substitute for Community Evaluation and was not envisaged to be a mechanism by which one applicant could gain a competitive advantage over another*”.

⁸ See: Response, pages 4 and 5.

⁹ See: Response, page 5.

44. Further, Applicant rejects Objector's argument that the substantial opposition to the application comes from a significant portion of the Sport Community. Indeed, it is Applicant's position that Objector represents a subset of the alleged Community and does not represent the interests, goals, or values of numerous stakeholders in such "Community".¹⁰

45. In any event, dot Sport Limited states that *"there is not a strong association between the "Community" represented by Objector and the applied for ".sport" TLD" string.*¹¹

46. Finally, concerning the material *"detriment"* to the rights and legitimate interests of the Sport Community –as alleged by Objector–, Applicant argues that SportAccord failed to prove a likelihood of material detriment. It further states that the damages alleged by SportAccord are speculative in nature and there is no evidence that such alleged detrimental outcomes would occur.¹²

47. Based on these arguments, dot Sport Limited requests the Appointed Expert to hold that SportAccord's objection is invalid and, therefore, deny the Objection.

VI. Findings of the Appointed Expert

48. In order to make its determination, the Appointed Expert will address the following issues, in accordance with the criteria listed in the ICANN Guidebook :

(1) Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?

(2) Is the Sport Community clearly delineated?

(3) Is there a substantial opposition to the application ".sport" gTLD on behalf of a significant part of the Sport Community?

(4) Is the Sport Community explicitly or implicitly targeted by the application ".sport" gTLD?

(5) Is there any material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed?

49. In the following Sections, the Appointed Expert sets out and summarises his understanding of the Parties' positions concerning each of these issues, as elaborated by the Parties in their written pleadings, followed by the Appointed Expert's own analysis and determination concerning such issues.

¹⁰ See: Response, page 8.

¹¹ See: Response, page 10.

¹² See: Response, page 11.

A. Objector's Standing

(1) *Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?*

50. The Appointed Expert is of the view that prior to considering the grounds of the Objection, it is necessary to address this preliminary issue, namely the question of whether SportAccord has standing to put forward a "Community Objection" against the application ".sport" gTLD made by dot Sport Limited.

51. The Appointed Expert will start by deciding this preliminary question in the understanding that if the Appointed Expert finds that the Objector lacks *ius standi* to object, it will become unnecessary to enter into the analysis of the grounds of the Objection.

(i) *Positions of the Parties*

52. Applicant has challenged Objector's standing to file an objection against the application for the ".sport" gTLD. In its Response, Applicant argues that Objector failed to prove that it has "*an on-going relationship*" with a "*clearly delineated Sport Community*" as a whole, failing to meet the standard established in Article 3.2.2.4 of the ICANN Guidebook.¹³

53. While dot Sport Limited recognizes that Objector is an "established institution", it affirms that SportAccord only has an on-going relationship "*with a particular subset of stakeholders*".¹⁴

54. Applicant goes further and states that, in fact, there is no Sport Community since there are so many activities which can be legitimately identified as "sports". Based on this statement, dot Sport Limited reaffirms its position by stating that the alleged Sport Community is not "*clearly delineated*", because "*just about anyone could claim to have an interest in sport*".¹⁵ Additionally, Applicant criticizes Objector's policies for creating obstacles to free and open participation in its activities, membership and leadership.

55. Although Objector has not dealt directly with these arguments, which were put forward once SportAccord had submitted its Objection, it claims that it has standing to object to the application for the ".sport" gTLD since it is an established international representative institution of the Sport Community, which has been impacted by the mentioned string application.

56. Objector states that it is a not-for-profit association established since 1967,

¹³ See: Response, page 4.

¹⁴ See: Response, page 5. According to Applicant, "*Objector's mission statement clearly shows that Objector only represents a particular subset of the alleged community, organized sports, failing to represent other stakeholders such as: unorganized sports...; sports equipment manufacturers and retailers; media outlets such as newspapers, TV, bloggers... Objector cannot speak for them*".

¹⁵ See: Response, page 5.

which has an ongoing relationship with the Sport Community due to the fact that it comprises autonomous and independent international sports federations and other international organizations.

57. In particular, SportAccord alleges that it has (i) 91 full members: international sports federations governing specific sports worldwide, and (ii) 16 associate members: organizations which conduct activities closely related to the international sports federations. In Objector's words, "*SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events*".¹⁶

58. Finally, in the Objector's view, the Sport Community is highly organized on local, national and international levels and, thus it is clearly delineated by way of its organizational structures and values.

(ii) *Considerations of the Appointed Expert*

59. Pursuant to Article 3.2.2 of the ICANN Guidebook, it is for the Appointed Expert to determine whether the Objector has standing to object.

60. In accordance with the ICANN Guidebook, objectors must satisfy certain standing requirements to have their objections considered by the expert panel. In the case of a "Community Objection", "*established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection...*".¹⁷

61. Therefore, to qualify for standing for a "Community Objection", the Objector shall fulfill two conditions, namely that (i) it is an established institution, and (ii) it has an ongoing relationship with a clearly delineated community.

62. The ICANN Guidebook provides useful guidelines so as to determine whether these two requirements should be considered as satisfied by the Objector.

63. Regarding the first condition to be met (i.e.: "*established institution*"), Article 3.2.2.4 of the ICANN Guidebook lists some key factors which may be considered by the expert panel in making its determination. These factors are: (i) the level of global recognition of the institution, (ii) the length of time the institution has been in existence; and (iii) the 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.

64. In order to evaluate its standing "*the institution must not have been estab-*

¹⁶ See: Objection, page 6.

¹⁷ Article 3.2.2.4 of the ICANN Guidebook.

lished solely in conjunction with the gTLD application process.¹⁸

65. SportAccord (previously known as “GAISF”, the General Association of International Sports Federations) is a not-for-profit association established in 1967.¹⁹ The length of time that SportAccord has been in existence –almost half a century– is sufficient, in the Appointed Expert’s view, to consider Objector as a long-established institution and clearly evidences that such association was not created with the sole intention to participate in the gTLD application process.

66. Additionally, the Appointed Expert notes that Objector also meets the standard of “global recognition”, as mentioned in the ICANN Guidebook, since it has a very large membership, comprising of 91 international sports federations and 16 organizations related to sports. In the Appointed Expert’s opinion, this is also indicative of Objector’s public historical evidence of its existence.

