

**REVISED RECOMMENDATION**  
**OF THE BOARD GOVERNANCE COMMITTEE**  
**ON RECONSIDERATION REQUESTS 13-16 AND 14-10**

**1 JUNE 2017**

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In an Independent Review Process (IRP) proceeding, dot Sport Limited (dSL or Requestor), claimed, among other things, that the ICANN Board failed to take into account newly discovered evidence about alleged conflicts of interest of the Expert presiding over the Community Objection filed against the Requestor’s application for .SPORT. The IRP Panel recommended in the Final Declaration that the ICANN Board “reconsider its decisions on the Reconsideration Requests in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines.” Following consideration of the Final Declaration, the Board directed the Board Governance Committee (BGC) to re-evaluate the relevant Reconsideration Requests.

**I. Brief Summary**

The Requestor and SportAccord both applied for .SPORT and are in the same contention set. SportAccord filed a Community Objection (Objection) against the Requestor’s application (Application). The Expert rendered a determination in favor of SportAccord (Expert Determination). The Requestor then filed Reconsideration Request 13-16 (Request 13-16), challenging the International Centre for Expertise of the International Chamber of Commerce’s (ICC) appointment of expert, Dr. Guido Santiago Tawil (Expert), claiming that because 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 Requestor had not demonstrated that the Expert had failed to follow the

applicable ICC procedures for independence and impartiality.

The Requestor then complained to the Ombudsman and on 31 March 2014, the Ombudsman issued a “preliminary email” concerning the Requestor’s Ombudsman complaint.<sup>1</sup> While the Ombudsman complaint was still pending, the Requestor filed a second Reconsideration Request (Request 14-10), claiming that it had discovered additional evidence that the Expert had a conflict of interest. The Ombudsman advised ICANN that he sought and received confirmation from the Requestor that it wished to pursue Request 14-10 rather than its complaint to the Ombudsman, recognizing that pursuant to the applicable version of the Bylaws,<sup>2</sup> a complaint lodged with the Ombudsman could not be pursued while another accountability mechanism on the same issue was ongoing.<sup>3</sup>

Following the NGPC’s determination on Request 14-10, the Requestor lodged a new complaint with the Ombudsman.<sup>4</sup> On 25 August 2014, the Ombudsman issued a final report on the Requestor’s new complaint (Ombudsman Final Report).<sup>5</sup>

The Requestor then initiated an IRP. On 31 January 2017, the IRP Panel declared the Requestor to be the prevailing party, and recommended that the Board reconsider Requests 13-16 and 14-10 “in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the [International Bar Association Guidelines on Conflicts of Interest in International Arbitration]” (IBA Conflict Guidelines or the Guidelines).<sup>6</sup> On 16

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<sup>1</sup> Ombudsman Final Report at Pg. 4, (attached to this Recommendation as Attachment 1).

<sup>2</sup> ICANN Bylaws, Amended 7 February 2014, available at <https://www.icann.org/resources/pages/bylaws-2014-10-06-en>.

<sup>3</sup> NGPC Resolution 2014.07.18.01, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-18-en#1.b>.

<sup>4</sup> Ombudsman Final Report at Pg. 4.

<sup>5</sup> *See id.*

<sup>6</sup> IRP Final Declaration at ¶ 9.1(a)-(b).

March 2017, the ICANN Board accepted the IRP Panel’s recommendation.<sup>7</sup>

Following passage of the 16 March 2017 Resolution, the BGC has carefully considered whether the alleged evidence of apparent bias should have been disclosed by the Expert in light of the IBA Conflict Guidelines. The BGC has also evaluated the Ombudsman Final Report, which was issued after the NGPC’s determination on Request 14-10. The BGC concludes that the Requestor’s claims are unsupported because the alleged evidence of bias does not “give rise to doubts as to the arbitrator’s impartiality or independence,”<sup>8</sup> under the IBA Conflict Guidelines. The BGC notes that its previous findings regarding timeliness are not relevant to its re-evaluation of Requests 13-16 and 14-10.

## **II. Facts**

### **A. Background Facts**

The Requestor and SportAccord each applied to operate .SPORT. On 13 March 2013, SportAccord, an umbrella organization for international sports federations and other sport-related international associations, filed its Objection, asserting that there was “substantial opposition to the Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>9</sup>

On 20 June 2013, the ICC – the dispute resolution provider – appointed Jonathan P. Taylor as the expert to assess SportAccord’s Objection. The Requestor objected to Mr. Taylor’s appointment on the basis that Mr. Taylor was a sports lawyer, that he had represented the International Rugby Board, and that he worked for the International Olympic Committee (IOC). In light of the Requestor’s objection, the ICC did not confirm Mr. Taylor as the expert. On 29

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<sup>7</sup> ICANN Board Resolution 2017.03.16.10, *available at* <https://www.icann.org/resources/board-material/resolutions-2017-03-16-en#2.c>.

<sup>8</sup> 2004 IBA Conflict Guidelines General Standard 3(a).

<sup>9</sup> BGC Determination on Reconsideration Request 13-16 at Pg. 2.

July 2013, the ICC notified the parties that it had nominated Dr. Guido Santiago Tawil to consider the Objection. Dr. Tawil provided his *Curriculum Vitae* (CV) and completed the required Declaration of Acceptance and Availability and Statement of Impartiality and Independence, stating that he had nothing to disclose and could be impartial and independent.<sup>10</sup> Dr. Tawil is a lawyer, and his practice focuses not on sports law, but instead on international arbitration, administrative law, and regulator practice. The Requestor did not object to Dr. Tawil's appointment.<sup>11</sup>

On 23 October 2013, the Expert Determination was issued, upholding SportAccord's Objection. Following the issuance of the Expert Determination, on 2 November 2013, the Requestor filed Request 13-16, stating that it had discovered that the Expert had co-chaired a panel at a conference in February 2011 (Conference) entitled "The quest for optimizing the dispute resolution process in major sport-hosting events."<sup>12</sup> According to the Conference flyer, the Conference panel planned to "debate the trends and best practices of resolving disputes in challenging environments with time-sensitive deadlines," including "issues related to arbitration, dispute boards, expert determination, mediation, and electronic discovery on infrastructure projects for big international sports events. The experiences of Atlanta, Barcelona and the London Olympic Games will be discussed. The panel will also address the unique aspects of sports disputes and the potential use of a fast-track dispute resolution process in this area."<sup>13</sup>

Request 13-16 sought reconsideration of the Expert Determination on the grounds that, among other things, the Expert failed to disclose material information relevant to his

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<sup>10</sup> BGC Determination on Reconsideration Request 13-16 at Pg. 3.

