

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

dot Sport Limited)
Contact Information Redacted)
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Claimant)
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v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No.01- 15-0002-9483

**ADDITIONAL SUBMISSION
REPLY TO ICANN'S RESPONSE BY DOT SPORT LIMITED**

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I. PURPOSE OF IRP PROCEEDINGS – EXECUTIVE SUMMARY

1. dSL's purpose for initiating this IRP is to have the IRP Panel imposing measures on ICANN to finally resolve the dispute occasioned by ICANN's unquestioned acceptance of the recommendation and advice on the community objection by Dr. Tawil. ICANN should not have accepted Dr. Tawil's advice for two main reasons:

- By not disclosing a conflict of interest, Dr. Tawil created an appearance of bias in the eyes of the parties and in the eyes of a reasonable third party; and
- Dr. Tawil made an erroneous, unfair and discriminatory application of the standards for evaluating SportAccord's community objection.

2. Dr. Tawil failed to disclose his close ties to the sporting industry and to organizations which were identified as supporting SportAccord's community objection. Research revealed that Dr. Tawil and his law firm are closely linked to TyC, an organization which paid bribes and kickbacks to obtain and retain media rights contracts from at least one major organization that was claimed to support SportAccord's community objection (**Annex 28**, p. 38, para. 87). Dr. Tawil and his law firm regularly advise on such media rights contracts (**Annexes 19 and 20**). This strong appearance of bias is amplified by the fact that dSL had successfully challenged a previously nominated expert who had close ties with the IOC – *i.e.*, one of the organizations which was claimed to support SportAccord – and the sports industry (**Annexes 11, 12 and 13**). The appearance of bias created by this expert – who disclosed his involvement in the sports industry in his *curriculum vitae* (**Annex 11**) – is less strong than the appearance of bias created by Dr. Tawil, who failed to make any disclosure. Finally, the appearance of bias is amplified even further by the erroneous application of the standards for evaluating community objections. Consequently, ICANN should have rejected Dr. Tawil's recommendation and advice. ICANN refused doing so, forcing dSL to seek recourse in this IRP.

3. The IRP Panel has the jurisdiction to render decisions that are binding upon ICANN and that resolve the dispute. The IRP Panel's task is to look at whether ICANN's unquestioning acceptance of the CPE Panel's advice and ICANN's refusal to review the issues raised by Claimants are compatible with ICANN's fundamental obligations.

4. In their respective reviews, neither the ICANN Board nor the IRP Panel is limited to looking into the procedure only. Both the ICANN Board and the Panel should also look into the substance of the case when circumstances so require.

II. JURISDICTION OF THE IRP PANEL

A. Preliminary remark: Claimant's actions are timely

5. At the appropriate stage in the process, dSL raised objections to ICANN's erroneous acceptance of the challenged third-party determination on the community application for .sport. ICANN has argued at length that the time for Claimants to object to the new gTLD objection procedures had long passed. ICANN mischaracterizes dSL's request for IRP as a "*wholesale attack on the community objection procedures*". ICANN relies on the reasoning of the Panel in the *Booking.com IRP Declaration* (the "Booking.com Panel") to argue that Claimants should have objected to the new gTLD objection process at the time the Guidebook was first implemented.¹

6. ICANN's and the Booking.com Panel's reasoning on the timing has no merit. The Booking.com Panel ignored the fact that neither the string similarity review process nor the community procedures had been established and implemented in their entirety at the time the Guidebook was adopted. At that time, it was not possible for Booking.com, Claimants, or any other interested party, to effectively challenge the, as yet unfinalized, process or procedures. ICANN still had every opportunity to correctly implement the community objection process

¹ ICANN's Response of 8 May 2015 to Claimants request for IRP, paras. 6, 63-67.

in accordance with the applicable policy, the Guidebook and the fundamental principles in ICANN's Articles of Incorporation ("AoI") and Bylaws. The opportunity for Claimants to challenge the erroneous application of the policy for the new gTLD program in violation with ICANN's fundamental principles only arose when the flaws in ICANN's implementation of the policy became apparent. At the time of the adoption of the policy or the Guidebook, Claimants were effectively barred from challenging the Guidebook because they could not – at that time – show any harm. The policy still needed to be implemented, which can be seen, *inter alia*, from the following facts: ICANN entered into a memorandum of understanding with the ICC regarding community objections only on 12 June 2012 (**RM 30**), *i.e.*, after the application window for new gTLDs was closed; potential objectors had yet to decide whether they wanted to file a community objection; panels still needed to be trained and appointed; the appointed panels had yet to apply the community objections standards and issue their advice to ICANN; ICANN had still to perform a quality review and assess the advice; the ICANN Board had yet to exercise the necessary due diligence before deciding if it accepted the community objection panel's advice.

