

**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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)  
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)  
**Claimant** )  
)  
v. )  
)  
INTERNET CORPORATION FOR )  
ASSIGNED NAMES AND NUMBERS )  
)  
**Respondent** )  
\_\_\_\_\_ )

**ICDR Case No. \_\_\_\_\_**

**REQUEST FOR INDEPENDENT REVIEW PROCESS  
BY DOT SPORT LIMITED**

Flip Petillion,  
Crowell & Moring LLP  
Contact Information  
Redacted  
*Counsel for Claimant*

## **I. IDENTIFICATION OF THE PARTIES**

### **A. Claimant**

1. The Claimant in this dispute is dot Sport Limited (dSL). The Claimant is a subsidiary of Famous Four Media (FFM). The Claimant's contact details are as follows: Contact Information Redacted

2. The Claimant is represented in these proceedings by:

Flip Petillion  
Crowell & Moring LLP  
Contact Information  
Redacted

### **B. Respondent**

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

## **II. EXECUTIVE SUMMARY**

4. ICANN organized a new gTLD application round in 2012, allowing interested entities to compete for the right to operate new gTLDs or internet extensions of their choice. Where multiple entities applied for the same string, they were asked to come to an amicable agreement whereby one or more applicants would withdraw their application. If no amicable solution were found, applicants in contention for the same string were invited to participate in an auction, the proceeds of which would go to ICANN.

5. ICANN introduced a mechanism allowing well-established communities to obtain priority over non-community applications. ICANN also provided for a mechanism for so-called community objections against applications. Such objections were to be based upon well-determined 'community' criteria.

6. During ICANN's recent new gTLD application round, dSL applied to operate the .sport gTLD ([Annex 1](#)). Another applicant, SportAccord, also applied for the .sport gTLD ([Annex 2](#)) and opposed dSL's application in a so-called community objection. A third-party panelist, appointed by the ICC International Centre for Expertise, commissioned by ICANN, granted SportAccord's community objection ([Annex 3](#)). ICANN then adopted the panel's determination, without any review.

7. The determination was, however, in violation of ICANN's own policy on "community objections" and was issued by a panelist, Dr. Guido Santiago Tawil, who was not properly trained and who had created a reasonable appearance of bias. The appearance of bias was created by the panelist's failure to disclose the interests of his law firm and his clients in their dealings with the objector, its supporters and its affiliates. Because the panelist failed to disclose his (firm's) client interest in the outcome of the matter, dSL never had an opportunity to comment, let alone contest, the appointment of Dr. Tawil as panelist. dSL's application for .sport has been excluded without justification. Even if ICANN reconsiders the determination by Dr. Tawil, the Claimant's applications have been needlessly delayed and subjected to additional procedures (two Requests for Reconsideration (RfR), Ombudsman complaint). ICANN's acceptance of the determination rejecting dSL's application was an abdication of responsibility and contrary to the evaluation policies that ICANN had established for new gTLD applications, especially in view of the fact that community objections have been denied for similarly situated applications. The acceptance of the community objection to dSL's .sport application is not justified by any legitimate security or stability concerns. It is baseless and arbitrary. Moreover, the challenged determination fails to comply with ICANN's obligation to promote consumer choice, innovation and competition.

8. dSL repeatedly asked ICANN – for example, in two consecutive RfRs – to comply with its own policy and remedy the improper treatment of the .sport application. ICANN has

not only declined, but has attempted to evade all responsibility. ICANN's own Ombudsman recommended to the ICANN Board that there be a rehearing of the .sport community objection with a different appointed expert. The ICANN Board disregarded the Ombudsman's recommendation.

9. ICANN's treatment of the Claimant's application is inconsistent not only with the new gTLD policies established in the Guidebook, but also with fundamental ICANN policies and obligations requiring fairness, non-discrimination, transparency, accountability, and good faith. By accepting a third-party determination that is contrary to its policies, ICANN has failed both to act with due diligence and to exercise independent judgment. Accordingly, the Claimant requests that ICANN be required either to overturn the determination in relation to the community objection to .sport 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.

### **III. SUMMARY OF RELEVANT FACTS**

#### **A. The parties**

##### **1. Claimant**

10. dot Sport Limited (dSL) is a subsidiary of FFM. The Claimant and FFM offer services in the Internet's domain name system (DNS). Through its subsidiaries, FFM has applied for 35 gTLDs and is operating the .trade, .cricket and .science gTLDs among others (**Annex 4**).