<sup>11</sup> ICANN's Response to Dot Sport Limited's IRP Request at ¶ 20.

<sup>12</sup> BGC Determination on Reconsideration Request 13-16 at Pg. 3-4.

<sup>13</sup> Request 13-16, Annex 3 at 3, *available at* <https://www.icann.org/en/system/files/files/request-annex-sport-3-08nov13-en.pdf>.

appointment, meaning his involvement in the Conference. The Requestor suggested that the Expert's involvement in the Conference indicated that the Expert was attempting to create connections within the organized sporting industry, an industry of which SportAccord was a part.<sup>14</sup> The Requestor submitted the Conference flyer in support of its Request.<sup>15</sup>

On 8 January 2014, the BGC denied Request 13-16. With respect to the Requestor's claim that the Expert should have disclosed his participation in the Conference, the BGC noted that pursuant to the New gTLD Applicant Guidebook (Guidebook), the ICC Rules of Expertise govern challenges to the appointment of experts, and that the Requestor had not shown that either the Expert, or the ICC itself, had failed to follow the ICC's disclosure rules.<sup>16</sup>

On 6 February 2014, the Requestor filed a complaint with ICANN's Ombudsman (Complaint) reiterating the arguments the Requestor had raised in Request 13-16.<sup>17</sup>

The Requestor claims that on 25 March 2014, during the pendency of this Ombudsman Complaint, it discovered that: (i) DirecTV, a client of the Expert's firm, acquired broadcasting rights for the Olympics from the IOC on 7 February 2014 (the DirecTV Contract); and (ii) a partner in the Expert's law firm is the president of Torneos y Competencias S.A. (TyC), a company that has a history of securing Olympic broadcasting rights (the TyC Relationship). The Requestor forwarded this information to ICANN's Ombudsman in support of its Complaint.<sup>18</sup>

On 27 March 2014, the Requestor sent a letter to the ICC regarding this information, stating that in the Requestor's view there was "little question . . . that Dr. Tawil provided false and/or information [*sic*] in respect to his declaration of impartiality" and requesting further

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<sup>14</sup> Request 13-16 at § 8, Pg. 9.

<sup>15</sup> Request 13-16, Annex 3 at Pg. 3, *available at* <https://www.icann.org/en/system/files/files/request-annex-sport-3-08nov13-en.pdf>.

<sup>16</sup> BGC Determination on Reconsideration Request 13-16 at Pg. 12-13.

<sup>17</sup> IRP Final Declaration at ¶ 6.23.

<sup>18</sup> Request 14-10 at § 5, Pg. 2; § 8, Pg. 6-8.

information regarding the “specific steps leading to the selection and the appointment of Dr. Guido Tawil by the relevant ICC Standing Committee, including but not limited to any correspondence, minutes and the CVs of other potential candidates who may have been suggested.” On 29 March 2014, the ICC responded and informed the Requestor that the ICC’s Rules and the Practice Note “set a specific time limit for objections,” and that the case had been closed and “neither the [Practice Note] nor the [ICC’s] Rules provide[d] a basis for reopening of a matter or a challenge of the Expert after closure of the matter.”<sup>19</sup>

On 31 March 2014, without seeking comment from the ICC, and relying solely on the ICC’s letter to the Requestor, the Ombudsman sent an email to ICANN, the Requestor, and the ICC, regarding the Requestor’s Complaint, recommending to the Board that the Objection be reheard with a different expert.<sup>20</sup> On 1 April 2014, the ICC sent a letter to ICANN, objecting to the Ombudsman’s email on the basis that the ICC “was not given the opportunity to provide [the Ombudsman] with information relevant to the issues raised in the letter or to request additional comments from the concerned expert.”<sup>21</sup> In response, the Ombudsman clarified that his email was only a draft report, and offered the ICC a chance to comment.<sup>22</sup>

On 2 April 2014, the Requestor filed Request 14-10, seeking reconsideration of, among other things the BGC’s denial of Request 13-16 and the ICC’s appointment of the Expert.<sup>23</sup> The Ombudsman advised the Requestor that, under Article V, Section 2 of the then-applicable Bylaws, an Ombudsman complaint cannot be pursued concurrently with another accountability

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<sup>19</sup> ICANN’s Response to dSL’s IRP Request at ¶ 29.

<sup>20</sup> ICANN’s Response to dSL’s IRP Request at ¶ 30; dSL’s IRP Request, Annex-23.

<sup>21</sup> ICANN’s Response to dSL’s IRP Request at ¶ 30.

<sup>22</sup> IRP Final Declaration at ¶ 6.29.

<sup>23</sup> IRP Final Declaration at ¶ 6.35.

mechanism, such as a request for reconsideration, on the same issue.<sup>24</sup> The Requestor chose to pursue Request 14-10, rather than its Complaint with the Ombudsman.<sup>25</sup>

In Request 14-10, the Requestor raised the information that it purportedly discovered on 25 March 2014: (i) the DirecTV Contract; and (ii) the TyC Relationship. The Requestor argued that the IOC “was named as an interested party” in the Objection, “SportAccord is effectively controlled by the IOC,” and “[t]he IOC and SportAccord are inextricably linked.”<sup>26</sup>

On 21 June 2014, the BGC recommended that the Request 14-10 be denied, finding that the Requestor’s arguments regarding the allegedly newly-discovered information regarding the Expert’s conflict of interest were not timely under the ICC’s rules, and did not support reconsideration because the Requestor had not established that the DirecTV Contract affected the Expert’s determination, or that the TyC Relationship should have been disclosed under “the applicable ICC procedures.”<sup>27</sup> On 18 July 2014, the NGPC accepted the BGC’s recommendation.<sup>28</sup>

Following the NGPC’s determination on Request 14-10, the Requestor lodged a new complaint with the Ombudsman.<sup>29</sup> On 25 August 2014, the Ombudsman issued a Final Report concluding that the Expert was not required to disclose the relationships and events identified by the Requestor, as they fell within the IBA Conflict Guidelines “green list category,” which, as described below, comprise circumstances that do not require disclosure.<sup>30</sup> Accordingly, the

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<sup>24</sup> IRP Final Declaration at ¶ 6.34.