67. Even though Applicant has relied on a survey according to which Objector is hardly known to the majority of the public surveyed,²⁰ it is the Appointed Expert’s view that the level of global recognition of any institution should be analysed within the context of the community that such institution is claiming to be a part of, not the public in general.

68. Although the facts described above would be enough to confirm Objector’s compliance with the first condition, the Appointed Expert notes that the very same Applicant has recognized that Objector is an “*established institution*”,²¹ focussing its challenge on the second condition required to file an objection (i.e.: an on-going relationship with a clearly delineated community).

69. Based on these reasons, the Appointed Expert concludes that Objector is an “*established institution*” in the terms of Article 3.2.2.4 of the ICANN Guidebook.

70. Having decided that Objector meets the first standard contained in the ICANN Guidebook, the Appointed Expert now turns to the issue of whether Objector has an on-going relationship with a clearly delineated community.

71. To make a determination on this issue, the Appointed Expert should take into account the guidelines provided in Article 3.2.2.4 of the ICANN Guidebook. To this end, such provision sets out the following elements to be considered: (i) the presence of mechanisms for participation in activities, membership, and leadership, (ii) the institutional purpose related to the benefit of the associated community, (iii) the performance of regular activities that benefit the associated community; and (iv) the level of formal boundaries around the community.

72. Referring to these factors, the ICANN Guidebook states that “*the panel will*

¹⁸ See: Article 3.2.2.4 of the ICANN Guidebook.

¹⁹ See: Exhibit Ap-1.

²⁰ Response, page 8 and Annex A-1.

²¹ Response, page 4.

*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”.*²²

73. Applicant has challenged Objector’s standing on the grounds that it only has an on-going relationship *“with a particular subset of stakeholders”* and not the community as a whole.²³

74. In the Appointed Expert’s view, Applicant’s argument is not convincing. First, because even though Objector may not represent the “entire” Sport Community, it acts for a preponderant part of such community.

75. The ICANN Guidebook does not require that an “entire” community agree on an objection to an application. In fact, it would be almost impossible for an institution to represent any community as a whole. If such was the requirement, there would be no reason to provide for the possibility of community objections.

76. It is difficult to imagine which other association may claim representation of the Sport Community besides an institution that represents, as Objector does, more than a hundred well-known sports federations and institutions related to sports.

77. Furthermore, Objector’s declared purposes are closely associated with the benefits of the community members it represents²⁴ and its regular activities are naturally intended to benefit its members.

78. In addition, the Appointed Expert notes that Objector, as an institution that represents multiple sports federations, has explicitly foreseen –through its statutes– different mechanisms for participation in activities, membership and leadership among the sport federations and organizations. For instance, SportAccord’s statutes regulate in detail the procedure to become a member of the institution and participate accordingly.²⁵

²² Article 3.2.2.4 of the ICANN Guidebook.

²³ Response, page 4.

²⁴ According to Objector’s statutes (See: Exhibit Ap-1): *“The objectives of SportAccord are: a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports; c) to develop specific services for its Members, and provide them with assistance, training and support; d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport; e) to organise multi-sports games and actively support the organisation of multi-sports games by its Members; f) to be a modern, flexible, transparent and accountable organisation; g) to organise, at least once a year, a gathering of all of its Members, and of other stakeholders of the sport movement, preferably on the occasion of its General Assembly; h) to recognise the autonomy of its Members and their authority within their respective sports and organisation; i) to promote closer links among its Members, and between its Members and any other sport organisation; j) to coordinate and protect the common interests of its Members; k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis; l) to collect, collate and circulate information to and among its Members”.*

²⁵ See: Exhibit Ap-1, SportAccord’s Statutes, Articles 5 to 15.

79. Regarding Applicant's argument that Objector's policies create obstacles to free and open participation in its activities, membership and leadership (for instance, by excluding some sports activities, such as card games), in the Appointed Expert's view such "obstacles" are simply the conditions that any organization has to meet to become a member of the institution, as occurs in any other field.²⁶

80. In analysing Objector's statutes, membership is open to "*any sport organisation... which groups together the majority of the National Federations (or organisations) throughout the world practising its sport and regularly holding international competitions...*" and "*any sport organisation which groups together the activities of several members... for the purpose of organising competitions*",²⁷ which shows that membership, far from being closed and exclusive, is accessible to any organization which complies with these minimum standards.

81. Finally, although the issue of the existence of a "Sport Community" is related to the merits of the Objection –and will be analysed in section B–, the Appointed Expert is of the view that Objector's "community", which includes multiple organizations associated with sports, is "*clearly delineated*" for the purpose of objecting to the application for ".sport" gTLD made by dot Sport Limited.

82. Therefore, in the Appointed Expert's view, SportAccord is an established institution which has an ongoing relationship with a clearly delineated community and, consequently, has standing to object to Applicant's application in the present case.

B. The "Sport Community"

(2) *Is the Sport Community clearly delineated?*

83. Having decided that SportAccord has standing to object to the application for ".sport" gTLD made by dot Sport Limited, the Appointed Expert will now focus on the issue of whether the Sport Community is clearly delineated.

84. The Parties have discussed at length the independent existence of a "Sport Community" and diverging positions were advanced on this issue.

(i) *Positions of the Parties*

85. In its Objection, SportAccord defines the Sport Community as "*the community of individuals and organizations who associate themselves with Sport*".²⁸ According to Objector, Sport is an activity done by individuals or teams of individuals, aiming at healthy exertion, improvement in performance, perfection of skill, fair

²⁶ It should be also noted that not all game cards –as claimed by Applicant– are excluded from Objector's membership. The World Bridge Federation is, for instance, a member of SportAccord.

²⁷ See: Exhibit Ap-1, SportAccord's Statutes, Article 6.

²⁸ See: Objection, page 8.

competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

86. Objector's position is that the Sport Community *"is highly organized"* both at a local level (local clubs, etc.) and a higher level (Sport Community governance is exercised by regional, national, and international Sport Federations, which collaborate at the local, national and international levels in sport events or with event organizers, governments, the various bodies of the Olympic Movement, associations or federations).