##### **2. ICANN**

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet's DNS. Core to its mission is increasing competition and fostering choice in the DNS. ICANN's Articles of Incorporation require ICANN to act "*for the benefit of the Internet community as a whole*" and "*in conformity with the relevant*

*principles of international law and local law*” (RM<sup>1</sup> 1, Article 4). ICANN’s fundamental principles, which are reiterated numerous times in ICANN’s governance documents and other policies, require ICANN to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition, as well as to act in good faith.

**B. ICANN established the new gTLD Program**

12. ICANN’s responsibilities include establishing a process for introducing new top-level domains (TLDs) in order to promote consumer choice and competition (RM 4, Article 9.3). Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs).

13. In 2005, ICANN’s Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (RM 6-7). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (RM 2, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (RM 8-9). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN’s Board approved the Guidebook and authorized the launch of the new gTLD program (RM 10). The program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (RM 11).

14. The GNSO decided that there must be a clear and pre-published application process

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<sup>1</sup> Reference Material.

using objective and measurable criteria (**RM 9**, GNSO Recommendation 9). The Applicant Guidebook was intended to make sure that prospective applicants understand what is required of them when applying for a new gTLD, and what they can expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook was made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

**C. ICANN grants a special status to the International Olympic Committee in the new gTLD Program**

15. On 16 March 2010, the International Olympic Committee (IOC) contacted ICANN to discuss protection of the IOC's intellectual property rights within ICANN's new gTLD program. The IOC also informed ICANN that it wanted to discuss "*the status of the development of the new extension '.sport'*" (**Annex 5**). Following the IOC's request, ICANN engaged in one-to-one discussions with the IOC (**Annexes 6-8**). The outcome of the discussion was ICANN's decision to protect several names in which the IOC had an interest, by prohibiting delegation of these names as a new gTLD string (**RM 5**, Module 2-10 and 2-11).

16. ICANN decided not to grant special status to the generic .sport string, despite the IOC's efforts in this respect. As a result, the .sport string remained available for every applicant who met ICANN's evaluation criteria.

**D. dSL applied for .sport**

17. dSL filed an application to operate the .sport gTLD (**Annex 1**). dSL relied on the objective and measurable criteria in the Applicant Guidebook. dSL met ICANN's evaluation criteria. There was no reason to deny dSL's application for .sport.

**E. SportAccord, also applied for the .sport gTLD**

18. The IOC did not apply for the .sport gTLD itself. The IOC tried to secure the .sport

gTLD through its affiliated organization, SportAccord (**Annexes 2, 5 and 9**). SportAccord presents itself as an umbrella organization for both Olympic and non-Olympic international sports federations as well as organizers of international sporting events (**Annex 2**, p. 17). SportAccord is inextricably linked with the IOC. Two of the six members of SportAccord's Executive Council (Marisol Casado and Franco Kasper) are also members of the IOC. Five of the eight members of the Council of SportAccord are directly appointed by three of the four sports associations officially recognized by the IOC on their website, the Association of Summer Olympic International Federations (ASOIF), the Association of International Olympic Winter Sports Federations (AIOWF) and the Association of IOC Recognised International Sports Federations (ARISF). The fourth sports association that is officially recognized by the IOC is SportAccord itself (**RM 14**). By its own admission, SportAccord enjoys “*a close collaborative relationship with the IOC*” (**RM 15, Annex 24**). SportAccord has formed strategic alliances with the IOC. The close relationship between SportAccord and the IOC is further demonstrated by the IOC's expression of support of SportAccord's application for .sport (**Annex 9**).

#### **F. ICANN established a Policy in relation to community objections**

19. The GNSO recommended that there be an objection process within the framework of the new gTLD program to protect the legitimate rights of certain specific, defined groups, while also ensuring that objectors could not prevent the delegation of legitimate TLDs. Accordingly, objections were only to be permitted on four specific grounds enumerated in the Guidebook: string confusion, legal rights, community opposition, and limited public interest (**RM 5**, Module 3-4). Any objection outside these narrow grounds must fail.<sup>2</sup> The

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<sup>2</sup> **RM 5**, Module 3-22 and following: “If [...] the group represented by the objector is not determined to be a clearly delineated community, the objection will fail. [...] If [opposition] [...] does not meet the standard of substantial opposition, the objection will (Continued...)”