<sup>25</sup> ICANN’s Response to dSL’s IRP Request at ¶ 31.

<sup>26</sup> Request 14-10 at § 8, Pg. 5.

<sup>27</sup> BGC Recommendation on Request 14-10, Pg. 8-12.

<sup>28</sup> IRP Final Declaration at ¶¶ 6.36, 6.37, 6.38.

<sup>29</sup> Ombudsman Final Report.

<sup>30</sup> Ombudsman Final Report at Pg. 5.

Ombudsman was unable to “make any recommendation about unfairness.”<sup>31</sup>

On 24 March 2015, the Requestor initiated an IRP. The Requestor’s IRP Request asked that ICANN be “required either to overturn the [expert] determination [...] and allow the Claimant’s application to proceed on its own merits, or to have the community objection reheard by an independent and impartial expert who has received proper and transparent training.”<sup>32</sup>

On 31 January 2017, the IRP Panel declared the Requestor to be the prevailing party<sup>33</sup>. The IRP Panel stated that “[h]ad the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable.”<sup>34</sup>

The IRP Panel further declared that: (i) the ICANN Board “did not follow or refer to [the Ombudsman’s draft] recommendation in considering the Reconsideration Request,” which the IRP Panel determined was a “relevant factor for this IRP Panel’s consideration as to whether or not the ICANN Board acted in accordance with its governing documents”<sup>35</sup>; and (ii) “the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP

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<sup>31</sup> Ombudsman Final Report at Pg. 6.

<sup>32</sup> dSL’s IRP Request, at ¶ 9.

<sup>33</sup> IRP Final Declaration at ¶ 9.1(a).

<sup>34</sup> IRP Final Declaration at ¶ 7.73.

<sup>35</sup> IRP Final Declaration at ¶¶ 7.76-7.77. After the Final Declaration, SportAccord contacted the Panel and indicated that the Ombudsman issued a final report on 25 August 2014, and therefore suggested that the Panel made a mistake in paragraph 7.77 of the Declaration. The IRP Panel responded “that it will not make any changes to the Final Declaration” because: (1) “no application has been made by either party pursuant to the ICDR Rules to correct ‘any clerical, typographical, or computational error in the Declaration,’ including at paragraph 7.77”; (2) “it is not clear that any change to the Final Declaration in relation to Sport Accord’s concerns regarding paragraph 7.7 would fall within the scope of ‘any clerical, typographical, or computational error’ for the Panel to correct on its own initiative”; and (3) the discussion in the Final Declaration at paragraph 7.77 remains accurate in the context of the discussion because the Ombudsman had not proceeded to a final report prior to the Second Reconsideration Request decision.”

that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding, decision-making bodies.”<sup>36</sup>

The IRP Panel recommended that the “Board reconsider its decisions on the Reconsideration Requests, in the aggregate, weighing the new evidence in its entirety against the standard applicable to neutrals as set out in the IBA Conflict Guidelines.”<sup>37</sup>

On 16 March 2017, the Board adopted the IRP Panel’s recommendation and directed the President and CEO of ICANN to facilitate re-evaluation of the Requests 13-16 and 14-10.<sup>38</sup>

#### **B. The Requestor’s Claims.**

The Requestor’s claims that the Board has directed the BGC to re-evaluate are:

1. The Requestor claims that the Expert’s failure to disclose that he co-chaired a panel at the Conference constitutes a breach of the ICC dispute resolution procedures as well as a breach of the ICANN policy on transparency as set out in the applicable Article III, Section 1 of the Bylaws.<sup>39</sup>
2. The Expert violated ICANN policy and process by failing to disclose that: (i) one of the Expert’s law firm’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) (i.e., the 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

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<sup>36</sup> IRP Final Declaration at ¶ 7.88.

<sup>37</sup> IRP Final Declaration at ¶ 9.1(b).

<sup>38</sup> ICANN Board Resolution 2017.03.16.10, *available at* <https://myicann.org/news/articles/15681/related/67576?language=es#2.b>.

<sup>39</sup> Request 13-16 at § 8, Pg. 6-7.

Olympic broadcasting rights and of which DirecTV Latin America is the principal shareholder (i.e., the TyC Relationship).<sup>40</sup>

**C. Relief Requested.**

The Requestor asks that ICANN: (i) revoke the designation of authority of Dr. Tawil as Expert for undisclosed conflict of interest and/or obvious bias; (ii) reject the Expert Determination and refund the Requestor 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; (iv) instruct the Expert to give an account of why he failed to disclose his alleged conflict of interest; (v) request the ICC to demonstrate that the expert received reasonable training; and (vi) request a formal account from the Expert of whether he has links with SportAccord “or any of its member federations”; or alternatively (vii) refer the Objection to a new panel of three experts for *de novo* review.<sup>41</sup>

**III. Issues.**

Given the specific Board resolution to re-evaluate the Reconsideration Requests in light of the IBA Conflict Guidelines, the issue is whether the Requestor’s allegations of apparent bias of the Expert support reconsideration of the Expert Determination. Specifically, whether the Guidelines required the Expert to disclose any of the following alleged conflicts of interest:

1. The Expert co-chaired a panel at the Conference;<sup>42</sup>
2. The DirecTV Contract;<sup>43</sup> and
3. The TyC Relationship.<sup>44</sup>

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<sup>40</sup> Request 14-10 at § 8, Pg. 5-8.

<sup>41</sup> Request 14-10 at § 9, Pg. 11-12; Request 13-16 at § 9, Pg. 10-11.

<sup>42</sup> Request 13-16 at § 8, Pg. 7.

<sup>43</sup> Request 14-10 at § 8, Pg. 5-8.

<sup>44</sup> Request 14-10 at § 8, Pg. 5-8.

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

The applicable version of ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>45</sup> Dismissal of a request for reconsideration is appropriate if the BGC recommends, and in this case the Board agrees, that the Requestor does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.<sup>46</sup>

ICANN has previously determined that the reconsideration process can properly be invoked for challenges to new gTLD-related expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the provider failed to follow the established policies or processes it is required to follow in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.<sup>47</sup>

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, the BGC's

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<sup>45</sup> As previously noted, Requests 13-16 and 14-10 are being re-reviewed in accordance with the Bylaws in effect when the Board made its previous determinations on those Reconsideration Requests, as those are the Bylaws that were in place when the Board (via the BGC and NGPC, respectively) made its determinations at issue in the IRP. Article IV, § 2.2 of ICANN's then-operative 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.

