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14 June 2017

By E-mail : reconsideration@icann.org

Members of the ICANN Board

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536, USA

Dear Members of the ICANN Board of Directors,

Re: Reconsideration requests 13-16 and 14-10

I send you this letter on behalf of dot Sport Limited, Requester in Reconsideration requests 13-16 and 14-10.

I refer to the Board Governance Committee (BGC)'s revised recommendation on reconsideration requests 13-16 and 14-10 of 1 June 2017. Requester submits that the ICANN Board should not accept the BGC's recommendation as:

- The BGC did not take due account of the IRP Declaration in ICDR Case No. 01-15-0002-9483;
- The BGC mischaracterized the conflict of interest;
- The BGC made an incorrect appreciation of the IBA Guidelines on Conflicts of Interest;
- The BGC relies on inaccurate, irrelevant and incomplete information; and
- The BGC did not examine and fails to disclose the discussions between ICANN and the IOC.

1. The BGC fails to take due account of the IRP Declaration in ICDR Case No. 01-15-0002-9483

The Panel that ruled in ICDR Case No. 01-15-0002-9483 consisted of eminent experts in the field of rules of ethics and conflicts of interests. The Chair of the Panel, Ms. Wendy Miles, currently acts as Vice President of the ICC Court of Arbitration and as Vice Chair of the IBA Arbitration Committee. In these capacities, she is regularly called upon to deal with questions of ethics and conflicts of interest in alternative dispute resolution, and she is seen as an authority in this field.

On 31 January 2017, this eminent IRP Panel decided:

"In light of the direct applicability of the IBA Conflict Guidelines in repeated respects, it is highly possible that a proper review of the evidence of apparent bias against those Guidelines as a

whole could result in the BGC – like the Ombudsman – ordering a rehearing with a different expert appointed.”¹

In other words, the IRP Panel found that the IBA Conflict Guidelines apply in repeated respects with respect to the allegations of apparent bias. The Panel had reviewed the evidence of apparent bias, and concluded that a rehearing with a different expert appointed was a highly possible remedy to be ordered by the BGC or the ICANN Board. The Panel indeed considered:

- that the actual evidence alleged by Requester “*gives rise to apparent bias*”;² and
- “*In the event that an Expert appointed in accordance with the Module 3 procedure were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias.*”³

The IRP Panel thus found that it was “highly possible” that the ICANN Board order a rehearing with a different expert appointed to address the apparent bias which results from the Requester’s evidence.

The IRP Panel may have given discretion to the ICANN Board with respect to the specific redress mechanism; however, the IRP Panel was abundantly clear about the fact that apparent bias existed and that the ICANN Board must offer redress.

2. The BGC mischaracterized the conflict of interest

The BGC appears to be bending over backwards in arguing that there was no need for Dr. Tawil to disclose his conflict of interest to rule in the matter between the Requester and SportAccord. Just like ICANN did in the IRP proceedings, the BGC is trying to characterize the relationship of Dr. Tawil’s long time firm clients TyC and DirecTV as *adverse to the IOC*.⁴

This argument did not convince the IRP Panel, which decided that the relationship between Dr. Tawil’s long time firm clients and the IOC gave rise to the direct applicability of the IBA Conflict Guidelines.

Indeed, in assessing Dr. Tawil’s conflict of interest, it is important to unravel the dynamics of the monetized sporting industry. A broadcasting company (such as TyC or DirecTV) which is interested in obtaining broadcasting rights for a major sporting event is not simply adverse to the organizer of the event. The interests of the broadcasting company are very much aligned with the interests of organizations such as the IOC, FIFA and related associations. It would be harmful for Dr. Tawil’s and his law firm’s significant clients to go against the interests of the IOC and its related associations, such as SportAccord. Indeed, because of the large financial interests in sponsoring and broadcasting events such as the Olympic Games or the FIFA World Cup, companies such as TyC and DirecTV make great efforts and concessions to accommodate the interests of the “adverse” party with a view to obtain the broadcasting and/or sponsorship rights. TyC went too far in accommodating the interests of organizers of major sports events, and paid bribes and kickbacks to obtain and retain media rights contracts.⁵ That is one of the reasons why a controlling principal of TyC was indicted in May 2015 by the Grand Jury of the United States

¹ ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.92.

² ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.89.

³ ICDR Case No. 01-15-0002-9483, Final Declaration, § 7.72.

⁴ See ICDR Case No. 01-15-0002-9483, ICANN’s Response to Claimant Dot Sport Limited’s Request for Independent Review Process, 8 May 2015, §§48-49; ICDR Case No. 01-15-0002-9483, ICANN’s Sur-Reply to the Reply of Claimant Dot Sport Limited, 21 December 2015, § 35; BGC’s revised recommendation on reconsideration requests 13-16 and 14-10, 1 June 2017, p. 16.

⁵ See ICDR Case No. 01-15-0002-9483, Claimant’s Annex 28, p. 38, § 87.

District Court of the Eastern District of New York.⁶ The fact that TyC's president is a senior partner in the same law firm where Dr. Tawil is also a senior partner does not remove the Requester's justifiable doubts as to the impartiality and independence of Dr. Tawil to render an expert determination in relation to Requester's application for .sport.