recommendation to accept objections based on community opposition and the implementation of the community objection standards and process has been heavily debated. The GNSO did not reach a consensus regarding its recommendation on community objections (**RM 9**, p. 5). Nevertheless, the GNSO Chair at the time gave clear guidance for setting up a fair and just community objection process:

*“In order for an objection system to work properly, it must be fair and must allow for any applicant to understand the basis on which they might have to answer an objection. If the policy and implementation are clear about objections only being considered when they can be shown to cause irreparable harm to a community then it may be possible to build a just process. In addition to the necessity for there to be strict filters on which potential objections are actually processed for further review by an objections review process, it is essential that an external and impartial professional review panel have a clear basis for judging any objections”* (**RM 9**, p. 23).

20. The GNSO Chair’s guidance was clearly aligned with the GNSO consensus recommendations that (i) there had to be *“a clear and pre-published application process using objective and measurable criteria”* (**RM 9**, p. 4), (ii) all applicants for a new gTLD registry had to be *“evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process”* (**RM 9**) and (iii) *“[d]ispute resolution and challenge processes must be established prior to the start of the process”*. The need for an external and impartial professional review panel, having a clear basis for judging community objections, resonated well within the ICANN community.

21. In response, ICANN clarified that:

- *“[t]he ultimate goal of the community-objection process is [to] prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding”* **RM 16**, p. 94, p. 104);
- *“simple detriment to the objector alone is not acceptable”* and not enough for a community objector to prevail. *“[A]dditional detriment is required in order to block a string”*; and

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fail. [...] If [...] there is no strong association between the community and the applied-for gTLD string, the objection will fail. [...] If [...] there is no likelihood of material detriment to the targeted community [...] the objection will fail.”).



- there is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant. Therefore, [...] it is not incongruous that “*a single institution can endorse an application to raise it to the community level, but it requires substantial opposition from a significant portion of the community to object*” **RM 17** p. 79;
- “[t]he standard for a successful community objection requires that the opposition be substantial so that the dispute resolution process is a consideration of the issues rather than a means for a single entity to eliminate an application.” **RM 18**, p. 15

22. The purpose of the community objection was never to eliminate competition among applicants for a truly generic TLD or to pick winners and losers within a diverse commercial industry. Indeed, any such purpose would be contrary to the fundamental principles that form the basis of the Applicant Guidebook. The purpose was to give means to clearly delineated communities to defend themselves against the clear misappropriation of their community name in a manner that was likely to cause material detriment to the community in question.

23. With that purpose in mind, ICANN made its criteria more stringent in the final version of the Guidebook. The standards established by ICANN require *inter alia* that a community objection meet four substantive tests to succeed; if it fails any one of those tests, the objection must fail.

24. The substantive tests included that:

- “[t]he objector must prove a strong association between the applied-for gTLD string and the clearly delineated community represented by the objector” (**RM 5**, Module 3-22, 3-23); and
- “[t]he objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted” (**RM 5**, Module 3-24).

#### **G. SportAccord filed a Community Objection with ICC**

25. Despite ICANN’s strict standards for community objections, SportAccord filed a community objection on 13 March 2013 to prevent a competing applicant from obtaining the

.sport gTLD. ICANN has specifically stated that an objection for the purpose of preventing a competing applicant from obtaining the gTLD “*will not be sufficient for a finding of material detriment*” (**RM 5**, Module 3-24).

26. On 21 May 2013, the Claimant filed its Response to SportAccord’s community objection, demonstrating that SportAccord’s objection was unfounded (**Annex 10**).

**H. The appointed ICC Panel failed to disclose its interests in the sports industry and in dealings with the IOC**

27. On 20 June 2013, the ICC nominated Mr. Jonathan P. Taylor as panelist to assess SportAccord’s community objection. Mr. Taylor’s *curriculum vitae* showed that he was active in sports law and that he had previously been involved with organizations and federations that are members of SportAccord (**Annex 11**). As Mr. Taylor’s legal practice was closely related to the activities of SportAccord and its constituent sports federations, the Claimant objected to Mr. Taylor’s appointment on 27 June 2013 (**Annex 12**). The ICC, known for imposing strict independence and impartiality requirements on its panelists, decided not to confirm the appointment of Mr. Taylor as panelist and informed the parties about its decision on 25 July 2013 (**Annex 13**).