<sup>46</sup> Bylaws, Art. IV, § 2.9.

<sup>47</sup> See Recommendation of the BGC on Reconsideration Request 13-5, *available at* <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>.

review is not to evaluate the ICC Panel's conclusion that there is substantial opposition from a significant portion of the community to which the Requestor's application for .SPORT may be targeted. Rather, the BGC's review is limited to whether the Expert violated the IBA Conflict Guidelines, which the Requestor suggests was accomplished when the Expert failed to disclose the DirecTV Contract, the TyC Relationship, and his participation as co-chair of a panel at the Conference.<sup>48</sup>

## **V. Analysis and Rationale.**

Under the applicable version of the Bylaws, reconsideration of the actions of a third-party service provider or expert in the New gTLD Program, such as the ICC, is appropriate only where it can be stated that either the vendor failed to follow *its process* in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.<sup>49</sup> Although the *processes* that third-party service providers must follow reflect guidance set forth in the Articles and Bylaws, there is no obligation for third parties to comply with ICANN's Articles or Bylaws. Rather, under the applicable version of the Bylaws, reconsideration is designed to allow ICANN to undertake a procedural review of decisions by third party vendors.

Originally, the Board (through the BGC and the NGPC) denied both of the Requestor's reconsideration requests because, as the Board explained, the evidence reflects that: (1) both the ICC and the Expert followed the ICC's established policies and procedures with respect to the Expert's appointment (and thereby, followed ICANN's established procedure that the ICC use its process for determining an expert's impartiality); and (2) the Requestor's challenge to the Expert was untimely under the ICC's Rules and Practice Note (and thereby ICANN's established

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<sup>48</sup> Request 13-16 at § 8, Pg. 6.

<sup>49</sup> Recommendation of the BGC on Reconsideration Request 13-5, pg. 4, *available at* <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>.

procedure that challenges to experts must comport with the ICC's rules). The BGC does not believe that the ICANN Board was obligated to expand the scope of its review beyond that previously conducted.

Nonetheless, the BGC takes very seriously the results of one of ICANN's long-standing accountability mechanisms. For the reasons set forth in the Board's Resolution and Rationale adopting the IRP Panel's Final Declaration, the BGC has re-reviewed Requests 13-16 and 14-10 to consider the Requestor's claims of apparent bias of the Expert against the standard applicable to neutrals as set out in the IBA Conflict Guidelines. The BGC also considered the Ombudsman Final Report, which was issued after the BGC rendered its recommendations and the NGPC issued its determination on Requests 13-16 and 14-10.

Following careful consideration of the alleged evidence of bias against the IBA Conflict Guidelines, the BGC has concluded that the Guidelines did not mandate the Expert to disclose the DirecTV Contract, the TyC Relationship, or the Expert's presentation at the Conference. Accordingly, because the Expert was not required under the IBA Conflict Guidelines to disclose any of the alleged conduct giving rise to the claims of apparent bias asserted by the Requestor, reconsideration is not warranted.

**A. The IBA Conflict Guidelines Do Not Require Disclosure of the DirecTV Contract or the TyC Relationship.**

Contrary to the Requestor's claims, the IBA Conflict Guidelines do not require the Expert to disclose the DirecTV Contract or the TyC Relationship. Disclosure requirements for neutrals are generally assessed in accordance with the guidance set forth in the IBA Conflict Guidelines.<sup>50</sup> The 2004 IBA Conflict Guidelines that were in effect during the Objection proceedings generally

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<sup>50</sup> The IBA Conflict Guidelines were first drafted in 2004 and were amended in 2014, after the appointment of the Expert in 2013.

require an ICC expert to disclose “facts or circumstances . . . that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence.”<sup>51</sup>

In an effort to achieve “greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals,” the Guidelines set forth “lists of specific situations that . . . do or do not warrant disclosure or disqualification of an arbitrator”<sup>52</sup> (Guidelines Application List). The lists are designated Red, Orange and Green. Circumstances identified on the Red List *must* be disclosed to the parties and will disqualify an expert unless the parties affirmatively *waive* the conflict.<sup>53</sup> An expert has a duty to disclose issues appearing on the Orange List, but those issues will not disqualify an expert unless the parties affirmatively *object* to the conflict.<sup>54</sup> Further, even if a party objects to an Orange List disclosure, an expert may still be appointed if the authority that rules on the challenge decides that it does not meet the objective test for qualification.<sup>55</sup> Conduct appearing on the Green List need not be disclosed at all.<sup>56</sup>

The 2004 IBA Conflict Guidelines note that “a later challenge based on the fact that an arbitrator did not disclose” facts or circumstances in the orange category “should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. . . . [N]on-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.”<sup>57</sup>

The IRP Panel and Ombudsman in his Final Report identified several Guidelines that they viewed as being potentially implicated by the DirecTV Contract and the TyC Relationship.<sup>58</sup>

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<sup>51</sup> 2004 IBA Conflict Guidelines General Standard 3(a).

<sup>52</sup> 2004 IBA Conflict Guidelines Introduction at ¶ 3.

<sup>53</sup> 2004 IBA Conflict Guideline II.2. Certain Red issues are not waivable. *Id.*

<sup>54</sup> 2004 IBA Conflict Guideline II.3.

<sup>55</sup> 2004 IBA Conflict Guideline II.4.

<sup>56</sup> 2004 IBA Conflict Guideline II.6.

<sup>57</sup> 2004 IBA Conflict Guidelines at II.5.

<sup>58</sup> Ombudsman Final Report at Pg. 5; IRP Final Declaration at ¶ 7.91.

The BGC has carefully considered the Guidelines in their entirety, including those sections of the Guidelines identified by the IRP Panel and the Ombudsman. As discussed below, the BGC concludes that the Guidelines did not require the Expert to disclose the DirecTV Contract or the TyC Relationship.