87. Even though Objector states that it represents 107 International Sport Federations, individual practitioners of sport, sport spectators, sport fans and sport sponsors are also part of the Sport Community and share their values and objectives.²⁹

88. Finally, Objector explains that the Sport Community *"is clearly delineated"* since it has formal lines of accountability on all levels. In Objector's view, the keyword *"delineated"* should not imply a focus on rigid edges of a community, like card-carrying membership organizations.³⁰

89. Applicant rejects Objector's assertion that the Sport Community is *"clearly delineated"*. Indeed, dot Sport Limited contends that the Sport Community lacks this characteristic since *"it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests, thus the community lacks formal boundaries, evidenced by disagreement as to which stakeholders are considered members of the Sport community"*.³¹

90. According to Applicant, the alleged Sport Community is associated with a "generic" string (".sport") and, therefore, it cannot meet the *"clearly delineated"* criteria due to its broad definition and the nature of the generic term ("sport"), which is by definition used by a significant number of people, who do not necessarily share similar goals, values or interests.

91. Further, Applicant criticizes Objector's assertion that the Sport Community is *"highly organized"* when there is no organization, for instance, for viewers, the media or amateur sportspeople who play sport for fun in their spare time. In Applicant's view, *"there is therefore confusion as to who actually comprises the sport community. This is simply because there is no clearly delineated community"*.³²

92. In addition, dot Sport Limited states that, according to a survey undertaken by itself, there is a low level of public recognition of a Sport Community since 74% of participants surveyed did not see formal organization or registration as a requirement to participate in sports.³³

²⁹ See: Objection, page 9.

³⁰ See: Objection, page 9.

³¹ See: Response, page 5.

³² See: Response, page 6.

³³ See: Response, Annex 1.

93. Applicant also argues that there is no agreement among experts as to the definition of “sport”, giving examples of different accepted definitions. In analyzing Objector’s definition of “sport”, Applicant concludes that such concept fails to recognize other community stakeholders, for example, non-federation sport organizations (such as, community recreational leagues), media outlets that cover sports, equipment producers and retailers, video game industry, etc.

94. Finally, it is dot Sport Limited’s position that the Sport Community is not clearly delineated because there is no agreement as to the entities that make up the alleged community. Applicant explains that, for instance, Objector’s membership criteria exclude legitimate sport activities from membership such as poker, electronic gaming and hunting.³⁴

95. To conclude, Applicant states that Objector acknowledged that the Sport Community is comprised of “billions of members” and, consequently, a community comprising the majority of the human race is not clearly, or even slightly, delineated.³⁵

(ii) *Considerations of the Appointed Expert*

96. The Appointed Expert has to decide whether the “Sport Community” is clearly delineated.

97. In accordance with Article 3.5.4 of the ICANN Guidebook, “...for an objection to be successful... the objector must prove that the community expressing opposition can be regarded as a clearly delineated community”.

98. As mentioned before, the ICANN Guidebook offers useful guidelines in order to determine whether a community is clearly delineated. “A panel could balance a number of factors to determine this, including but not limited to: (i) the level of public recognition of the group as a community at a local and/or global level; (ii) the level of formal boundaries around the community and what persons or entities are considered to form the community; (iii) the length of time the community has been in existence; (iv) the global distribution of the community (this may not apply if the community is territorial); and (v) the number of people or entities that make up the community”.³⁶

99. Having set out the factors to be considered, the ICANN Guidebook further provides that “...if opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail”.

100. The concept of “community” is not defined by the ICANN Guidebook. The

³⁴ See: Response, page 7.

³⁵ See: Response, page 7.

³⁶ Article 3.5.4 of the ICANN Guidebook.

word “community” is broad and allows more than one interpretation. Besides the political (nationality), religious or ethnic meanings or implications that the term may have, it generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.³⁷

101. Furthermore, the word “sport” is also a generic term. If someone mentions the word “sport” without any specificity, it is highly probable that different listeners will imagine different aspects, ideas or own preconceptions about what the speaker does want to refer. The same occurs with other generic terms such as “health”, “law”, “government”, “commercial”, etc.

102. Nevertheless, the generic nature of these words does not constitute an obstacle for a community to identify itself with them. For instance, the word “lawyer” (or, more precisely, the “.lawyer” gTLD) may identify the community of lawyers around the world, even though it would be difficult (or impossible) to find that all lawyers share the same goals, values or interests.

103. In the case at hand, it is the Appointed Expert’s view that the community represented by Objector (international sports federations and organization) enjoys a high level of public recognition in its field and has existed for decades. Further, since it was established in 1947, it has succeeded in increasing the number of its members, rather than becoming smaller or less representative.

104. Further, regarding the “*number of... entities that make up the community*”, an aspect that the ICANN Guidebook highlights as relevant, the Appointed Expert notes that Objector is comprised of 91 well-known international sports federations and 16 organizations related to sports. If SportAccord had not obtained a high level of recognition in the sport field since it had been established, some of the well-known federations included in such association would not have remained part of it.

105. In any event, the Appointed Expert understands that this is not a case in which a single sport association or organization claims for the priority use of the “.sport” gTLD –irrespective of other federations or organization which could claim for the same right or interest–, but the whole community of sports federations and organization (or, at least, the most part of it) represented by Objector.

106. Finally, the Appointed Expert cannot accept Applicant’s argument that the Sport Community is not organized when Objector has proved that it has its own mechanism of participation, programs and organization through its statutes and government bodies. The fact that the media (which may constitute a different community) or viewers are unable to be part of this association is irrelevant to consider Objector as a delineated community. Otherwise, no community could be

³⁷ According to the British English Dictionary, the word “community” has three different meanings “1) the people living in one particular area or people who are considered as a unit because of their common interests, social group, or nationality, 2) a group of animals or plants that live or grow together, 3) the general public”. See British English Dictionary, Cambridge Ed., 2013.

recognized under the ICANN gTLD proceedings since it would be easy for any Applicant to find secondary or not closed-related members outside of it.

107. The “Sport Community”, in the Appointed Expert’s view, is a community that clearly distinguishes itself from other communities by its characteristics, objectives and values.

108. Therefore, the Appointed Expert concludes that the Sport Community is clearly delineated for the purpose of these proceedings and, consequently, Applicant’s objections in this respect must also fail.

C. The “Substantial Opposition” to the Application

(3) Is there a substantial opposition to the application for the “.sport” gTLD on behalf of a significant part of the Sport Community?

109. Having decided that the Sport Community is clearly delineated, the Appointed Expert now turns to determine whether there is a substantial opposition of a significant part of the Sport Community.

(i) Positions of the Parties

110. Objector highlights that it expresses opposition on behalf of the 107 International Federations encompassed in such association, as listed in Appendix A-2 of the Objection. Objector has proffered more than 50 letters of opposition from different federations and also points to other individual oppositions.³⁸

111. SportAccord notes that while many international sport bodies, international sport federations and specialized agencies have already expressed their opposition, there is no evidence, by contrast, of community support in favour of the application “.sport” gTLD made by dot Sport Limited.