28. On 29 July 2013, the ICC nominated Prof. Dr. Santiago Tawil as panelist to assess SportAccord’s objection. On 30 July 2013, the ICC notified the Claimant and SportAccord of Dr. Tawil’s appointment and attached Dr. Tawil’s *curriculum vitae*, as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence (DAASII) (**Annex 14**). Dr. Tawil received the ICC’s electronic file and was aware of the Claimant’s objection to Mr. Taylor (**Annex 3**).

29. Although he was aware of the ICC’s strict requirements on independence and impartiality, and of the fact that he replaced another candidate panelist because of a conflict,

Dr. Tawil declared in his DAASII that he had nothing to disclose. Dr. Tawil made the following statement:

*“I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality” (Annex 14).*

30. The *curriculum vitae* that Dr. Tawil had submitted did not mention any involvement with sports law or any dealings with the IOC (Annex 14). This clearly contrasts with Mr. Taylor’s *curriculum vitae*. The Claimant’s due diligence efforts at the time of Dr. Tawil’s appointment did not reveal any apparent link with sport or sporting bodies. Dr. Tawil’s website biography made no reference to any involvement or experience within the sporting industry. Given the unequivocal and affirmative language in Dr. Tawil’s DAASII, the Claimant had every reason to rely on this statement, especially in view of Dr. Tawil’s awareness of the Claimant’s successful challenge of Mr. Taylor on the basis of his involvement in the sporting industry. Declarations such as the DAASII are always part of the nomination process of panelists in alternative dispute resolution (ADR). They are meant to show why parties may trust that one or more panelists will act in all independence and impartiality. It is indeed impossible for the parties to know about any involvements of a potential panelist in previous matters. Parties cannot start full investigations concerning a particular candidate panelist. The ADR center is helping to establish trust by collecting the necessary certificates or declarations. This trust can only be maintained if DAASIIs are correct and complete.

31. Later, it was revealed that Dr. Tawil’s DAASII was anything but correct and complete (*infra*, para. 34).

32. Unfortunately, the first signs of Dr. Tawil’s lack of independence and impartiality only became apparent when he rendered his surprising determination. This encouraged the

Claimant to perform in-depth investigations into Dr. Tawil's links with the sport industry. It was only then that the Claimant discovered that Dr. Tawil lectured on the topic during an IBA conference (**Annex 15**).

33. The Claimant addressed these first signs of apparent lack of impartiality and independence with the ICANN Board (**Annex 15**) and the ICC (**Annex 16**). On 6 February 2014, the Claimant also filed a complaint with ICANN's Ombudsman, who responded that he would commence an investigation (**Annexes 17 and 18**). The Claimant continued his investigations into Dr. Tawil's activities in the sporting industry.

34. The Claimant's further investigations revealed Dr. Tawil and his law firm's vested interests in dealings with the IOC (**Annexes 19 and 20**). Dr. Tawil and his law firm have a long history of representing their clients Torneos y Competencias S.A. (TyC) and the related company DirecTV in negotiations with the IOC concerning broadcasting and sponsorship rights to the Olympic Games. By its own admission, the sale of broadcasting and sponsorship rights to the Olympic Games comprises 92% of the IOC's marketing revenue (**Annex 6**, p. 5). TyC has held broadcasting rights to the Olympic Games since 1996. TyC's president, Marcelo Eduardo Bombau is a senior partner with M&M Bomchil, the law firm where Dr. Tawil is also a senior partner. On 7 February 2014, just 3 months after Dr. Tawil rendered his expert determination on SportAccord's community objection, M&M Bomchil's significant client DirecTV secured a major rights deal covering Latin America for the 2014 winter Olympic Games in Sochi, Russia and the 2016 summer Olympics in Rio de Janeiro, Brazil. DirecTV will broadcast the Olympics in Argentina, Chile, Colombia, Ecuador, Peru, Uruguay and Venezuela. The deal covers television, online and mobile platforms (**Annexes 19 and 20**). This sort of deal typically requires months of preparation and close involvement by a law firm. In sum, Dr. Tawil and his law firm are closely related to, and have a long history of representing, broadcasters who have a great interest in maintaining an excellent relationship

with the IOC and its related associations. Nevertheless, Dr. Tawil decided not to disclose this relationship and his experience in sports law when accepting his appointment as an expert panelist. Dr. Tawil's failure to disclose his involvement in the sports industry and with the IOC has created an appearance of bias, as acknowledged by ICANN's Ombudsman (*infra*).