1. Guidelines 4.2.1 and 3.4.1 (Law Firm Adversary)

The Ombudsman suggested that Guideline 4.2.1 was arguably invoked by the Expert's law firm's representation of DirecTV in negotiations with the IOC.<sup>59</sup> Guideline 4.2.1 categorizes as Green (i.e., with no disclosure requirement) the circumstance where "[t]he arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator."<sup>60</sup>

After careful consideration, the BGC concludes that Guideline 4.2.1 does not fit the circumstances here because the IOC is not an affiliate of SportAccord, as discussed further below. However, even if Guideline 4.2.1 applied, that Guideline does *not* require disclosure. Accordingly, Guideline 4.2.1 cannot support Reconsideration. Notably, the Ombudsman recognized in his final report that Guideline 4.2.1 "is not quite on point," but found it to be the "closest" set of facts to the Expert's law firm's representation of DirecTV in negotiations with the IOC. The Ombudsman added that although "[t]he guidelines talk about affiliates of parties," the "connections" in this case were "not so clear."<sup>61</sup> The BGC agrees, inasmuch as SportAccord lacks any business, corporate, or other relationship with the IOC, but rather merely participates in the same industry, as discussed further below. Either way, as the Ombudsman noted, even if Guideline 4.2.1 *was* on point, an arbitrator's law firm's past adversity to a party or affiliate is on

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<sup>59</sup> Ombudsman Final Report at Pg. 5.

<sup>60</sup> 2004 IBA Conflict Guideline Application List at ¶ 4.2.1.

<sup>61</sup> Ombudsman Final Report at Pg. 5.

the Green List and therefore need not have been disclosed.

The BGC has additionally considered Guideline 3.4.1. Guideline 3.4.1, categorized as Orange (i.e., disclosure required), discusses when “[t]he arbitrator’s law firm is currently acting adverse to one of the parties or an affiliate of one of the parties,” and characterizes it as Orange List. Guideline 3.4.1 does not apply here because the Expert’s law firm was adverse to *the IOC* in its representation of DirecTV. The IOC was neither a party to the Objection nor an affiliate of a party. The IBA Conflict Guidelines make clear that the term affiliate is used to describe different entities “within the same group of companies,” including entities with a parent-subsidary relationship or sister companies controlled by the same parent entity.<sup>62</sup> With respect to affiliates, the Guidelines are specifically focused on entities that have a “controlling influence” on a party.<sup>63</sup>

As the Requestor acknowledges, SportAccord is an umbrella organization for all international sports federations (*Olympic and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations. SportAccord has ninety-two full members; the IOC is *not* among them.<sup>64</sup> Nor is SportAccord a member of the IOC.<sup>65</sup> In an industry as interconnected as the international sporting industry, the mere fact that: (1) the IOC’s website notes that SportAccord is one of several associations organizing IOC-recognized sports federations;<sup>66</sup> and (2) that *two* of the six members of SportAccord’s Executive Council are

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<sup>62</sup> 2004 IBA Conflict Guidelines Explanation 6(b); *Id.* Application List note 5.

<sup>63</sup> *Id.* Explanation 6(c).

<sup>64</sup> See <http://www.sportaccord.com/about/mission/>.

<sup>65</sup> See <http://www.olympic.org/ioc-members-list>.

<sup>66</sup> The IOC recognizes various international sports federations that “administer[] one or more sports at world level” and whose rules and activities “conform with the Olympic Charter.” On its website, the IOC notes that there are a number of associations, including SportAccord, that those federations use to “discuss common problems and decide on events calendars.” <http://www.olympic.org/content/the-ioc/governance/international-federations/>

among the **102** members of the IOC does not demonstrate an affiliation.<sup>67</sup> These facts do not create an affiliation between the two entities that is comparable to an affiliation between two members of the same group of companies.<sup>68</sup> Ultimately, there is nothing that shows, from the Requestor or otherwise, that the IOC has a “controlling influence” on SportAccord as a result of an affiliation or otherwise. Therefore, Guideline 3.4.1 did not mandate disclosure of the DirecTV Contract.

## 2. Guideline 2.3.6 (Law Firm Significant Commercial Relationship)

Guideline 2.3.6 categorizes as Red (i.e., disclosure required) the circumstance when the arbitrator’s “law firm currently has a significant commercial relationship with one of the parties or an affiliate with one of the parties.” The IRP Panel declared that Guideline 2.3.6 was invoked and recommended that ICANN consider whether it required the Expert to disclose his law firm’s “relationship” with TyC.<sup>69</sup> That “relationship” consists of the fact that a partner in the Expert’s law firm is the president of TyC, and the Expert’s law firm has represented TyC in negotiations for Olympic broadcasting rights from the IOC.<sup>70</sup>

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<sup>67</sup> Far from being affiliates, SportAccord and the IOC in recent years have in fact been competitors. On 20 April 2015, SportAccord’s president, Marius Vizier made a speech that was sharply critical of the IOC. He called on the IOC’s president to “stop blocking [] SportAccord [] in its mission to identify and organize conventions and multi-sport games” and noted that he had “tried to develop a constructive collaboration with the IOC” but that that had “never become a reality.”

Reuters noted that the IOC has had an “uneasy relationship” with Mr. Vizier (who took over SportAccord in 2013) due to Mr. Vizier’s unsuccessful attempt to set up a competing international multi-sports event, the United World Games. “SportAccord chief launches scathing attack on IOC,” (Reuters, 20 April 2015) *available at* <http://www.reuters.com/article/2015/04/20/us-olympics-ioc-sportaccord-idUSKBN0NB13M20150420>; *see also* “Marius Vizier voted SportAccord Chief,” (ESPN.com, 31 May 2013) (“In a potential direct challenge to the IOC and the Olympics, [] Marius Vizier plans to organize a global world championship[] every four years for all international sports federations . . . . Vizier won on a platform of transforming SportAccord into a more powerful and lucrative body”), *available at* [http://espn.go.com/olympics/story/\\_/id/9328014/new-sportaccord-chief-marius-vizer-plans-global-games](http://espn.go.com/olympics/story/_/id/9328014/new-sportaccord-chief-marius-vizer-plans-global-games).

<sup>68</sup> *See* 2004 IBA Conflict Guidelines Explanation 6(b).

<sup>69</sup> IRP Final Declaration at ¶ 7.91(b).

<sup>70</sup> Request 14-10 at § 8, Pg. 6-8.

Guideline 2.3.6 reflects the IBA’s view that anyone with a “significant economic interest in the matter at stake”<sup>71</sup> should not serve as an arbitrator in that matter. This is because one with a financial interest in the outcome of an arbitration cannot be – or will be perceived as not being – impartial and independent in the matter.<sup>72</sup> As a result, Guideline 2.3.6 prohibits the appointment of an arbitrator whose law firm currently maintains a “significant commercial relationship”<sup>73</sup> with one of the parties or an affiliate of a party.