112. According to SportAccord, “*the portion of the community expressing opposition through its representative organization is not just significant, but overwhelming*”.³⁹ It also argues that Applicant’s application targets the most visible and highly organized segments of the Sport Community, represented by national and international sport federations.

113. Finally, Objector elaborates on the argument that although individual practitioners of the Sport Community (who do not need organization to practise sports) have not made opposition to the application, it is natural that the organized segment of such Community reacts and raises objections on behalf of their stakeholders.

114. In turn, Applicant claims that SportAccord has failed to prove “substantial

³⁸ See: Objection, page 9.

³⁹ See: Objection, page 10.

opposition” to the application, since Objector represents a subset of the alleged community and does not represent the interests, goals, or values of numerous stakeholders in the alleged community (for instance, sports excluded from membership and the other stakeholders not represented by Objector).⁴⁰

115. Applicant insists on the “relative” low number of oppositions compared with the composition of the alleged community. In Applicant’s own words, “*expressions of opposition from Objector are small compared to the large composition of the alleged ‘sport’ community*”.⁴¹

116. Further, dot Sport Limited also claims that Objector did not provide examples of support from members of the alleged community that do not comprise its membership. Based on this argument, Applicant states that Objector does not encompass all sport activities by any means.

117. Applicant also alleges that Objector organized a campaign among its members to support its Objection by using a standard template letter that requires no thought or effort to sign it.⁴² Notwithstanding so, Applicant notes that only half of SportAccord’s members have actually shown support to the Objection. Further, Applicant states that Objector has offered no proof that its membership as a whole signed on to the opposition.

118. Regarding the counter-argument related to individual sport practitioners (not organized) advanced by Objector, dot Sport Limited answers that such assertion “*totally ignores the fact that the sports industry includes a great number of professional organisations such as media outlets, who could easily have objected*” but did not do so.⁴³

(ii) *Considerations of the Appointed Expert*

119. The Appointed Expert has to decide whether there is a substantial opposition to the application for the “.sport” gTLD on behalf of a significant part of the Sport Community.

120. To this end, the Appointed Expert will focus on Article 3.5.4 of the ICANN Guidebook, which establishes the standards to be analysed in order to make a determination on this issue.⁴⁴

⁴⁰ See: Response, page 8. Moreover, dot Sport Limited states that, according to the sports survey undertaken by itself, the vast majority of the public are not even aware of the existence of SportAccord.

⁴¹ See: Response, page 8.

⁴² See: Response, page 9.

⁴³ See: Response, page 9.

⁴⁴ According to such provision, “*a panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: (i) number of expressions of opposition relative to the composition of the community; (ii) representative nature of entities expressing opposition; (iii) level of recognized stature or weight among sources of opposition; (iv) distribution or diversity among sources of expressions of opposition, including: (a) regional (b) subsectors of community, (c) the leadership of community, (d) membership of community; (v) historical defense of the*

121. In order to determine the appropriate standard to evaluate the Objection, it should be noted that Article 3.5.4 of the ICANN Guidebook does not require that the “entire” community expresses its opposition. Rather, it requires that Objector proves a “substantial” opposition within the community it has identified itself as representing.

122. Therefore, the Appointed Expert is of the view that the argument on the “relative low number” of oppositions compared to the composition of the Sport Community, as put forward by Applicant, should be balanced with the relevance and representative nature of each opposition within the community. For instance, in the present case, the opposition made by an individual rugby player or fan will not have the same weight in order to determine if an objection represents substantial opposition as the one made by the International Rugby Board.⁴⁵

123. In this respect, the Appointed Expert is satisfied with the evidence produced by Objector, which includes 55 letters of opposition submitted by different recognized sport federations,⁴⁶ together with other statements from different reputable sport organizations and specialized agencies, such as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) or the United Nations Office on Sport for Development and Peace (UNOSDP).⁴⁷

124. Aside from this, the Appointed Expert notes that Objector represents all its members in these proceedings. Indeed, in accordance with its internal organization, the fact that SportAccord’s Executive Council has decided to object to dot Sport Limited’s application implies that all members of the association are deemed to have agreed to such decision to object.⁴⁸

125. Therefore, to require individual letters from all SportAccord’s members –as Applicant has suggested– is simply redundant. The fact that other sport federations represented by Objector did not explicitly object to dot Sport Limited application should not be seen, in the Appointed Expert’s view, as an opposition to SportAccord’s claim.

126. Consequently, based on the representative nature of the Objector for the Sport Community, the relevance of the entities which have expressed their opposition (either individually or through the Objector) and the global recognition of the entities which are represented by Objector in these proceedings, the Appointed Expert concludes that there is a substantial opposition to the application “.sport” gTLD on behalf of a significant part of the Sport Community as established in Article 3.5.4 of the ICANN Guidebook.

community in other contexts; and (vi) costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition”.

⁴⁵ See: Objection, Appendix A-3, tab 34.

⁴⁶ See: Objection, Appendix A-2.

⁴⁷ See: Objection, Appendix A-3.

⁴⁸ SportAccord’s Statutes, Article 33.3 “...the Council represents and commits SportAccord with regard to third parties”. See Exhibit Ap-1.

D. Targeting

(4) *Is the Sport Community explicitly or implicitly targeted by the application “.sport” gTLD?*

127. The next issue to be decided by the Appointed Expert is whether the Sport Community has been explicitly or implicitly targeted by the application for the “.sport” gTLD made by Applicant.

(i) *Positions of the Parties*

128. Due to the fact that word “sport” is almost exclusively associated with organized sport, sport for leisure and sport for health, Objector states that the Sport Community is “*explicitly*” targeted by the application for the “.sport” gTLD. In any event, SportAccord also argues that the “.sport” gTLD string “*implicitly*” targets the Sport Community.

129. Therefore, Objector concludes that the criterion of “*strong association*” between the Sport Community and the gTLD string “.sport” is, in its view, completely satisfied.⁴⁹

130. Conversely, Applicant alleges that Objector failed to prove a “*strong association*” between the applied-for gTLD string and the alleged community since SportAccord does not represent the community as a whole. According to dot Sport Limited, “*whereas Applicant’s use of the TLD would target the entire sports industry, Objector plans to restrict the TLD at launch to persons of their choosing, beginning with Federations and other governing sports bodies, before later opening up the TLD to persons of its choosing outside the restricted definitions, using vague and unspecified post validation procedures and unspecified eligibility requirements*”.⁵⁰

131. Applicant considers that it has a broader target than the alleged Sport Community, and the “*strong association*” alleged by Objector is purely ancillary or derivative.