7. Booking.com raised similar concerns (**RM 31**), but the Booking.com Panel simply did not draw a distinction between the adoption of the general principles and their subsequent implementation. The Booking.com Panel limited its review to ICANN's compliance with the letter, rather than the spirit, of the Guidebook. It refrained from reviewing the Board's actions in implementing the Guidebook, asserting that the ICANN Board had ultimate discretion whether or not to intervene.

8. Other panels disagree with the Booking.com Panel (*infra*). And rightfully so. Indeed, ICANN's reasoning would logically result in any review of the objection procedure being denied, no matter how arbitrary the third party determination may be.

9. For the sake of clarity, dSL does not express a “wholesale attack” on the community objection procedures nor the Guidebook. Rather, dSL requests that the community objection procedures be correctly implemented in accordance with ICANN’s AoI and Bylaws, and that the standards, policies and procedures on community objections be applied in a fair, equitable and non-discriminatory fashion. If it is the case that a literal reading of the Guidebook would prevent a fair, equitable and non-discriminatory application of the standards, policies and procedures for community objections, ICANN must deviate from the letter of the Guidebook and honor its spirit to make sure that it implements its policies in accordance with ICANN’s fundamental obligations.

B. The IRP Panel is empowered to render decisions that are binding upon ICANN

10. The IRP has all the characteristics of an international arbitration. The IRP is conducted pursuant to a set of independently developed international arbitration rules: the ICDR’s International Arbitration Rules (“ICDR Rules”) as minimally modified by the Supplementary Procedures for ICANN’s Independent Review Process (“Supplementary Procedures”). The IRP is administered by a provider of international arbitration services. The decision-maker is not ICANN, but a panel of neutral individuals selected by the parties in consultation with the ICDR, and appointed pursuant to the ICDR Rules.

11. Within its New gTLD Program, ICANN created the IRP so as to provide an alternative to dispute resolution by courts. To submit a new gTLD application, Claimant had to agree to eight pages of terms and conditions (**RM 5**, Module 6). The terms and conditions include a waiver of all Claimant’s rights to challenge ICANN’s decisions on Claimant’s application in court or in any other judicial forum, provided that, as an applicant, Claimant may utilize any accountability mechanism set forth in ICANN’s Bylaws (**RM5**, Module 6-4). Assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable,

the ultimate accountability remedy for Claimant is the IRP (Cf. **RM 32**, para. 40; **RM 33**, para. 73).

12. The IRP is not a mere “corporate accountability mechanism” aimed at ICANN’s internal stakeholders. The IRP is open to *any* person materially affected by a decision or action by the Board (Article IV(3)(2) of ICANN’s Bylaws). It is made explicitly available to applicants such as Claimant (**RM 5**, Module 6-4), who is by definition a third party.

13. The IRP cannot fulfil its role as an effective and robust mechanism for accountability (as required by ICANN’s Affirmation of Commitments (**RM 4**, Article 9.1) and ICANN’s Bylaws (**RM2-3**, Article I(2)(10)) unless it be binding upon ICANN. Otherwise, the ICANN Board’s discretion would indeed be unfettered and ICANN’s AoI and Bylaws would be called into question.

14. A previous IRP panel ruled that “[v]arious provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel’s decisions, opinions and declarations are binding” and that “[t]here is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding” (**RM 32**, para. 98).

15. Indeed, as per Article IV(3)(8) of the ICANN Bylaws, the ICANN Board has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures (**RM 32**, para. 101). The Supplementary Procedures supplement the ICDR Rules (Supplementary Procedures, Preamble and Section 2). The preamble of the ICDR Rules provides that “[a] dispute can be submitted to an arbitral tribunal for a final and binding decision”. Article 30 of the ICDR Rules specifies that “[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties”. No provision in the Supplementary Procedures deviates

from the idea that the Panel's decisions are binding. On the contrary, Section 1 of the Supplementary Procedures defines an IRP Declaration as a decision/opinion of the IRP Panel. Section 10 of the Supplementary Procedures requires that IRP Declarations i) are made in writing, and ii) specifically designate the prevailing party. Where a decision must specifically designate the prevailing party, it is inherently binding. Moreover the binding nature of IRP Declarations is further supported by the language and spirit of Section 6 of the Supplementary Procedures and Article IV(3)(11)(a) of the ICANN Bylaws. Pursuant to these provisions, the IRP Panel has the authority to summarily dismiss requests that are brought without standing, are lacking in substance, or are frivolous or vexatious. It is clear that such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory only (**RM 32**, para. 107).

16. Finally, even if ICANN's Bylaws and Supplementary Procedures were considered to be ambiguous (*quod non*) regarding the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Claimant is clearly one of an adhesion contract. In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was possible for ICANN, and clearly within its power, to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure (**RM 32**, paras. 108-109).

17. An IRP panel in a recent decision, the *Vistaprint* decision, made a distinction between i) an IRP panel's finding on whether or not the Board has acted consistently with the AoI and Bylaws and ii) the form of relief that the IRP panel can provide by directing the ICANN Board either to take, or to refrain from taking, any action or decision. According to the panel in the *Vistaprint* decision, the former is binding; the latter would serve only as a recommendation to be reviewed and acted upon by the ICANN Board (**RM 34**, para. 140).