The IBA’s reasons for drafting Guideline 2.3.6 have no application here. The Expert’s law firm’s “relationship” with TyC is limited to the fact that another partner at the law firm is the president of TyC, and the firm—not the Expert—has represented TyC. The Requestor has not demonstrated that the law firm itself had a substantial (or any) financial stake in TyC or that TyC’s business has any effect on the law firm’s finances. The Requestor presented no evidence that would support the Requestor’s claim that the Expert—or his law firm—would have received any benefit, commercial or otherwise, from deciding for or against SportAccord.

Finally, even if the Expert’s law firm did have a significant commercial relationship with TyC, TyC is *not* a party or affiliate of SportAccord. TyC was, if anything, across the table from and *adverse to* the IOC – TyC negotiated with the IOC for Olympic broadcasting rights. The Requestor has not asserted that TyC had any actual connection to the party at issue here, SportAccord, except through the IOC, which as discussed above is not an affiliate of SportAccord. For this additional reason, Paragraph 2.3.6 of the IBA Conflict Guidelines did not require the Expert to disclose the TyC Relationship.

### 3. Guidelines 3.1.4, 3.2.1, and 3.2.3 (Party Client)

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<sup>71</sup> 2004 IBA Conflict Guidelines Explanation 2(d).

<sup>72</sup> *Cf. Id.*

<sup>73</sup> 2004 IBA Conflict Guideline Application List at ¶ 2.3.6.

Because the IOC is neither a party nor an affiliate of a party to the Objection, the remaining Guidelines—Guidelines 3.1.4, 3.2.1, and 3.2.3—that the IRP Panel identified as arguably applicable to the Requestor’s claims cannot be interpreted to require the Expert to disclose the TyC Relationship or the DirecTV Contract.

Guideline 3.1.4, categorized as Orange, applies when “[t]he arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.”

Guideline 3.2.1, categorized as Orange, applies when “[t]he arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.”

Guideline 3.2.3, categorized as Orange, applies when “[t]he arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.”

The Requestor has not identified a party or affiliate of a party who is a client of the Expert’s law firm, and as discussed the IOC is not a party or affiliate of a party. Therefore, none of the above-listed Guidelines are analogous to the purported conflicts that the Requestor identified here.

Finally, the IBA Conflict Guidelines recognize that the “growing size of law firms” can unduly limit the ability of a party to “use the arbitrator of its choice.”<sup>74</sup> Therefore, “the activities of an arbitrator’s law firm” cannot “automatically constitute a source of . . . conflict or a reason for disclosure.”<sup>75</sup> Reading the IBA Conflict Guidelines to require disclosure of law firm

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<sup>74</sup> 2004 IBA Conflict Guidelines Explanation 6(a).

<sup>75</sup> 2004 Conflict Guidelines General Standard 6(a).

relationships that are as tenuously connected to the subject of a dispute as the TyC Relationship and the DirecTV Contract were to the Objection would impose an unnecessary and excessive limit on the ability of parties to “use the arbitrator[s of their] choice.” The BGC cannot recommend that result.

**B. The IBA Conflict Guidelines Do Not Require Disclosure of the Expert’s Presentation at the Dispute Resolution Conference.**

The Requestor also claims that the Expert should have disclosed his participation in a February 2011 program entitled “[t]he quest for optimizing the dispute resolution process in major sport-hosting events,” at a conference aimed at, among others, “sports federation leaders.”<sup>76</sup> None of the rules in the IBA Conflict Guidelines, however, require such disclosure.

The IRP Panel suggested that Guideline 3.5.2 of the IBA Conflict Guidelines is relevant to assessing whether the Expert was required to disclose his participation on a panel. Guideline 3.5.2 applies when “[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.” Guideline 3.5.2 is part of the Orange List.

Guideline 3.5.2 would apply *only if* the Expert “publicly advocated *a specific position regarding the case* that is being arbitrated” (emphasis added), which the Expert here did not do. Rather, the Expert participated in the Conference at issue in February 2011, *more than two years before* SportAccord filed its Objection and almost two and a half years before the ICC nominated the Expert to consider the Objection. Therefore, it is logically impossible that the Expert’s 2011 presentation advocated a specific position regarding the Objection; as the Objection had not been filed and would not be filed for two years *after* the Conference. Further,

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<sup>76</sup> Request 13-16 at § 8, Pg. 7.

the Requestor has not asserted that the Expert advocated a specific position regarding the Objection at the Conference; instead, the Requestor argued simply that the Conference was “aimed at . . . sports federation leaders.”<sup>77</sup> Identifying a target audience for a Conference does not rise to the level of “advocat[ing] a specific position regarding the case that is being arbitrated,” as is required to implicate Guideline 3.5.2.

The IBA issued updated Conflict Guidelines in 2014, which, although issued after the Expert’s appointment, provide additional guidance regarding conflict disclosures. The 2014 IBA Conflict Guidelines further clarified that an “arbitrator must, in principle, be considered to bear the identity of his or her law firm, but the activities of the arbitrator’s firm should not automatically create a conflict of interest. The relevance of the activities of the arbitrator’s firm . . . and the relationship of the arbitrator with the law firm, should be considered in each case.”

The 2014 Guidelines include a new Guideline 4.3.4, which identifies as Green the circumstance that “[t]he arbitrator was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties.”<sup>78</sup>

The 2014 IBA Conflict Guidelines make clear that an arbitrator need *not* disclose that he or she “was a speaker, moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties.”<sup>79</sup>

Here, the Expert participated in a panel relating to sports law; his connection to the

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<sup>77</sup> Request 13-16 at ¶ 8.

<sup>78</sup> 2014 IBA Conflict Guideline Application List at ¶ 4.3.4.

<sup>79</sup> 2014 IBA Conflict Guidelines Application List at ¶ 4.3.4.

subject matter raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or counsel to a party. If participation in a panel with counsel to the parties need not be disclosed,<sup>80</sup> there is no reason to believe that participation in a panel covering the same genre as the arbitration covered should require disclosure.

In addition to carefully considering the Guidelines identified by the IRP Panel and the Ombudsman (all of which are discussed above), the BGC also reviewed the IBA Conflict Guidelines in their entirety. Based on that review, the BGC concludes that no other guideline is even arguably applicable to the alleged conflicts raised by the Requestor, and thus no other guideline suggests, let alone mandates, that the alleged conflicts should have been disclosed.