(ii) *Considerations of the Appointed Expert*

132. It is for the Appointed Expert to decide whether the Sport Community is explicitly or implicitly targeted by the application for the “.sport” gTLD.

133. Pursuant to Article 3.5.4 of the ICANN Guidebook, “*the objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: (i) Statements contained in application; (ii) other*

⁴⁹ See: Objection, page 10.

⁵⁰ See: Response, page 10.

public statements by the applicant; (iii) associations by the public”.

134. In the Appointed Expert’s opinion, since the community represented by Objector is the “Sport Community”, it is evident that the application for “.sport” gTLD made by Applicant explicitly targets such community.

135. Having recognized that the Sport Community is clearly delineated, it cannot be denied that there is a strong (or even identical) association between the applied-for gTLD string “.sport” and the community represented by Objector.

136. Therefore, the Appointed Expert concludes that the Sport Community has been explicitly targeted by the “.sport” gTLD.

E. Detriment

(5) Is there any material detriment to the rights or legitimate interests of the Sport Community if the application for the “.sport” gTLD is allowed to proceed?

137. Finally, the Appointed Expert has to address the issue of whether the application for the “.sport” gTLD causes any material detriment to the rights or legitimate interests of the Sport Community.

(i) Positions of the Parties

138. Objector states that the “.sport” gTLD application made by dot Sport Limited lacks accountability to the Sport Community. Regarding the detriment that such application may generate, SportAccord points to ambush marketing, cybersquatting, typo-squatting, brand-jacking, misuse of sport themes for pornography, the systematic exacerbation of naming conflicts and the massive utilization of name-defensive registrations, giving examples on how each situation (in any given scenario) may affect the rights or legitimate interests of the Sport Community.⁵¹

139. In its Objection, SportAccord describes other possible detriments, such as the false sense of official sanction that consumers may have if an unaccountable registry operator manages such domain.⁵²

140. Further, according to Objector, *“Under the United States Department of Commerce’s agreement with ICANN, the Affirmation of Commitments, ICANN must demonstrate that the new gTLD program contributes, in part, to consumer trust. Delegating “.sport” to an unaccountable registry operator, which lends a false sense of official sanction to the .sport domain name space, would inevitably erode consumer trust by misleading individuals through unofficial content”*.⁵³

⁵¹ See: Objection, page 11.

⁵² See: Objection, page 13. SportAccord says that, for example, “Rugby.Sport” domain will lead internet users to believe that the International Rugby Board sanctions such a website.

⁵³ See: Objection, page 13.

141. Objector also notes that if the “.sport” gTLD application is allowed to proceed, the Sport Community would suffer a loss in its image and prestige by the misappropriated use of community-specific keywords. *“The very reason why there is a community-based objection (as opposed to a rights infringement objection) is the fact that keywords targeting a sub-community are a commons and that each member of the sub-community has the right to expect that community institutions ensure the responsible management of those keywords.”*⁵⁴

142. According to Objector, while in many cases there is no concept of individual ownership in terms of intellectual property, each community has a natural concept of collective ownership of keywords essential to it or to its sub-communities. Based on this argument, SportAccord considers that the uncontrolled or unaccountable operation of the “.sport” registry would constitute the *“tragedy of the commons”*, a material detriment which cannot be measured in monetary units.

143. Objector expands on the disruption of Sport Community efforts and achievements. It provides examples of the loss of credibility of community-based governance models and states that community-based communication policies for anti-doping, anti-drug, anti-racism, ticket scalping, illegal or undesirable gambling, etc., will be disrupted if key domain names related to them are used without adherence to those policies. This can only be avoided, in Objector’s view, if the gTLD registry is directly accountable to the Sport Community.⁵⁵

144. Further, SportAccord focuses on the actual and certain damages that the Sport Community would suffer in case the “.sport” gTLD is operated by a registry without appropriate community-based accountability. In Objector’s view, not only would this situation generate an economic damage, but also a detriment of the reputation, the values and the governance of the Sport Community as a whole.⁵⁶

145. Finally, Objector points to the loss of benefits for not operating the “.sport” TLD by the Sport Community itself, the loss of opportunity to create a community-based organizational tool and, most important, the irreversible damage caused by the forfeiture of the opportunity for the Sport Community to build the right image through the operation of the gTLD.⁵⁷

146. Applicant contends that, in fact, Objector failed to prove a likelihood of material detriment to the rights or legitimate interests of the alleged community. In its opinion, Objector speculates that the alleged detriments would befall the alleged Sport Community should the gTLD be delegated to Applicant, but *“most of the alleged detriments are detriments inherent in the nature of the Internet and not attributable to Applicant’s plans for operating the gTLD”*.⁵⁸

⁵⁴ See: Objection, page 14.

⁵⁵ See: Objection, page 15.

⁵⁶ See: Objection, page 17.

⁵⁷ See: Objection, page 18.

⁵⁸ See: Response, page 11.

147. Applicant claims that it has taken measures to address the detriments inherent in the nature of the Internet. *“Thus, Objector’s alleged detriment seems to purely stem from the fact that Applicant would be delegated the gTLD instead of Objector”*.⁵⁹

148. Further, it is dot Sport Limited’s position that Objector proves no kind or amount of damage to the reputation of the Sport Community that would result from Applicant’s operation of the applied-for gTLD string. In Applicant’s words, *“Consumer trust will be a core operating principle: abusive registrations and abuse of the gTLD will result in rapid sanctions”*.⁶⁰

149. In addition, dot Sport Limited accuses Objector of not offering evidence (i) that Applicant is not acting or does not intend to act in accordance with the interests of the Sport Community or of users more widely; (ii) that Applicant’s operation of the “.sport” gTLD string will interfere with the core activities of the alleged community; and (iii) much less that the Objector’s core activities depend on the domain name system.⁶¹

150. Applicant also states that the alleged economic damage to the Sport Community has not been proved by Objector. In any case, abusive behaviour or Objector’s speculative detriments, if they occur, may be easily corrected or penalized. In addition, dot Sport Limited criticizes some evidence advanced by Objector which, in its view, does not show any actual damage to the alleged Sport Community.⁶²

151. To conclude, it is Applicant’s position that the Objector’s alleged damages are hypothetical and would not result from Applicant’s operation of the applied-for gTLD string.⁶³

(ii) *Considerations of the Appointed Expert*

152. The Appointed Expert has to decide on the likelihood of material detriment to the rights or legitimate interests of the Sport Community in the event that the application process ends with the adjudication of the string (“.sport”) to Applicant.