The *Vistaprint* IRP Panel attempted to support its reasoning by reference to a statement made by a former Chair of the ICANN Board, who advocated, in 2009, that an IRP panel's recommendations be advisory (**RM 34**, para. 142).

18. However, the panel in the *Vistaprint* decision disregarded the fact that the IRP procedure has been modified to make ICANN more accountable, and that for the New gTLD Program, the IRP procedure was conceived by ICANN as the ultimate dispute resolution mechanism (*supra*, para. 10). Maybe more importantly, the panel in the *Vistaprint* case made an erroneous reading of Article IV(3)(11) of ICANN's Bylaws, when it stated that the Panel may *only* recommend that the ICANN Board stay or take any action or decision (**RM 34**, paras. 136 and 143). However, nothing in the ICANN Bylaws or the Supplementary Procedures suggests that the examples of an IRP panel's authority given in Article IV(3)(11) impose limits on the IRP Panel's authority. A recommendation can be a binding recommendation. No provision (be it in the Supplementary Procedures, in the ICANN Bylaws or elsewhere) limits the IRP Panel's task pursuant to the ICDR Rules of resolving the dispute with a final and binding decision (*infra*). This has been the interpretation of most IRP panels appointed in the context of the New gTLD Program (*infra*; **RM 33, 35 and RM 36**).

19. For all these reasons, the IRP Declaration is binding upon ICANN.

C. The IRP Panel has the authority to grant the affirmative relief that would finally resolve the dispute

20. The right to an independent review is "*a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process*" (**RM 35**, para. 59).

The IRP Panel's authority is not limited to a simple declaration that ICANN breached its obligations under its AoI, Bylaws and the Applicant Guidebook. The task of an IRP panel is to resolve the dispute: the applicable ICDR Rules (as supplemented by the Supplementary

Procedures) are designed to resolve a dispute between the parties; the panel is instructed to arbitrate and to render final and binding awards. (See Preamble of ICDR Rules: “*These Procedures are designed to provide a complete dispute resolution framework for disputing parties.*”; Article 20(2) ICDR Rules: “*The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute.*”; Article 30(1) ICDR Rules: “*Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.*”).

21. To resolve the dispute and to offer effective redress to an applicant, the IRP Panel may issue a binding recommendation regarding what action ICANN must take in order to cease violating its obligations. Indeed, IRP panels “*have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook.*” (**RM 37**, para. 126, emphasis added). The point is all the stronger here, as ICANN created the IRP specifically to be the sole dispute resolution mechanism available to new gTLD applicants (*supra*).

22. Previous IRP panels have given binding recommendations to ICANN:

- In the *GCC* case, the emergency panelist made the “*order by way of an interim declaration and recommendation to the ICANN Board that [...] ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted*” (**RM 35**, para. 96);
- In the *Dot Registry* case, the emergency independent review panelist “*ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC*” (**RM 36**, p. 19);
- In the *DCA* case, the IRP Panel issued a binding recommendation that “*ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s*

application to proceed through the remainder of the new gTLD application process”
(**RM 37**, para. 149).

23. As a result, the applicable rules and the jurisprudence clearly establish that an IRP panel is authorized to grant affirmative relief.

24. In the *Vistaprint* case, the IRP Panel issued a non-binding recommendation for the ICANN Board. As explained above, this IRP panel considered its authority to be limited to issuing non-binding recommendations on the basis of an erroneous and isolated reading of ICANN’s Bylaws (**RM 34**, para. 149). The panel in the *Vistaprint* case recognized nonetheless that it would not be uncommon for individuals, companies or even governments to agree to participate in binding dispute resolution processes with third parties in similar circumstances (**RM 34**, para. 147). Also important is that the IRP Panel in the *Vistaprint* case was unable to agree on the question of whether the ICANN Board had complied with i) the standard of non-discrimination imposed by Article II(3) of ICANN’s Bylaws, and ii) the relevant core values in Article I(2) of ICANN’s Bylaws (*e.g.*, applying documented policies neutrally and objectively with integrity and fairness) (**RM 34**, para. 189). Instead of ruling on the issue, the *Vistaprint* Panel referred the matter back to the ICANN Board, giving the ICANN Board the opportunity to exercise its judgment on the issue (**RM 34**, paras. 191, 197). The Panel considered that the ICANN Board had not yet had the opportunity to do so. However, once the ICANN Board considers the issue – and it must do so pursuant to Article IV(3)(21) of ICANN’s Bylaws – the ICANN Board should refrain from violating the AoI and ICANN’s Bylaws. The issue of disparate treatment and fair application of ICANN’s policies could again be brought before an IRP panel, as it is an IRP panel’s task to examine compliance of the Board’s actions and inactions with the AoI and ICANN’s Bylaws. The IRP Panel in the *Vistaprint* case did not act in accordance with the ICDR Rules, as it did not finally resolve the dispute. The *Vistaprint* case illustrates the need for an IRP panel to grant

affirmative relief, as was understood by the IRP Panels in the *Dot Registry*, *GCC* and *DCA* cases.