**I. The appointed ICC Panel made an arbitrary determination on SportAccord's community objection**

35. Dr. Tawil's appearance of bias is reinforced by the arbitrary nature of his determination on SportAccord's community objection. By way of example, Dr. Tawil considered that SportAccord had "*proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts*" (**Annex 3**). Dr. Tawil effectively lowered ICANN's standard, which requires a "*likelihood of material detriment to the community*", by finding it sufficient that there was a "*potential detriment*". Dr. Tawil even added that SportAccord had not "*proved that [dSL] will not act (or will not intend to act) in accordance with the interests of the Sport Community*" (**Annex 3**). In other words, he admitted that SportAccord had not proved a likelihood of material detriment, which is a requirement for an objection to succeed. Although Dr. Tawil considered that this requirement had not been met, he accepted SportAccord's objection.

36. In addition, Dr. Tawil effectively proved that he was unfamiliar with ICANN's new gTLD program. He considered that the Claimant would be an "*unaccountable registry*" (**Annex 3**). There is no basis for the Claimant to be considered unaccountable as a registry. The Claimant would need to comply with the terms and conditions of the registry agreement to be entered into, imposing obligations on third parties who could seek redress through various mechanisms.

37. Dr. Tawil also saw a "*strong dependence of the Sport Community on such domain name*". It is unclear what Dr. Tawil means with 'such domain name'. A domain name is the

combination of a top-level domain or TLD and a second-level domain, *i.e.* the part before the dot (*e.g.* ‘sport’ in <sport.com>, a domain held by an unknown third party (**RM 19**) and used to advertise running, fitness, yoga, sleep and nutrition applications (**RM 20**). One can only guess that Dr. Tawil intended to refer to the domain name system (DNS) and the .sport gTLD. However, there is no evidence that the community SportAccord claims to represent is strongly dependent on the DNS or the applied-for .sport gTLD. It is a bold statement to claim that SportAccord or its purported ‘community’ is strongly dependent on the DNS. The point is all the stronger in view of the fact that the <sport.com> domain name is held by an unrelated third party (**RM 19 and 20**).

38. Dr. Tawil’s expert determination contrasts with other expert determinations on community objections. *E.g.*, in the expert determination ruling on the Federation Internationale de Basketball’s objection to dot Basketball Limited (dBL)’s application for .basketball, the appointed panel ruled that the “*series of speculative allegations with no evidence to support a finding that any material detriment to the Basketball Community would likely come to pass if “.BASKETBALL” were delegated to the Applicant*” was insufficient for the objector to meet its burden of proof of a likelihood of material detriment (**RM 21**). Just like the Claimant, dBL is a subsidiary of FFM and dBL’s plan for operating .basketball is identical to the Claimant’s plan for operating .sport (**Annex 1 and RM 22**). The panel found:

*“The mere fact that the Applicant intends to operate “.BASKETBALL” in an open and liberal manner does not prove that the wrongful conduct the Objector foresees would likely occur and cause the Basketball Community “millions of dollars” in economic damage. [...] And the Application – which promises to implement “Abuse Prevention and Mitigation Policies and Procedures” and “Rights Protection Mechanisms” that are extensive and go beyond the safeguards required by ICANN – suggests it would not.”* (**RM 21**).

39. A similar reasoning was applied with respect to the objections to *e.g.* applications for .gay, .hotels, .islam (**RM 23, 24 and 25**).

40. In sum, Dr. Tawil’s determination is contrary to ICANN’s policy on community

objections and is inconsistent with determinations in which ICANN's criteria were correctly applied.

**J. The ICANN Board failed to assure compliance with ICANN's Policies, as it accepted an arbitrary determination rendered by a biased Panel**

41. Despite its arbitrary nature and the appearance of bias, ICANN simply accepted the expert determination without any quality review by ICANN or its Board.

42. This is surprising as the ICANN Board ultimately has the responsibility to ensure that ICANN policies are duly followed. In fact, its Bylaws (and this Independent Review Process) require it. The incorrect and unfair implementation of ICANN's policy with respect to dSL's application for .sport should have been addressed by the Board by its own motion.

**K. The ICANN Board improperly refused to grant the Claimant the right to defend itself**

**1. dSL's first Request for Reconsideration**

43. As the Claimant had received no indication that the ICANN Board was going to address the erroneous application of ICANN's policy on community objections, the Claimant explicitly requested the Board to fulfill its obligation to ensure compliance with ICANN's policies. On 8 November 2013, the Claimant filed a first Request for Reconsideration (RfR), seeking reconsideration of ICANN's decision to accept the panel's expert determination accepting the community objection (**Annex 15**). To this RfR, the Claimant attached the first indication it had found showing the panel's appearance of bias, *i.e.*, the panel's undisclosed interest in sporting arbitration.