Under the standard of review set forth in the Bylaws in effect when the Requestor submitted Requests 13-16 and 14-10, the BGC's review would conclude after evaluating whether the ICC failed to follow *its processes* concerning the appointment of the Expert. However, pursuant to the IRP Panel's recommendation, and the Board's resolution, the BGC has considered the Expert's compliance with the IBA Conflict Guidelines and, additionally, considered "whether the alleged conflicts give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination."<sup>81</sup> For the reasons discussed in detail above, The DirecTV Contract and The TyC Relationship cannot possibly create a material concern of lack of independence or impartiality, or undermine the integrity or fairness of the Expert. Likewise, the mere fact that the Expert participated on a panel relating to the general topic of sports law raises no inference of bias or partiality, nor does it signify a relationship with one of the parties, an affiliate of the parties, or

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<sup>80</sup> 2014 IBA Conflict Guidelines Application List at ¶ 4.3.4.

<sup>81</sup> IRP Final Declaration at ¶ 7.73.

counsel to a party.

The BGC concludes, for the reasons discussed above, that the IBA Conflict Guidelines did not mandate the disclosure by the Expert of the DirecTV Contract, the TyC Relationship, or the Expert's presentation at the Conference, nor did the alleged conflicts give rise to a material concern as to the independence or impartiality of the Expert or the integrity or fairness of the Expert Determination.

## **VI. Recommendation.**

The BGC takes very seriously the results of ICANN's long-standing accountability mechanisms, including the IRP. For the reasons set forth in the Board's Resolution and Rationale adopting the recommendation in the IRP Panel's Final Declaration, Requests 13-16 and 14-10 were re-evaluated to weigh the Requestor's allegations that the Expert was required to disclose the DirecTV Contract, TyC Relationship, and his participation at the Conference, under the IBA Conflict Guidelines.

Following careful consideration of the IBA Conflict Guidelines against the Requestor's alleged conflicts of interest, the BGC concludes that the IBA Conflict Guidelines did not mandate the disclosure by the Expert of the DirecTV Contract, TyC Relationship, or the Expert's presentation. Nor do the alleged conflicts give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination.<sup>82</sup> Accordingly, the BGC recommends that reconsideration is not warranted and that Requests 13-16 and 14-10 again be denied.

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<sup>82</sup> This conclusion is consistent with the Ombudsman Final Report, which concluded that "the issues raised come under the green list category," and "[t]he interests complained about are [in] my view too remote to create the appropriate perception of bias that would be required to disqualify the expert appointed by ICC." Ombudsman Final Report at Pg. 5.

## ATTACHMENT 1

## **Office of the Ombudsman**

**Case 13-00392**

**In a matter of a Complaint by dot Sport Limited**

**Report dated 25 August 2014**

### **Introduction**

This investigation is one of a number in relation to the ICANN new gTLD program. Dot Sport Limited applied for .sport, and faced a community objection by a body called SportAccord. Under the procedure in the Applicant Guidebook (the AGB) this objection was dealt with by an expert panel appointed by ICC. ICC was the dispute resolution provider, which agreed to provide dispute resolution services for community objections to the new string applications. In this case the objection was successful. Dot Sport Limited was unhappy with that result, and sought reconsideration by the ICANN Board under the ICANN bylaws. Reconsiderations are dealt with by the Board Governance Committee (BGC) of the ICANN Board. This reconsideration request was also considered and rejected, by the New gTLD Program Committee, using the standard procedure for handling these requests. A further reconsideration request was then made, and rejected, through the same path, and the complainant has therefore come to the office of the Ombudsman to investigate whether the process and decision was unfair. This is to be found at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-18-en>

### **Jurisdiction**

This is a matter where I have jurisdiction, although the jurisdiction must be limited to the way in which ICANN has handled the second reconsideration request. It is important to note that the reconsideration process has been followed using the standard process in this case, and there are no unusual features, save for the fact that it is a second reconsideration request on essentially the same issue. The issue is of course the alleged bias on the part of the ICC panellist. The complainant has again asserted that the panellist was biased, and that the reconsideration did not take this into account.

It is important to note that I do not have jurisdiction to review or act in some way as an appeal body, to the expert decision from the ICC Panel. The reason I do not have jurisdiction relates to the nature of the ICANN community, which is the limit of my mandate. An ombudsman operates with what has been called informality, which means that I am not bound by strict rules of procedure, nor do I operate as if this was a formal hearing, with submissions, evidence and a reasoned decision. My powers such as they are, are limited to making a recommendation to the ICANN Board. If I were to find an unfairness in the decisions, I would recommend a course of action to remedy that unfairness. This has to be done in the context of the limits to my jurisdiction expressed in my bylaw. So while I may adopt an informal process, this does not enable me to step outside of the limits.

The scope of the complaint also deals with the second decision of the ICANN reconsideration decision from the ICANN BGC. There is no difficulty with jurisdiction in this case, because that is clearly within my bylaw, and was suggested as the next step by the BGC.

## Issues

The issues which I am required to investigate whether the decision of the the ICANN Board deciding the second reconsideration request, is unfair.

These are stated by the complainant as quoted from their complaint to me:-

*1. Our second reconsideration request did not relate to the decision of the BGC on the first reconsideration request, as it is affected by the new facts that came to light in March 2014. That would have been impossible for the BGC, because neither us nor the BGC had that information at the time. It was essentially a fresh reconsideration based on new facts, and the failure related to the failure of the ICC and the panellist to properly disclose the conflict of interest. There was no allegation of failure of the BGC for their first decision based on the specific facts rendered on 8 January 2014.*

*Therefore the following assertion:*

*“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.”*

*does not make much sense.*

*2. There was nothing about your report which indicated it was in draft form only. I attach a further copy of this for your ease of reference.*

*Therefore the sentence “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.” We would like you to reconsider whether an email making a formal recommendation can considered to be interim when it contains absolutely no reference to it being so.*

*3. It is not reasonable to require us to explain every minutae of how we came across new information relating to the Pf Tavil’s conflict of interest. The BGC wrote:*

*“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.”*

*Research does not happen overnight: it took a considerable amount of time to unearth the information because we had not previously widened the net to other members of his law firm. With respect it is ludicrous and totally contrary to the principles of natural justice for the BGC to write “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." In essence, what they are saying is that we did not work hard enough to uncover a conflict with was hidden by the panellist and so we are denied any recourse. No court would accept this position.*