III. THE OBLIGATIONS OF ICANN AND ITS BOARD REGARDING COMMUNITY EXPERT DETERMINATIONS

25. ICANN only acts through its Board, and the ICANN Board has ultimate responsibility for the New gTLD Program. (Article II(1) of the ICANN Bylaws; **RM 5**, Module 5-4) ICANN has previously confirmed this, arguing that Californian law requires that all activities and affairs of ICANN be managed and that all corporate powers be exercised under the ultimate direction of the Board (**RM 38**, para. 41).

26. However, the fact that the ICANN Board exercises all the corporate powers of ICANN does not mean that its actions are beyond scrutiny or that the ICANN Board has unlimited discretionary powers. The Board must still comply with its fundamental obligations and can be held accountable for any violation thereof. Ruling otherwise would imply that no Californian corporation could be held accountable in court or be subject to binding (international) arbitration.

27. In this respect, one must distinguish between i) the ICANN Board's internal role towards its stakeholders, and ii) ICANN (and the ICANN's Board)'s external responsibility towards third parties. Internally, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. Externally, the ICANN Board's discretionary power is limited. ICANN and its Board must offer redress, when its decisions or actions harm third parties. ICANN has the obligation to act "*consistently with relevant principles of international law, including the general principles of law recognized as a source of international law*" by virtue of Article IV of the AoI (**RM 27**, para. 140).

28. The ICANN Board's latitude in its decision making does not bestow the Board with "*an unfettered discretion in making decisions. [...] The decision or action [of the ICANN*

Board] should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion” (**RM 35**, para. 76). Some of ICANN’s obligations are so fundamental that limitations to the ICANN Board’s discretion are explicitly mentioned in the ICANN Bylaws. In this respect, the ICANN Bylaws expressly provide that ICANN may not discriminate and that it must operate in an open, transparent and fair manner:

- “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.” (Article II(3) of the ICANN Bylaws)
- “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” (Article III(1) of the ICANN Bylaws)

29. The obligations of the ICANN Board in its decision making are “reinforced by the standard of review for the IRP process [...] when the action of the Board is compared to the requirements under the [AoI] and Bylaws.” (**RM 35**, para. 77). As made apparent *inter alia* by the applicable standard of review, ICANN is “bound by its Bylaws to conduct adequate diligence to ensure that it [is] applying its procedures fairly.” (**RM 37**, para. 105).

30. It is unsustainable for ICANN to adopt a purely process-focused position. The ICANN Board has an overriding responsibility to make fair, reasoned and non-discriminatory decisions under conditions of full transparency. Simply following the processes and procedures developed by ICANN cannot alone be sufficient grounds for declining to review a decision. If the requirements of fairness, reasoned decision-making, non-discrimination and transparency have not been met in the implementation of the process and procedures, the ICANN Board must, when invited to do so, conduct a meaningful review (**RM 37**, para. 107). Claimants understand that the ICANN Board may be required to take advice and

recommendations from its constituent bodies or third party experts into consideration; however, the Board is not obliged to follow those recommendations (**RM 37**, para. 111). Also, when the ICANN Board receives an advice or recommendation, it is expected to (at the very least) investigate the matter before taking a decision (**RM 37**, para. 113), and conduct a meaningful review when reviewing a challenged decision (**RM 37**, para. 107).

31. With respect to expert determinations on community objections, the expert determination has no effect unless ICANN accepts it, and there is no legal basis for ICANN to accept it unquestioningly. The Guidebook may provide that the findings of a DRSP panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process (**RM 5**, Module 3-17). However, that is no reason for the ICANN Board to refrain from its obligation to exercise its independent judgment when considering the expert advice. As mentioned above, the ICANN Board has ultimate responsibility for the New gTLD Program (**RM 5**, Module 5-4), and the ICANN Board does not act responsibly if it unquestioningly accepts an expert determination and advice without performing the necessary due diligence as to the expert's qualifications, independence, impartiality and fair and correct application of the applicable standards.

32. Interventions by the ICANN Board in specific cases support the finding that an expert determination is not a final decision. When ICANN was asked to review expert determinations on so-called string confusion objections (SCO), the ICANN Board intervened to address "*perceived inconsistent or otherwise unreasonable SCO Expert Determinations*" (**RM 43**). ICANN never explained why it intervened with respect to some of the inconsistent and unreasonable SCO expert determinations, but elected not to intervene with respect to equally consistent and unreasonable community objection expert determinations.