153. The Appointed Expert first notes that, in accordance with Article 3.5.4 of the ICANN Guidebook, *“the objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant por-*

⁵⁹ See: Response, page 11.

⁶⁰ See: Response, page 11. Applicant further believes that there are benefits to rights and legitimate interests of the sports industry created by operation of a free and open TLD by a commercial entity. *“Given that there is no special regulated definition of the word “sport” or any restriction on the use of the word worldwide, combined with the fact that consumers understand that a domain name registration in a particular gTLD does not confer or even define special status for the holder worldwide and for every purpose, there will not be any loss of trust in the sports industry...”*.

⁶¹ See: Response, page 12.

⁶² See: Response, page 13.

⁶³ See: Response, page 13.

tion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment”.

154. Such Article also provides the factors that could be used by an expert panel in making this determination. These elements include, but are not limited to, “(i) *nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; (ii) evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; (iii) interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string; (iv) dependence of the community represented by the objector on the DNS for its core activities; (v) nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and (vi) level of certainty that alleged detrimental outcomes would occur*”.⁶⁴

155. First, the Appointed Expert finds that the ICANN Guidebook does not call for “actual damage” for an objection to be accepted. It establishes a lower bar, namely a “*likelihood of material detriment*”, logical consequence of the impossibility of assessing any damage when the Applicant has yet to start operating the gTLD string.

156. Therefore, the standard that the Appointed Expert should apply to this issue is the “chance” that detriment will occur, which differs from the standard of “actual damage” invariably applied in litigation or arbitration. In other words, the standard of a “*likelihood of material detriment*” is, in the Appointed Expert’s opinion, equivalent to future “possible” damage.

157. In this regard, the Appointed Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical, such as the risk of cybersquatting, ambush marketing or the misuse of sport themes for purposes foreign to sport values.

158. Notwithstanding so, the Appointed Expert is of the opinion that Objector 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.

159. Further, the Appointed Expert shares Objector’s argument that all domain registrations in a community-based “.sport” gTLD will assure sports acceptable use policies. On the other hand, this cannot be warranted by Applicant in the same way in the event that the application for the “.sport” gTLD is approved by

⁶⁴ Article 3.5.4 of ICANN Guidebook.

ICANN.

160. Regarding the economic damage that SportAccord may suffer, the Appointed Expert is of the view that although the figures and calculations on negative externalities provided by Objector may have been exaggerated,⁶⁵ the risk of economic damages which would be inflicted to Objector due to the operation of the gTLD by an unaccountable registry shows a reasonable level of certainty and could not be avoided if the application is allowed to proceed.

161. Therefore, the Appointed Expert is not in a position to accept Applicant's argument that Objector's alleged detriment only relies on the fact that Applicant would be delegated the ".sport" gTLD instead of Objector.

162. Finally, 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. Conversely, the Appointed Expert sees a strong dependence of the Sport Community on such domain name.

163. For these reasons, the Appointed Expert concludes that there is a strong likelihood of material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed.

VII. Decision

164. Having read all the submissions and evidence provided by the Parties, for the reasons set out above and in accordance with Article 21(d) of the Rules of Procedure, I hereby render the following Expert Determination:

- I. The "Community Objection" which has been put forward by SportAccord in these proceedings is successful.
- II. Objector SportAccord prevails.
- III. The ICC Centre will refund SportAccord the advance payment of costs it made in connection with these proceedings.

Date: October 23, 2013

Signature: _____


Prof. Dr. Guido Santiago Tawil
Expert

⁶⁵ See: Objection, Appendix A-13.

1b-Ref Mat-Attachment-G-Reconsideration Request 14-10.pdf

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-16

8 JANUARY 2014

The Requester seeks reconsideration of the 23 October 2013 Expert Determination in favor of SportAccord's community objection to the Requester's application for the .SPORTS gTLD.

I. Brief Summary

Both the Requester dot Sport Limited ("Requester" or "dot Sport") and SportAccord applied for the .SPORTS string, and are in the same contention set. SportAccord won its Community Objection against the Requester's application. The Requester claims that the Panel failed to apply the requisite ICANN standards, processes and policies in reaching the Determination by: (a) creating a new standard for determining the *likelihood* of material detriment; (b) failing to apply the existing standard for cause of the material detriment to a community; and (c) creating a new standard for examining the alleged material detriment. The Requester also claims that the Expert violated established policy or process by failing to disclose material information relevant to his appointment in. As a result, the Requester asks ICANN to reject the Expert Determination, and send the .SPORT matter back to a new panel that the ICC must show has been given substantial training in the Guidebook processes and standards. In the alternative, the Requester asks that ICANN request a formal accounting of the Expert's current or prospective links with SportAccord or any of its member federation, and that the ICC demonstrate that the Expert was given reasonable training in the Guidebook processes and standards.

With respect to the first claim, the Requester failed to demonstrate that the Panel applied the wrong standard and there is no indication that: (a) the Panel created a new standard for determining the likelihood of material detriment; (b) the Panel ignored the causation requirement for evaluating the likelihood of material detriment; and (c) the Panel created a new test for examining material detriment.

With respect to the second claim, the Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality. Rather, the Requester is challenging the merits of the Expert's disclosure. Such challenges should be brought to the ICC under the ICC Rules of Expertise, not through the Reconsideration process.

Therefore, it is the BGC's recommendation that Request 13-16 be denied.

II. Facts.

A. Background Facts.

The Requester and SportAccord applied for the .SPORTS string, and are in the same contention set.

On 13 March 2013, SportAccord filed a Community Objection with the ICC¹ to the Requester's application asserting that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Applicant Guidebook ("Guidebook"), § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e).)

On 21 May 2013, the Requester filed a response to SportAccord's Objection.

¹ International Centre for Expertise of the International Chamber of Commerce.

On 29 July 2013, the ICC appointed Professor Dr. Guido Santiago Tawil as the expert (“Expert” or “Panel”) to consider SportAccord’s Objection and notified the parties of the appointment. The ICC provided the parties with the Expert’s *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

On 23 October 2013, the Panel rendered an “Expert Determination” in favor of SportAccord. The Panel determined that SportAccord had standing to object as an “established institution which has an ongoing relationship with a clearly delineated community.” (Determination, Pg. 12, ¶ 82.) Based on the submissions and evidence provided by the parties, the Panel determined that SportAccord established that there is substantial opposition from a significant portion of the community to which the Requester’s application for the .SPORTS string may be targeted. The Panel deemed SportAccord to be the prevailing party and the Requester to be the losing party. (Determination, Pg. 24, ¶ 164.)

