

Please see Errata attached at the end of this document.

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 the BGC is recommending 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.

ERRATA SHEET

The Recommendation of ICANN's Board Governance Committee ("BGC") on Reconsideration Request 13-16, which was published on 8 January 2014, is a true record of the BGC's Recommendation, with the following exceptions:

Page	Paragraph	Corrections
1	1	<u>“.SPORTS” should read “.SPORT”</u>
1	2	<u>“.SPORTS” should read “.SPORT”</u>
2	4	<u>“.SPORTS” should read “.SPORT”</u>
3	2	<u>“.SPORTS” should read “.SPORT”</u>
6	1	<u>“.SPORTS” should read “.SPORT”</u>
7	1	<u>“.SPORTS” should read “.SPORT”</u>
9	1	<u>“.SPORTS” should read “.SPORT”</u>
9-10	2 nd full para.	<u>Each reference to “.SPORTS” should read “.SPORT”</u>

Date: 28 July 2014