IV. THE IRP PANEL'S REVIEW ON THE MERITS OF THE CASE

A. The IRP Panel controls ICANN and its Board's exercise of its discretion

33. The Applicant Guidebook explicitly provides that an “*applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application*” (**RM 5**, Module 6-4). An ICANN decision only becomes final when its Board has expressed itself on the issue. Any other reasoning would be impossible according to ICANN’s own logic: that all the activities and affairs of ICANN must be managed and that all corporate powers must be exercised under the ultimate direction of the Board. As confirmed in the Applicant Guidebook, the ICANN Board remains responsible for the New gTLD Program (**RM 5**, Module 5-4). And any final decision can be challenged in an IRP. Even if a decision is made entirely pursuant to the Guidebook, that decision remains subject to possible review by the IRP Panel (**RM 35**, para. 79). *E.g.*, the ICANN Board’s decision regarding the DCA Trust’s application for .africa might have been correct from a purely process-focused perspective; the fact that the Board’s actions and inactions with respect to DCA Trust’s application “*were not procedures designed to insure the fairness required by Article III[(1) of the ICANN Bylaws]*” was sufficient for the IRP Panel to conclude that the Board’s actions and inactions were inconsistent with the AoI and Bylaws, and required review (**RM 37**, para. 109). It is not too late to challenge either applicable policy or the Guidebook, if implementation is inconsistent with the AoI and Bylaws. According to established case law of the U.S. Supreme Court, a policy’s age or the age of an implementing regulation cannot be used as an excuse for clear inconsistency with fundamental legal principles.² Even if a statute of limitations is imposed on challenges to a specific policy, it does not prevent those affected by the application of the policy from

² See *e.g.*, *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (**RM 39**); *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (**RM 40**).

challenging that application on the grounds that the policy conflicts with a more fundamental legal principle.³

34. As explained above, the Expert Determination only becomes final when the parties have accepted the Expert Determination or when the ICANN Board has dutifully expressed its opinion. When the Board intervenes (or elects not to intervene) regarding an expert determination advice, that action (or inaction) of the Board is subject to review by the IRP Panel. The IRP Panel must review and determine whether the contested actions of ICANN and its Board are consistent with i) ICANN’s AoI and Bylaws and ii) secondary rules created by ICANN. These rules require ICANN and its Board to act in good faith and in accordance with the principles of international law. The IRP Panel’s mandate includes a review as to whether or not ICANN’s Board acts in a discriminatory manner with regards to its interventions on CPE, and as to whether ICANN “*act[s] and make[s] decisions ‘neutrally and objectively with integrity and fairness.’*” (**RM 37**, paras. 95-97).

B. The IRP Panel adopts an objective standard of review

35. IRP panels are required “to ‘*objectively*’ determine whether or not the Board’s actions are in fact consistent with the [AoI], Bylaws and Guidebook” (**RM 42**, para. 111; **RM 37**, para. 75). They must appraise the Board’s conduct “*independently, and without any presumption of correctness.*” (**RM 42**, para. 111; **RM 37**, para. 75). Consequently, the standard of review in an IRP is “*a de novo, objective and independent one, which does not require any presumption of correctness.*” (**RM 37**, para. 76; *see also* **RM 42**, para. 112-114; **RM 27**, para. 136; **RM 34**, para. 125).

C. The remit of the IRP Panel’s review covers both process and substance

36. The IRP Panel is competent to determine whether ICANN’s implementation of the

³ *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F. 3d 142, 145 (D.C. Cir. 2014) (**RM 41**).

CPE – and in particular the Board’s actions and inactions in this respect – were consistent with ICANN’s AoI and Bylaws. The IRP Panel’s task entails a review as to whether ICANN and its Board act fairly, neutrally and in a non-discriminatory manner (**RM 37**, para. 94). The Panel must review ICANN’s compliance with its fundamental obligations, including:

- Did ICANN apply its policies “*neutrally and objectively, with integrity and fairness*”? (Article I(2)(8) of the ICANN Bylaws; **RM 37**, paras. 94-96);
- Did ICANN operate “*in an open and transparent manner and consistent with procedures designed to ensure fairness*”? (Article III(1) of the ICANN Bylaws);
- Has ICANN applied “*its standards, policies, procedures, or practices inequitably or single[d] out any particular part for disparate treatment*” without justification by substantial and reasonable cause? (Article II(3) of the ICANN Bylaws; **RM 37** para. 96).