**2. The ICANN Board denied dSL's first Request for Reconsideration**

44. On 8 January 2014, ICANN's Board Governance Committee (BGC) denied dSL's first RfR (**Annex 21**). The BGC opined that "*the Panel's evaluation [did] not appear inconsistent with the standards set forth in the Guidebook*". The BCG did not address the inconsistencies between the expert determination on .sport and other expert determinations.

45. Concerning the first indication of apparent bias, the BGC concluded:

*“Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. [...] Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support reconsideration – i.e., reconsideration is not the appropriate mechanism to raise the issue for the first time” (Annex 21, p. 13).*

3. **dSL continued its investigations and asked for input from the ICC**

46. The ICC disagreed with the BGC that the ICC Rules of Expertise still govern any issues relating to the independence and impartiality of experts. In response to the Claimant’s request of 15 January 2014, the ICC informed the Claimant on 21 January 2014 that *“the Expert is no longer in place [...] and does not have any current function in connection to [the] matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert” (Annex 22).*

47. Nevertheless, the ICANN Board still had discretion as to whether or not to accept the expert determination.

4. **At dSL’s request, ICANN’s Ombudsman investigated the issue and recommended to the ICANN Board that there should be a rehearing of the .sport community objection with a different expert appointed**

48. On 6 February 2014, the Claimant filed a complaint with ICANN’s Ombudsman. The Claimant continued its own investigation and on 26 March 2014, the Claimant discovered that the appointed expert had commercial interests in dealings with member federations of SportAccord, and the IOC in particular. On 26 March 2014, the Claimant informed ICANN and the Ombudsman about the heightened appearance of bias resulting from the appointed expert’s failure to disclose these interests. The Ombudsman ended his investigations on 31 March 2014 and issued a report. The Ombudsman found that Dr. Tawil’s commercial relationship *“ought to have been disclosed”* and that *“a reasonable appearance of bias”* had



been created. The Ombudsman concluded his report with the recommendation to the ICANN Board “*that there should be a rehearing of the objection with a different expert appointment*” (**Annex 23**).

#### 5. **dSL filed a second Request for Reconsideration**

49. Despite the Ombudsman’s clear recommendation, the Claimant had no indication that the ICANN Board was going to consider the Claimant’s findings. Therefore, the Claimant filed a second RfR on 2 April 2014, based on ICANN’s failure to warrant the appointment of an independent and impartial panel, and based on ICANN’s failure to remedy the situation (**Annex 24**). On 21 June 2014, the BGC recommended that the NGPC deny the Claimant’s RfR without further consideration (**Annex 25**). This recommendation was based on the erroneous assumption that no explanation was given for why the information had not been submitted when the first RfR was filed. However, dSL had provided this explanation. There were no signs of apparent bias before Dr. Tawil had rendered his determination. Dr. Tawil’s links with the sporting industry and the IOC were only revealed after in-depth investigations.

50. In addition, the BGC seemed to have forgotten that it decided in the first RfR not to consider the appearance of bias, on the wrong assumption that the ICC Rules of Expertise would govern this issue (**Annex 21**). As the appearance of bias was only discovered after the expert determination was rendered, the decision as to whether or not to accept the expert determination was entirely up to the ICANN Board. ICANN’s Ombudsman recommended there be a rehearing, but the BGC refused to consider his advice.

51. On 18 July 2014, the ICANN Board denied the Claimant’s RfR (**Annex 26**). The ICANN Board limited its review to compliance by the ICC with a given process. The Board did not address the issue that it had accepted an erroneous expert determination that was impacted by the panel’s apparent bias. The Board also refused to consider the Ombudsman’s findings and recommendation. The ICANN Board claimed that the Ombudsman’s

communication had subsequently been withdrawn (Annexes 26 and 27). However, dSL was never informed of the alleged withdrawal or the circumstances surrounding the alleged withdrawal. In any event, the ICANN Board's acceptance of the expert determination without any review constitutes an abdication of responsibility in contravention of Article II(1) of the ICANN Bylaws, and a failure by the ICANN Board to conduct due diligence. In blindly accepting Dr. Tawil's determination, despite clear indications it was erroneous and unfair, the ICANN Board failed to exercise independent judgment in a decision that is clearly not in the best interests of the Internet community, and, by extension, ICANN.

