

**Please see Errata attached at the end of this document.**

**RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**

**RECONSIDERATION REQUEST 14-10**

**21 JUNE 2014**

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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's<sup>1</sup> designation of the Expert Panelist who presided over the underlying objection; and (iii) the BGC's<sup>2</sup> 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

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<sup>1</sup> International Centre for Expertise of the International Chamber of Commerce

<sup>2</sup> 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.<sup>3</sup> (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.

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<sup>3</sup> 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.<sup>4</sup>

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

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<sup>4</sup> 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.<sup>5</sup> (Bylaws, Art. IV, § 2.) Requester is challenging both Board

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<sup>5</sup> 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 NGPC<sup>6</sup> 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.<sup>7</sup>

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

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<sup>6</sup> New gTLD Program Committee.

<sup>7</sup> 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.<sup>8</sup>

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

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<sup>8</sup> 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.

## ERRATA SHEET

The Recommendation of ICANN's Board Governance Committee ("BGC") on Reconsideration Request 14-10, which was published on 21 June 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	2	<u>“.SPORTS” should read “.SPORT”</u>
10	2	<u>“.SPORTS” should read “.SPORT”</u>

Date: 28 July 2014