37. To assess whether ICANN has applied its standards, policies and procedures in a fair, equitable and non-discriminatory fashion, it is imperative that the IRP Panel reviews the application of standards, policies and procedures in detail. One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied. A review of the substance is required, and it must be examined whether standards have been applied consistently to ensure fairness and non-discrimination. The ICANN Board has consistently refused to perform such a review, and is currently arguing that an IRP panel should not engage in such a review. Arguing that “[*t*]he reconsideration process is for the consideration of policy-or process-related complaints” (**Annex 21**, p. 13), the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner. The ICANN Board instead limited its review to the question of whether the DRSP Panel had made mention of the applicable standard. Such a limited review is not a meaningful one. Moreover, the ICANN Board failed to address the

appearance of bias of Dr. Tawil. The BGC limited itself to the statement that dSL had not given an explanation for why it could not have submitted information regarding Dr. Tawil's conflict of interest before (**Annex 25**). However, as explained in dSL's request for IRP, dSL had provided this explanation to ICANN.⁴ ICANN's Ombudsman considered that dSL had performed an adequate due diligence and search, and that there was an entirely reasonable reliance upon Dr. Tawil's certificate of impartiality (**Annex 23**, p. 3). The fact that dSL found out about the appearance of bias after the expert determination was rendered is no justification to deprive dSL of its due process rights. Depriving dSL of its due process rights and a right to a fair trial violates international public order. A decision or expert determination that violates these fundamental rights is a bar to giving *res judicata* effect to an expert determination and advice.

38. Rather than correcting the procedural and substantial errors in the expert determination, the ICANN Board discriminated against dSL even further by granting remedies to certain other parties, but not to dSL. As mentioned above, the ICANN Board intervened to address "*perceived inconsistent or otherwise unreasonable SCO Expert Determinations*" (**RM 43**). However, the ICANN Board never explained why it elected not to intervene with respect to other SCO expert determinations that were just as unreasonable (**RM 44-45**). On 9 October 2015, the *Vistaprint* IRP panel recommended that the ICANN Board exercise its judgment on the question of whether an additional review mechanism be appropriate to re-evaluate an SCO expert determination in view of ICANN's Bylaws concerning core values and non-discriminatory treatment (**RM 34**).

39. It is not justifiable for ICANN to invoke the fact that the Guidebook does not explicitly mention good faith and due process guarantees in order to deny applicants their

⁴ Request for IRP, para. 49.

elementary right to due process. The ICANN Board’s interventions with respect to certain specific expert determinations show the Board’s ability to adapt the implementation of ICANN policies in cases where there has not been fair application of those policies. However, ICANN and its Board fail to provide reasonable justification for intervening in some cases and not in others. That is simply arbitrary.

40. Moreover, the Guidebook makes explicit mention of the availability of accountability mechanisms, which are designed to offer applicants a meaningful review and serve as a guarantee of due process.

V. RESPONSE TO ICANN’S ARGUMENTS ON THE MERITS OF THE CASE

A. ICANN is misrepresenting Dr. Tawil’s conflict of interest

41. ICANN submits that Dr. Tawil was not required to disclose his involvement in the sports industry and his relationship with DirecTV and TyC in broadcasting agreements with the IOC. According to ICANN, no provision in the IBA Guidelines on Conflicts of Interest would require Dr. Tawil to disclose this information. ICANN considers that the relationship with DirecTV and TyC is adverse to the IOC.

42. The IBA Guidelines offer valuable advice on conflicts of interest in international arbitration. They contain general standards regarding impartiality, independence and disclosure, as well as lists with practical examples in which the general standards are applied. The IBA Guidelines specify that “[t]hese lists cannot cover every situation. In all cases, the General Standards should control the outcome.” (RM 46, p. 17) 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.

43. In the case at hand, dSL’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 show 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 (Annexes 19 and 20), and that Dr. Tawil has been lecturing on dispute resolution in major sport-hosting events at a high-profile conference (Annex 15) should have been disclosed. ICANN'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.

44. In assessing Dr. Tawil's conflict of interest, it is important to unravel the dynamics of the monetized sporting industry. A broadcasting company which is interested in obtaining broadcasting rights for a major sporting event is not simply adverse to the organizer of the event, as ICANN wants this IRP Panel to believe (ICANN's response, para. 48). 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 (Annex 28, p. 38, para. 87). 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 District Court of the Eastern District of New York (Annex 28, p. 14, para. 29). 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 dSL's justifiable doubts as to the impartiality and independence of Dr. Tawil to render an expert determination in relation to dSL's application for .sport.

45. By any standard, the appearance of impartiality and independence of Dr. Tawil to rule on SportAccord's objection is compromised. As was demonstrated by the successful challenge by dSL of the previously nominated expert in the .sport case, when ICANN and the ICC adopted a strict standard concerning conflicts of interest. ICANN had adopted a code of conduct according to which "[u]nethical actions, or even the appearance of compromise, [were] not acceptable" (**RM 5**, Module 2-31). Panelists had to "exclude themselves from participating in the evaluation of an application if, to their knowledge, there [was] some predisposing factor that could prejudice them with respect to such evaluation" (**RM 5**, Module 2-32). Breaches of ICANN's code of conduct by a panelist would result in discarding the assessment by that panelist (**RM 5**, Module 2-35).