On 8 November 2013, the Requester filed Request 13-16, seeking reconsideration of the Expert Determination.

B. Requester’s Claims.

Requester seeks reconsideration on the following grounds:

First, the Requester claims that the Panel failed to apply the requisite ICANN standards, processes and policies in reaching the Determination. Specifically, the Requester contends the Panel:

- Created a new standard for determining the *likelihood* of material detriment;
- Failed to apply the existing standard for cause of the material detriment to a community; and
- Created a new standard for examining the alleged material detriment.

(Request, Section 10b(iv)(a)-(d).) The Requester further asserts that the Panel's alleged failure to apply the proper standard is evidence that the Expert was not qualified to render a determination on SportAccord's objection, and thus, the ICC's failure to appoint an appropriately qualified expert demonstrates a process violation sufficient to void the Expert Determination.

(Request, Sections 9 & 10b(iv)(e).)

Second, the Requester alleges that the Expert failed to disclose material information about his interest in sporting arbitration and the organized sporting industry (of which SportAccord is a part), as well as his co-chairing of a panel entitled "The quest for optimizing the dispute resolution process in major sport-hosting events," which the Requester suggests gives rise to doubts as to the Expert's impartiality and independence. The Requester claims that the Expert's failure to disclose these interests constitutes a breach of the relevant dispute resolution procedures as well as a breach of the ICANN policy on transparency as set out in Article 3, Section 1 of the Bylaws, which states that ICANN shall operate "in an open and transparent manner and consistent with procedures designed to ensure fairness." (Request. Section 8.)

III. Issues.

As noted above, the Requester asks ICANN to consider: (i) whether the Panel failed to follow the requisite ICANN standards, processes and policies in rendering the Expert Determination; and (ii) whether the Expert failed to disclose material information relevant to his appointment which should invalidate the Expert Determination.

In view of the claims set forth in Request 13-16, the issues for reconsideration are:

- A. Whether the Panel applied the wrong standard in contravention of established ICANN policy or process by:
 - 1. Creating a new standard for determining the *likelihood* of material detriment in the Determination;

2. Failing to apply the existing standard for cause of the likelihood of material detriment to a community; and
 3. Creating a new standard for examining the alleged material detriment.
- B. Whether the Expert failed to disclose material information relevant to his appointment in violation of established policy or process.

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with the specified criteria.² (*See* Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration relating to staff action or inaction is appropriate if the BGC³ concludes, and the Board or the NGPC⁴ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or

² Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

³ Board Governance Committee.

⁴ New gTLD Program Committee.

processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁵

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 application 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 "derogated substantially" from the applicable standard for evaluating community objections. (Request, Section 8.)

The standards for evaluating community objections include a four-part test to help an expert panel determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

⁵ See BGC Recommendation on Reconsideration Request 13-5 at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

(Guidebook, Section 3.5.4.) Section 3.5.4 also includes a list of factors that could be used to evaluate each of the four criteria. (*See id.*) The factors relevant to Requester's claims are discussed below.

V. Analysis and Rationale.

A. Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy Or Process.

The Requester contends that the Panel applied the wrong standard in evaluating SportAccord's community objection to Requester's application for .SPORTS. Specifically, the Requester claims that the Panel: (i) created a new standard for determining the "likelihood of material detriment"; (ii) failed to apply the existing standard for cause of the likelihood of material detriment to a community; and (iii) created a new test for examining the alleged material detriment. (Request, Section 10b(iv)(a)-(d).)

1. The Panel did not Create a New Standard for Determining the Likelihood of Material Detriment.

The Requester claims that the Panel erroneously interpreted the standard for assessing the "likelihood of material detriment" as requiring a "potential" harm, which is a lesser standard than the "probability" of harm that is purportedly required in the Guidebook. (Request, Section 10(b)(iv)(a).) The Requester's conclusions in this respect are not supported.

As noted above, to prevail on a community objection, the objector must, among other things, establish 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." (Guidebook, Section 3.5.4.) The Guidebook includes a list of factors that could be used by a panel in making this determination. The factors include but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

Here, the Panel correctly referenced the above standard (Determination, Pgs. 22-23;

¶¶ 153-154) and noted:

Therefore, the standard that the Appointed Expert should apply to this issue is the “chance” that detriment will occur, which differs from the standard of “actual damage” invariably applied in litigation or arbitration. In other words, the standard of a “*likelihood of material detriment*” is, in the Appointed Expert’s opinion, equivalent to future “possible” damage.

(Determination, Pg. 23, ¶ 156.)

The Requester has failed to establish how the Panel’s interpretation of “likelihood” is a violation or contradiction of the Guidebook. Contrary to the Requester’s assertion, the Guidebook does not specifically define “likelihood of material detriment” but provides a set of factors that can be used to make a determination, and the Requester’s interpretation of the meaning of “likelihood” is not supported by the Guidebook. Nevertheless, and notwithstanding the Panel’s agreement with Requester that many detriments alleged by SportAccord were “purely

hypothetical” (such as the risk of cybersquatting, ambush marketing, or the misuse of sport themes for purposes foreign to sport values), the Panel concluded that there was a “strong likelihood of material detriment to the rights or legitimate interests of the Sport Community if the application ... is allowed to proceed.” (Determination, Pg. 24, ¶ 163 (emphasis added).) The Panel determined that SportAccord “proved several links between potential detriments” that the community may suffer and the operation of the .SPORTS string by Requester (such as the sense of official sanction or the disruption of some community efforts.) (Determination, Pg. 23, ¶¶ 157-58.) The Requester’s argument therefore does not support reconsideration because the Requester has failed to demonstrate how the Panel’s actions contradict any established policy or process.

2. The Panel did not Fail to Apply the Existing Standard for Cause of the Likelihood of Material Detriment to a Community.

The Requester alleges that the Panel ignored the requirement that the objector prove that the application “specifically created” or is the “cause” of the likelihood of material detriment. The Requester claims that the Panel “did not identify a single objectionable or lacking aspect in the application that creates a likelihood of material detriment.” (Request, Section 10b(iv)(b).) Requester’s arguments here are likewise unsupported.