**L. Claimant had no choice but to initiate a request for an Independent Review Process**

52. As ICANN has failed to voluntarily remedy the errors made in the expert determination process, and in light of ICANN's refusal to correct these errors, the Claimant had no choice but to initiate this request for an Independent Review Process. The decisions and actions that it challenges are attributable to the ICANN Board and materially affect the Claimant. If the expert determination is maintained, the Claimant will be unable to compete for the .sport gTLD, in which it has a legitimate interest. As a result, dSL has standing to file this request.

**IV. APPLICABLE LAW**

53. In accordance with Article IV(3) of ICANN's Bylaws, an IRP Panel must determine whether the contested actions of the ICANN Board are consistent with applicable rules. The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with *inter*

*alia* International law<sup>3</sup> and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.

54. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent versions of ICANN’s Bylaws<sup>4</sup> – which had not been introduced at the time of the Claimant’s submission of its application<sup>5</sup> – also requires the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.

## **V. SUMMARY OF ICANN’S OBLIGATIONS**

### **A. Act in good faith**

55. Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and

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<sup>3</sup> In particular, Article IV charges ICANN “with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (**RM 27**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

<sup>4</sup> Adopted on 11 April 2013 and subsequently amended on 7 February 2014. See also ICANN’s Bylaws as amended on 16 March 2012, Article IV(3).

<sup>5</sup> In 2012.

*performance of legal obligations.*”<sup>6</sup>

56. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.<sup>7</sup> ICANN’s Core Values require ICANN to obtain informed input from those entities most affected by ICANN’s decisions (**RM 2**, Art. I, §2(9)).

#### **B. Remain accountable**

57. As already noted, ICANN is required to ensure that it be accountable. Again, one of ICANN’s Core Values is that it must “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness” (**RM 2**, Art. I, §2(10)). This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “*be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.*”

#### **C. Apply policies neutrally, fairly and without discrimination**

58. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN’s governing documents. Article 2(3) of ICANN’s Bylaws provides that:

*“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . . ”*

59. The above obligation is further elaborated upon in ICANN’s Core Values, which require ICANN to make “*decisions by applying documented policies neutrally and*

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<sup>6</sup> Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (**RM 28**); *see also* Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”) (**RM 29**).

<sup>7</sup> U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

*objectively, with integrity and fairness*”(RM 2, Art. I, §2).<sup>8</sup>

#### **D. Remain transparent**

60. Article 4 of ICANN’s Articles of Incorporation provides that ICANN:

*“shall operate for the benefit of the Internet community as a whole, carrying out its activities ... to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets”* (emphasis added).

61. Similarly, Article III of ICANN’s Bylaws states that:

*“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”* (emphasis added).

62. These provisions are supplemented by the ‘Core Values’ set out in ICANN’s Bylaws.

The purpose of the Core Values is to *“guide the decisions and actions of ICANN”* in the performance of its mission (RM 2, Art. I, §2). The Core Values include:

*“Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.”*(RM 2, Art. I, §2(7))

63. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘open’ and ‘transparent’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision making.

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<sup>8</sup> This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are ‘fair and applied uniformly’, and not in an ‘arbitrary and capricious manner.’

## **E. Promote competition and innovation**

64. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN's Core Values, which include:

“2. *Respecting the creativity, innovation, and flow of information made possible by the Internet by **limiting ICANN's activities** to those matters within ICANN's mission requiring or significantly benefiting from global coordination. [...]*

5. *Where feasible and appropriate, **depending on market mechanisms to promote and sustain a competitive environment.***

6. *Introducing and **promoting competition** in the registration of domain names where practicable and beneficial in the public interest.”(RM 2, Art. I, §2)*

## **VI. SUMMARY OF ICANN'S BREACHES**

### **A. The ICANN Board failed to establish, implement and supervise a fair and transparent Dispute Resolution process in failing to remedy apparent bias**

65. ICANN's community objection dispute resolution rules are silent on the discovery of apparent bias after an expert determination has been rendered. In its determination on RfR 13-16, the BGC considered that the ICC Rules of Expertise would still govern the issue. That is simply not the case. The ICC's task ended once it had communicated the expert determination to ICANN.