46. ICANN argues that the standards of its code of conduct for panelists would not apply to Dr. Tawil (**Annex 25**, pp. 10-11). However, ICANN's code of conduct applied to any evaluation panelist (**RM 5**, Module 2-31), and, according to ICANN's own definition, an evaluation panelist is any individual associated with the review of an application (**RM 5**, Module 2-34). Dr. Tawil was clearly an individual associated with the review of dSL's application. Hence, there is no reason why ICANN's code of conduct should not apply to Dr. Tawil. There also is no justification for ICANN to discriminate between the ethical standards for panelists evaluating unchallenged New gTLD applications and the ones evaluating applications that were challenged by a third party. In view of the contentious nature of objection proceedings, the standards should be higher rather than lower. Moreover, ICANN specified that its code of conduct contained minimum standards (**RM 5**, Module 2-34). As a result, there is no legal basis for a panelist in objection proceedings to adopt a lesser standard.

B. Whether or not the ICC followed its dispute resolution rules does not prevent the ICANN Board from evaluating compliance with the AoI and Bylaws

47. ICANN goes to great lengths to argue that the ICC followed the process.⁵

48. However, whether the ICC followed its dispute resolution rules on conflicts of interest is of no relevance. The conflict of interest was discovered – and could only be reasonably discovered – after Dr. Tawil rendered his determination and advice. The ICC Rules of Expertise do not govern this situation, and the ICC followed the process on conflicts of interest (**Annex 22**). However, Dr. Tawil frustrated ICC's process by failing to make the necessary disclosures in his DAASII, and by declaring that there were no facts or circumstances, past or present that he should disclose because they might be of such a nature as to call into question his independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to his impartiality (**Annex 14**). As demonstrated in dSL's RfRs, request for IRP and in the present reply, that declaration is false. In making this false declaration, Dr. Tawil violated the applicable conflicts of interest rules and process of both the ICC and ICANN. Therefore, no value can be attached to the expert determination, which was rendered by Dr. Tawil. Rejecting the recommendation and advice by Dr. Tawil is not a matter for the ICC; it is a matter for ICANN. And rejecting such recommendation or discarding a review that was conducted in violation of ICANN's code of conduct was something that ICANN promised it would do in Module 2-35 of the Guidebook (**RM 5**).

49. To draw an analogy: the ICC would or could never annul arbitral awards, even if the arbitrator(s) had violated general norms of international law by disregarding fundamental due process standards. However, such an award would be unenforceable and would be annulled

⁵ ICANN's Response, paras. 42 and following.

by the competent authorities reviewing the award. The ICC cannot prevent this from happening and cannot be blamed for it.

50. ICANN – a corporation which must abide by general principles of international law – was requested to review the ICC expert determination and to correct the due process violations, which were committed by the appointed expert. Instead of focusing its review on the due process violations committed by the expert which are a compelling reason to discard the expert determination, the ICANN Board limited its review to determining that the ICC complied with the process. Such a review is obviously meaningless and at odds with ICANN’s obligations under its AoI and Bylaws.

C. The ICANN Board improperly refused to consider the Ombudsman’s report and Dr. Tawil’s appearance of bias

51. The ICANN Board failed to exercise due diligence and care in not having a reasonable number of facts in front of it. In particular, the ICANN Board decided not to consider a report from its Ombudsman, recommending that the ICANN Board organize a rehearing of the .sport community objection.

52. ICANN argues that its Board properly refused to consider the Ombudsman’s report and recommendation, alleging that the Ombudsman’s report was not a final one (ICANN’s response, paras. 54-55). According to ICANN, neither the ICC nor Dr. Tawil had an opportunity to respond to dSL’s allegations (ICANN’s response, para. 54).

53. However, dSL informed the ICC about the issue as early as 15 January 2014 (**Annex 16**). Dr. Tawil had been informed by SportAccord on 15 May 2014 (**Annex 29**), *i.e.*, before the BGC considered the issue on 21 June 2014 and before the ICANN Board considered the issue on 18 July 2014. Dr. Tawil never sought to respond to dSL’s statement of the facts.

54. Moreover, the Ombudsman took into account ICC’s position in his report. On 13 February 2014, the Ombudsman informed dSL that he was opening a dialogue with the ICC. On 27 March 2014, the Ombudsman informed dSL that he wanted to see the ICC’s response

before he made “*a final decision*” (Annex 30). On 29 March 2014, the Ombudsman reported that he had seen “*the reply from ICC*” (Annex 31), and on 31 March 2014, the Ombudsman issued his report with his recommendation to the ICANN Board (Annex 23). There were no indications at the time that the Ombudsman’s report and his recommendation were not final. As a result, there was no need for dSL to seek a new “final” report. The ICC’s position had not changed (Annex 32; Resp. Ex. 05 and 06), and Dr. Tawil elected not to respond (*supra*).

55. Finally, ICANN’s allegation that a complaint with the Ombudsman may not be pursued concurrently with another accountability mechanism⁶ is both irrelevant and untrue. It is irrelevant as there was no need for dSL to pursue its complaint after the Ombudsman had issued his report and recommendation (Annex 23). It is also untrue: ICANN’s Bylaws provide that the Ombudsman shall act as a neutral party in matters for which the RfR policy and IRP have not been invoked (ICANN’s Bylaws, Articles V(2) and V(3)(1)). ICANN’s Bylaws set forth only what the Ombudsman must do; they do not prevent the Ombudsman from carrying on his activities once an RfR or IRP is initiated.