Based on the Expert Determination, it appears that the Panel’s analysis of the detriment element centered on whether the Requester’s application for the .SPORTS string was likely to cause a material detriment – *i.e.*, whether the Requester’s operation of the .SPORTS gTLD was likely to create the detriment alleged by SportAccord. (Determination, Pgs. 20-24, ¶¶ 137-163.) More specifically, SportAccord asserted that the Requester’s application for .SPORTS lacked accountability to the sport community and that such an application would generate numerous detriments to the interests of the community. (Determination, Pgs. 20-21, ¶¶ 137-145.) The

Requester challenged SportAccord's assertions by claiming, among other things, that any alleged detriments were hypothetical and would not result from the Requester's operation of the .SPORTS string. (Determination, Pgs. 21-22, ¶¶ 146-151.) As explained above, the Expert agreed with the Requester that many detriments alleged by SportAccord were purely hypothetical, but concluded that SportAccord was able to prove that Requester's operation of the .SPORTS string was linked to potential detriments that the sport community may suffer. (Determination, Pg. 23, ¶¶ 157-58.) Thus, there is no support for the Requester's claim that the Panel ignored the causation requirement for evaluating the likelihood of material detriment.

3. The Panel did not Create a New Test for Examining the Alleged Material Detriment.

The Requester asserts that the Panel created a new test for examining the alleged material detriment. To support this assertion, the Requester claims that the Panel applied the wrong test by considering both the Requester's intent to act in accordance with the interests of the sport community and the economic damage that SportAccord (as opposed to the sport community) may suffer if the Requester's application is allowed to proceed. (Request, Section 10b(iv)(c)-(d).) The Requester claims that SportAccord was never required to prove intention to cause material detriment; rather, it was required to prove that the application was likely to cause material detriment.

Turning first to the Requester's claim that the Panel erred by considering the Requester's intent to act in accordance with the interests of the sport community, "[e]vidence that the applicant is not acting or does not intend to act in accordance with the interests of the community" is one of the expressed factors set forth in the Guidebook that a panel may consider in evaluating detriment. (Guidebook, Section 3.5.4.) The Panel was therefore correct in addressing this factor.

With respect to the Requester's claim that the Panel improperly considered the economic damage to SportAccord (as opposed to the Sport Community), there is no support for this assertion. In setting forth the parties' positions on detriment, the Panel noted that SportAccord "focuses on the actual and certain damages that the Sport Community would suffer [if .SPORT] is operated by a registry without appropriate community-based accountability." (Determination, Pg. 21, ¶ 144 (emphasis added).) It is clear from SportAccord's focus on the alleged damages to the sport community and the Panel's evaluation of the alleged damages as presented that the Panel was referencing the community represented by SportAccord (and not SportAccord itself) in the Expert Determination. Based on the parties' submissions, the Panel concluded:

Regarding the economic damage that SportAccord may suffer, the Appointed Expert is of the view that although the figures and calculations on negative externalities provided by the Objector may have been exaggerated, the risk of economic damages which would be inflicted to Objector due to the operation of the gTLD by an unaccountable registry shows a reasonable level of certainty and could not be avoided if the application is allowed to proceed.

Therefore, the Appointed Expert is not in a position to accept Applicant's argument that Objector's alleged detriment only relies on the fact that Applicant would be delegated [.SPORT] instead of Objector.

(Determination, Pg. 24, ¶¶ 160-161 (footnote omitted.) One of the factors that a panel may consider in evaluating detriment is the "nature and extent of concrete or economic damage to the community represented by the objector" (Guidebook, Section 3.5.4.) As such, the Panel's evaluation does not appear inconsistent with the standards set forth in the Guidebook.

Because there is no support for the Requester's claim that the Panel applied the wrong standard in evaluating SportAccord's community objection, there is also no support for the Requester's contention that the Expert Determination should be voided due to the ICC's alleged failure to appoint an appropriately qualified expert.

B. The Expert’s Purported Failure To Disclose A Possible Conflict Of Interest Does Not Support Reconsideration.

The Requester also claims that the Expert Determination should be void because the Expert failed to disclose information about his purported “interest in sporting arbitration and his presence at [a sporting event] conference” in February 2011. (Request, Section 8.) In particular, Requester relies on the Expert’s alleged participation as co-chair of a panel at the conference entitled “The quest for optimizing the dispute resolution process in major sport-hosting events.” (Request, Section 8.) The Requester contends that the Expert’s participation at the conference reflects his “recent[] focus on the prospect of creating business opportunities by close connections with ... the organized sporting industry (of which SportAccord is a part)” and constitutes a conflict of interest that should have been disclosed prior to accepting the appointment. (Request, Section 8.) The Requester asks that ICANN request a formal account from the Expert of whether he has any links, including current or prospective links, with the objector or any of its member federations.

Section 3.4.4 of the Guidebook provides that the ICC will “follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.” (Guidebook, Section 3.4.4.) The ICC Rules of Expertise⁶ would therefore govern any challenges to the independence of experts appointed to evaluate community objections. Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment. Article 7(4) of the ICC Rules for Expertise and Article 3(3) of its Appendix I provide that “a prospective expert shall sign a statement of independence and disclose in writing to the Centre [ICC] any

⁶ <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Expertise/ICC-Rules-for-Expertise/>.

facts or circumstances which might be of such nature as to call into question the expert's independence in the eyes of the parties.” (Request, Section 8; ICC Expertise Rules, Art. 7(4) & Appendix I.) The Panelist submitted his *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence. (Determination, Pg. 4.) Requester seeks to challenge the merits of said disclosure. However, from the Request, it does not appear that the Requester 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 Requester 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

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies dot Sport Limited's Request for Reconsideration. As there is no indication that Panel violated any policy or process in reaching the determination sustaining SportAccord's community objection, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

⁷ Notably, the Requester demonstrated familiarity with the ICC Rules of Expertise by successfully challenging and replacing the first expert appointed to the matter. (Request, Section 8.)

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 13-16 shall be final and does not require Board consideration. Article IV, Section 2, Paragraph 16 of the Bylaws provides that the BGC is delegated with authority by the Board to make a final determination and recommendation for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final and establishes precedential value. (Bylaws, Art. IV, § 2.15.) The BGC has the discretion, but is not required, to recommend the matter to the Board for consideration and action, as the BGC deems necessary. (*See id.*) As discussed above, Request 13-16 seeks reconsideration of action or inaction taken by staff. After consideration of this particular Reconsideration Request, the BGC concludes that its determination on this matter is sufficient and that no further consideration by the Board is warranted.