66. After the communication of the expert determination, ICANN and its Board needed to decide whether or not to grant the expert determination. When considering the expert determination, ICANN needed to ensure that it complied with ICANN's core obligations governing the acceptance or rejection of expert determinations. Before accepting an expert determination, ICANN needed to verify whether its acceptance did not create disparate treatment or an unfair implementation of its policies. In other words, ICANN had to deal with obvious errors in the expert determination and the discovery of apparent bias after the determination was rendered. As demonstrated above, ICANN and its Board refused to do so.

**B. The ICANN Board failed to establish, implement and supervise a fair and transparent Dispute Resolution process in the selection of the Panel**

67. On 8 October 2014, ICANN's former Chief Strategy Officer and Senior Vice President of Stakeholder Relations, Kurt Pritz, who had been leading the introduction of the new gTLD program, witnessed on ICANN's objection procedure:

*“There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. [...] With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanism put [sic] into place to rationalize or normalize the answers. [...] It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in the objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the new gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning on discrimination, application of document policies neutrally, objectively and fairly, promotion of competition, and accountability.” (RM 26).*

68. Kurt Pritz, who had been leading the introduction of the New gTLD Program, thus recognized that the appointed panels had not received adequate training and were not familiar with the industry. In other words, he acknowledged that the panels were not ‘appropriately qualified experts’, as required by the ICANN (RM 5, Module 3-16). This violation resulted in clear policy violations and a failure of ICANN to provide due process.

**C. The ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in allowing the appointed Panel to develop and perform an unfair and arbitrary review process**

69. The international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. General principles of ‘international due process’ include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one’s case. These requirements are basic principles that inform transnational procedural public policy. They are more than just formalistic procedural requirements. Compliance must be meaningful: parties must be given adequate notice of the relevant rules and a full and fair

opportunity to present their case. Instead, the ICANN Board allowed a community objection determination that was (i) arbitrary and discriminatory, (ii) not a fair application of ICANN's policy, and (iii) lacking in meaningful reasoning.

1. **The ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord's community objection, while other objections with identical characteristics were denied**

70. The expert determinations on the applications of *e.g.* .basketball, .gay, .islam are diametrically opposed to the expert determination on the Claimant's application for .sport. The lack in consistency in the results and application of the objection criteria create disparate treatment without justification.

2. **The dispute resolution process was unfair and non-transparent because of the panel's disregard of ICANN's policy**

71. The appointed panel violated ICANN's policy by failing to make the necessary disclosures in his DAASII, creating an appearance of bias. This violates ICANN's policy to appoint independent and impartial panelists. In addition, he made an erroneous and unfair application of ICANN's policy on community objections by reversing the burden of proof and using a divergent standard to assess the likelihood of material detriment to the community invoked by the objector.

3. **The dispute resolution process was unfair, non-transparent and arbitrary, because of the lack of meaningful reasoning**

72. In applying a divergent standard to assess the likelihood of material detriment, the expert determination lacks meaningful rationale. Instead of examining whether the criteria for a community objection were met, the panel accepted the community objection on the basis of divergent criteria. This is neither a neutral nor a fair application of ICANN's policy.



**D. The ICANN Board failed to correct the mistakes in the Dispute Resolution process and denied the Claimant its right to be heard by an independent and impartial Panel**

73. The ICANN Board should have corrected the mistakes in the dispute resolution process on its own motion. Since ICANN's Board has ultimate responsibility for the new gTLD program, it is required to supervise and assure the compliance of that program (and its implementation) with ICANN's fundamental obligations under its Articles of Incorporation and Bylaws. The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism (**RM 5**, Module 5-4), such as a Request for Reconsideration (**RM 2 and RM 3**, Article IV(2)).

74. dSL's RfRs (**Annexes 15 and 24**) and the unambiguous recommendation of the Ombudsman (**Annex 23**) should have alerted the ICANN Board to the need to investigate and correct the errors in that process. Instead, the ICANN Board chose, in its own self-interest and although the process was clearly not followed, to invoke the unsupported excuse of compliance with the process (**Annexes 21 and 26**) and not to investigate compliance with its fundamental obligations.

**VII. PROCEDURAL MATTERS**

75. Pursuant to Article IV, Section 3(9) of the Bylaws, the Claimant hereby requests that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

76. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, the Claimant suggests that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

77. The Claimant proposes that both the Claimant and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

#### **VIII. RELIEF REQUESTED**

78. 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,

*Flip Petillion*  
*March 19, 2015*

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