D. ICANN made an erroneous application of the community objection standards

56. ICANN argues that the BGC found no support for Claimant’s contention that the Dr. Tawil applied the wrong standard for assessing community objections.⁷ ICANN tries to refute dSL’s argument that Dr. Tawil’s expert determination was erroneous, unreasonable and discriminatory by referring to the fact that, in another case a different expert upheld a community objection by SportAccord for .sports.⁸

57. However, the expert determination on .sports was made by the same expert who was first appointed to rule on SportAccord’s objection to .sport, but whose appointment dSL

⁶ ICANN’s response, para. 54.

⁷ ICANN’s response, para. 24.

⁸ ICANN’s response, para. 58.

successfully challenged, because of the expert’s close ties with the IOC and the sports industry (**Annexes 11-13; RM 47**). The expert determination on .sports is currently being challenged in an IRP, initiated by the applicant for .sports (**RM 48**). No account should be taken of the determination on .sports.

58. In contrast, account should be taken of the factors set out in the Guidebook and of the fact that Dr. Tawil failed to apply them, as shown by dSL in its two RfRs and in its request for IRP. Moreover, the IRP Panel should not simply consider whether the factors set out in the Guidebook were applied; it must be assessed whether or not ICANN’s policies on new gTLDs were applied fairly, equitably and without discrimination. ICANN is correct when it states that it is not the role of the BGC or an IRP Panel to “*second-guess the substantive determinations of independent, third-party service providers or experts*”⁹. The IRP Panel’s role is to evaluate whether ICANN’s policies were applied in a manner consistent with the AoI and Bylaws. The IRP Panel’s review encompasses a review as to whether due process principles and general principles of international law were complied with. These fundamental rules are not complied with when the independence and impartiality of third party “experts” is jeopardized.

59. Moreover, many of the organizations named as supportive to SportAccord in its community objection have openly distanced themselves from SportAccord. The International Association of Athletics Federations and the International Shooting Sport Federation resigned their membership (**Annex 33**). The International Paralympic Committee withdrew as an associate member, as did the rowing, modern pentathlon, volleyball and rugby federations (**Annexes 34, 35, 36, 37**). Many IOC federations as well as AIOWF, ARISF and ASOIF suspended their membership (**Annexes 34, 37, 38**). If SportAccord ever represented the

⁹ ICANN’s response, para. 61 (emphasis added).

sports “community”, it can no longer claim to represent this “community”. A community objection can only succeed if the objector shows – among other requirements – that it is representative of the community and that there is substantial opposition from the community (RM 5, Modules 3-22 and 3-23). These requirements are clearly not fulfilled, as is demonstrated by the withdrawal of many of the organizations which SportAccord claimed to represent. Also in this respect, dSL argues that upholding the challenged expert determination would not be a fair and equitable application of the policy on community objections.

VI. THE IRP PANEL MUST ORDER ICANN TO REJECT THE EXPERT DETERMINATION THAT GRANTED SPORTACCORD’S COMMUNITY OBJECTION

60. In its request for IRP and with the present Reply, dSL has shown that the Expert Determination on SportAccord’s community objection violates both process and substance. As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases. Such a review would show that the standards for community objection were applied inconsistently and erroneously in the case of SportAccord’s objection. ICANN has always made it very clear that the requirements to be met in order to successfully issue a community objection are strict. As demonstrated in Claimants’ request for IRP and in the present Reply, SportAccord was only granted its community objection because the Panel applied the very stringent requirements in an unusual and inaccurate manner (Request for IRP, paras. 36 and following).

61. ICANN and its Board should never have accepted such an erroneous expert determination advice. Moreover, recent reports showing that the objector’s organization has fallen into complete disarray indicate how fragile the initial objection was and show that SportAccord’s community objection should necessarily fail.

62. Relief must be efficient and procedurally economic. Any relief ordered must

effectively prevent another unfair, arbitrary and discriminatory decision. Claimant is convinced that SportAccord's objection would have failed – and that there would have been a different decision on the merits – if the community objection process had been organized, implemented and supervised in accordance with ICANN's established policies and ICANN's fundamental obligations. In fact, a proper implementation of the community objection process would have led to a different decision on the merits. The IRP Panel is capable of making this determination and is therefore competent to establish that the granting of SportAccord's community objection must be rejected by ICANN.

VII. RELIEF REQUESTED

63. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, the Claimant respectfully requests that the Panel:

- Declare that ICANN has breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the expert determination granting SportAccord's community objection;
- Award the Claimant its costs in these proceedings; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that the Claimant may request after further briefing or argument.

Respectfully submitted,



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- Annex 30 - Email from ICANN's Ombudsman to dSL of 13 February 2014
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