4. *The BGC uses the flimsiest of pretexts to establish that there was no conflict of interest and direct commercial relationship between the panellist and the SportAccord:*

*"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."*

*With respect, it is obvious to all that negotiations for the contractual rights would have been ongoing at around the time of the determination, and this would be the most critical time for the relationship between DirecTV and the IOC to be cemented. To argue otherwise is disingenuous.*

5. *Our allegation that the Guidebook was not followed was made in the context of establishing what the proper course of action should be (replacement of the panellist). We firmly established elsewhere in our reconsideration request that proper procedure regarding independence was not followed:*

*The BGC wrote: "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."*

*The facts is that we demonstrated that the Panellist committed a gross breach of the statement of impartiality, which is within the ICC's own rules, on pages 8 to 10 of our request for reconsideration. We went to great lengths to do this.*

## **Investigation**

To undertake this investigation I have received the initial complaint and asked for further information. The complainant has given me the material provided to the Board Governance Committee and matters which were raised with the objector. I have also looked at the AGB, the ICC website, the ICANN website in relation to new gTLDs and my bylaw and framework. I have also reviewed the ICANN BGC material in relation to the reconsideration. I have also discussed matters with ICC.

## **Facts**

The complainant is an applicant for a number of new gTLDs. For this application, both the Applicant and SportAccord (the Objector) applied for the .SPORT string, and are in the same contention set. The objector is a body set up to be a community representative of sporting interests. After the second reconsideration application was rejected, the complainant asked for the matter to be reviewed by the office of the ombudsman, and has made a submission and complaint about unfairness.

## **Reasoning**

The first issue raised by the complainant relates to the way in which ICANN handled the reconsideration request. The complainant says that the finding that the reconsideration request was out of time, is not logical because they only discovered the material asserted to raise issues of impartiality with the expert, on or about 25 March 2014. The issue is whether it is unfair for the BGC to recommend, and that the NGPC to resolve to reject the request, because the material in relation to impartiality is a new issue which should not affect the time limits for filing a reconsideration request. It should be noted that although the BGC commented that the request was out of time, they then went on to consider the impartiality issue in any event. So while I considered that there could have been an issue about timing, because of the discovery of the new material by the complainant, the fact that the new material was considered on the merits means that the timing issue is of less importance. No unfairness actually resulted from the first BGC recommendation therefore.

The second issue which has been raised relates to the preliminary email which I sent to the parties with some concerns. At the time of sending that email I had not had comments from the parties, and the email, was a preliminary and tentative concern. Before I could consider the other issues and parties, the complainant then took the matter to the first reconsideration, which meant my jurisdiction was ousted before I could complete the investigation at that stage.

The third issue criticises the comments made by the BGC in relation to the efforts made to discover the conflicts of interest. The complainant says that the information was gathered over a period of time, but was actually submitted on the 25 March 2014. They say it is unfair to criticise them for not making the complaint and that it is against natural justice to refuse to allow them to do so. However as I have noted earlier, even though there was criticism from the BGC about timeliness of the complaint, the BGC then went on to consider the complaint on its merits. This is important because if the sole ground for rejecting the reconsideration was late filing of the request, but otherwise the request actually had merit (which I am stating is a hypothetical issue and not the actual finding), then this may have been unfair. So any perceived unfairness has been overcome by the decision on the merits.

The fourth issue criticises the analysis made by the BGC on the merits of the conflict of interest, which the complainant submits is sufficient to cause a perception of bias. In the course of my investigation I reached out to ICC to seek their comments on this matter. The process used to appoint the expert was their standard process, where the expert completed a conflict of interest

form. In terms of that procedure there is therefore nothing unusual, and therefore since the procedure is appropriate there is no unfairness. I appreciate that the point made by the complainant is that, notwithstanding the appointment process and the completion of a conflict of interest form, that there were in fact ties which cause, in the submission of the complainant, a perception of bias. The BGC in its recommendation, analysed the appointment process by ICC and discussed this with reference to the AGB. The conclusion reached by the BGC was that because the ICC Rules of Expertise and the AGB were followed, this was sufficient. In my view, with the greatest respect to the conclusion, that was not the issue raised by the complainant. But in the end, when the connections are analysed with the material which has come to light over the two reconsiderations, the connections do not meet the test established for conflicts of interest and apparent bias. On my own analysis of the connections, and relying upon the IBA Guidelines on Conflicts of Interest in International Arbitration issued in 2004 by the Council of the International Bar Association, I do not believe that there is such an unfairness. The IBA Guidelines refer to red orange and green issues to identify conflicts of interest. In summary, any conflicts identified as red are either issues where the arbitrator cannot act at all, or for lesser examples, the parties can choose to waive the interest which must be disclosed in any event. In the orange list, they should be disclosed, but if no objection is made the parties are deemed to have accepted the arbitrator. The guidelines emphasise that orange disclosure should not automatically result in disqualification of the arbitrator. In addition even if the party challenges the appointment, the arbitrator can still act if the authority that rules on the challenge decides that the challenge does not meet the objective test for disqualification. The green list sets out issues where there is no duty to disclose situations.

In my view therefore there are two tests which have to be determined to see if there is a conflict of interest. The correct category should be identified, and using the guidelines, if the conflicts of interest did fall within the non-waivable red list, then there could be a problem. But in this case the conflicts of interest only appear to come under the green list categories. The closest is not quite on point, but can be analogous. In the guideline 4.2.1 this is identified as the arbitrator's law firm having acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator. The guidelines talk about affiliates of parties, but in this case the connections are not so clear. The interests complained about are in my view too remote to create the appropriate perception of bias that would be required to disqualify the expert appointed by ICC. I have looked at this issue a little differently from the BGC, because I was concerned whether a failure to identify a serious conflict of interest could have been a failure of procedure on the part of ICANN. They have not explicitly stated the basis for rejecting the complaint about conflict of interest, but the issues are clear and I have reached my own conclusions. However the procedure adopted by the BGC was, and this is significant in my view, their standard approach to a reconsideration request, with the parties able to make full submissions as prescribed by the bylaw. No unfairness results from this procedure.

It follows that the first point made by the complainant does not assist them. Because in my view the issues raised come under the green list category, there was no obligation to raise these in any event.

**Result**

As a result of this investigation, I cannot make any recommendation about unfairness.

Chris LaHatte

Ombudsman