The relationship between SportAccord and the IOC which existed at the time of the expert determination proceedings should also not be minimized, especially in the context of SportAccord's application for .sport. Indeed, ICANN has had confidential discussions with the IOC on .sport, and the IOC supported SportAccord's application for .sport. These facts support a clear affiliation and a commonality of interest between SportAccord and the IOC with respect to the dispute giving rise to Dr. Tawil's expert determination.

The BGC ignores this evidence of apparent bias of Dr. Tawil.

3. The BGC made an incorrect appreciation of the IBA Guidelines on Conflicts of Interest

The IBA Conflict Guidelines contain general standards regarding impartiality, independence and disclosure, as well as lists with practical examples in which the general standards are applied. The IBA Conflict Guidelines specify that "[t]hese lists cannot cover every situation. In all cases, the General Standards should control the outcome."

The general standards provide *inter alia* that a panelist shall disclose to the parties, the arbitration institution or other appointing authority the facts or circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence.

The BGC failed to examine the General Standards of the IBA Conflict Guidelines. Instead, the BGC made an extremely narrow interpretation of the lists of practical examples in which the General Standards are applied. The BGC completely ignores that Requester's successful challenge of a previously nominated panelist because of his activities in sports law and his involvement with sports federations, such as the IOC, shows that in the eyes of the parties, activities in sports law and involvement with sports federations gave rise to doubts as to a panelist's impartiality or independence. As a result, the fact that Dr. Tawil and his law firm have vested interests in dealings with the IOC, and that Dr. Tawil has been lecturing on dispute resolution in major sport-hosting events at a high-profile conference, should have been disclosed.

The BGC's argument that Dr. Tawil did not have to disclose this information, because the conflict of interest in his case purportedly does not exactly match any of the IBA's practical examples is a tenuous one. The general standard required disclosure. Moreover, Dr. Tawil's conflict of interest closely matches numerous situations on the IBA's Red and Orange lists.

The point is all the stronger, as the IRP Panel considered these arguments made by ICANN, and concluded that apparent bias existed and that it was highly possible that a proper review of the evidence of apparent bias could result in the BGC ordering a rehearing with a different expert appointed.

4. The BGC relies on inaccurate and incomplete information

The BGC seems to attach great weight to a second report by the Ombudsman of 25 August 2014. It is, however, unclear in which circumstances the second report was created. Requester fails to understand why the Ombudsman would have engaged in the drafting of a new report after the

⁶ See ICDR Case No. 01-15-0002-9483, Claimant's Annex 28, P; 14, § 29.

NGPC had rejected dSL's reconsideration request and during the Cooperative Engagement Process (CEP). According to ICANN's interpretation of its Bylaws, the Ombudsman could not act on a complaint concurrently with another accountability mechanism, which the CEP is.⁷

The situation is all the more puzzling as the Ombudsman wrote the following in an email to ICANN of 5 May 2015:

"I did not take any steps at all after the draft report, and have not been asked to do so by any party. So I closed the file. After the NGPC rejected their complaint I think they decided not to continue with me, but I just never heard again. When I realised they had sought IRP that explained the lack of contact I think, as they had decided to review this differently. Does that help?"⁸

It is unclear why ICANN elected not to produce the second Ombudsman report before. Moreover, the BGC's reading of the Ombudsman's second report as if Requester lodged a new complaint with the Ombudsman⁹ is contradicted by the Ombudsman himself. Indeed, in his communication of 5 May 2015, the Ombudsman declares that he never heard from Requester again.

More importantly, the Ombudsman's findings in his second report are also at odds with the IRP Panel's finding that the BGC should have considered the IBA Conflict Guidelines and any other standards for the requirements of independence and impartiality in neutral, binding decision-making bodies. Following the IRP Declaration, the IRP Panel has examined the second Ombudsman's report, and concluded that the report had no impact on the Panel's findings. As a result, the second Ombudsman's report is of no relevance, especially when the circumstances in which the report was created are unclear.

5. The BGC fails to examine and disclose the discussions between ICANN and the IOC

Finally, the BGC fails to examine the confidential discussions between ICANN and the IOC on .sport. The fact that the BGC goes against the findings of the IRP Panel and decides not to offer the highly possible redress in the form of a rehearing with a different expert, calls for a close examination and disclosure of the discussions between ICANN and the IOC, as the BGC's recommendation directly benefits an application which is supported by the IOC and which ICANN privately discussed with the IOC.

In view of the above, Requester respectfully requests the ICANN Board to reject the revised recommendation of the BGC, to examine and disclose ICANN's discussions with the IOC, and to order a rehearing of the ICC expert determination on .sport with a different expert.

I thank you for your consideration of this matter.

Yours sincerely,


Flip Petillion

⁷ See ICDR Case No. 01-15-0002-9483, ICANN's Response to Claimant Dot Sport Limited's Request for Independent Review Process, 8 May 2015, § 17.

⁸ ICDR Case No. 01-15-0002-9483, Final Declaration, § 6.34; Resp. Ex. 26.

⁹ BGC's revised recommendation on reconsideration requests 13-16 and 14-10, 1 June 2017, p. 2.