

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

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

---

 )

**ICDR Case No. 01- 15-0002-9483**

**CLAIMANT'S SECOND ADDITIONAL SUBMISSION**

Flip Petillion,  
Crowell & Moring LLP  
7, rue Joseph Stevens  
B-1000 Brussels, Belgium  
*Counsel for Claimant*

## I. THE ICANN BOARD'S DISCRIMINATORY INTERVENTIONS ON EXPERT DETERMINATIONS CONSTITUTE A VIOLATION OF ICANN'S ARTICLES OF INCORPORATION AND BYLAWS

1. **ICANN may not discriminate.** Pursuant to Article II(3) of ICANN's Bylaws, entitled "Non-discriminatory treatment", ICANN may not discriminate, and disparate treatment is only allowed if justified by substantial and reasonable cause.<sup>1</sup> The "promotion of effective competition" is the only example of substantial and reasonable cause given in Article II(3) of the Bylaws. It is a goal that is integral to ICANN's mission, and a theme that runs through ICANN's core values<sup>2</sup>; ICANN's Articles of Incorporation (AoI) also require that ICANN operate through open and transparent processes that enable "competition and open entry" in Internet-related markets (**RM 1**, Article 4).

As a result, when ICANN engages in disparate treatment – *e.g.*, by only installing review mechanisms for certain files and not for others – ICANN violates its AoI and Bylaws, unless it can prove that the disparate treatment was justified by substantial and reasonable cause.

2. **ICANN did discriminate.** In the case at hand, ICANN engaged in disparate treatment without such justification. It intervened in five specific files related to expert determinations (on 1) .car/.cars, 2) .cam/.com, 3) .med, 4) .shop/.通販 and 5) .hospital), but categorically refused to intervene in the case at hand.

1) and 2) On 5 February 2014, the ICANN Board intervened with respect to two individual string confusion objection ("SCO") expert determinations on .car/.cars and .cam/.com by first proposing (**RM 49-50**), and later ordering (**RM 51**), that the inconsistent or otherwise unreasonable SCO expert determinations be reviewed by a third party expert panel.<sup>3</sup> Not

---

<sup>1</sup> "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as *the promotion of effective competition*" (**RM 2**, ICANN Bylaws, Article II(3), emphasis added).

<sup>2</sup> **RM 2**, ICANN Bylaws, Article I(2)(5) and I(2)(6).

<sup>3</sup> The inconsistent and unreasonable SCO expert determination on .car/.cars did not result in a review by an expert panel. The applicants affected by this expert determination resolved the issue amicably, and the relevant application for .cars was withdrawn before the ICANN Board had implemented the proposed review mechanism. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process in its (Continued...)

only this, the new panel was also specifically requested to take into account (and give precedence to) certain expert determinations which the ICANN Board did consider reasonable and consistent with the applicable standard (**RM 51**).

- 3) On 21 June 2014, the ICANN Board<sup>4</sup>, decided to intervene with respect to the Community Objection expert determination on .med. The BGC considered that the objector had not met the standing requirements for filing a Community Objection and simply rejected the expert determination. The BGC made its decision on the basis of information that was not submitted to the expert panel. The BGC did not consider it necessary to refer the matter back to a new expert panel. (**RM 52**)
- 4) On 12 October 2014,<sup>5</sup> the ICANN Board decided to intervene with respect to the SCO expert determination on .shop/.通販 (“online shopping” in Japanese) (**RM 51**). The ICANN Board ordered that a new three-member expert panel re-evaluate the objections, on the basis that it perceived the SCO expert determinations finding of similarity between the gTLD strings to be “*inconsistent or otherwise unreasonable*” (**RM 51**). The ICANN Board gave clear instructions as to how the new three-member expert panel was to perform the re-evaluation. The new panel was asked only to review the SCO expert determination establishing confusing similarity, and, in its review, to take into account specific SCO expert determinations: determinations which the ICANN Board considered were relevant and which gave a strong indication that the three-member panel was expected to reverse the SCO expert determination it had to review. It then came as no surprise that the three-member panel did indeed reverse the challenged SCO expert determinations (**RM 54 and RM 55**).

---

resolution of 12 October 2014.

<sup>4</sup> The Board was acting through its Board Governance Committee (“BGC”). The BGC is a committee within the ICANN Board, responsible for assisting the Board to enhance its performance and with decision-making power on certain topics. An overview of the BGC, its members and its responsibilities can be found on <https://www.icann.org/resources/pages/governance-committee-2014-03-21-en> (last accessed on 13 April 2016).

<sup>5</sup> Following the BGC’s recommendation of 10 October 2013 (**RM 53**),

5) More recently, on 3 February 2016, the ICANN Board passed a resolution, finding that an ICC expert determination upholding the limited public interest objection (“LPIO”) against the application for .hospital was not in the best interests of the Internet community. Also in this individual case, the ICANN Board ordered that a new three-member expert panel re-evaluate the objection, on the basis that it perceived the LPIO expert determination to be “*inconsistent and unreasonable*” (**RM 56**, p. 27). The ICANN Board considered the determination to be inconsistent on the basis of the Board’s perception that the LPIO expert determination on .hospital was inconsistent with the other health-related LPIO expert determinations, like on .health, .healthcare and .medical.

3. Claimant acclaims the ICANN Board’s acknowledgment of the need to review SCO, Community Objection and LPIO expert determinations. However, the ICANN Board’s practice of selecting certain expert determinations to be reviewed while not reviewing others is arbitrary and not justified by reasonable and substantive cause. There is no reason why health-related gTLDs should be afforded the benefits of a consistent expert determination, while other gTLDs are not. All decision-making should be consistent, regardless of the sector or industry to which the gTLD may relate. There is no reasonable and substantive cause for ICANN to treat the health sector differently or to separate it from other sectors. Creating an artificial category of health-related gTLD applications and treating this category of applications differently at the request of a single gTLD applicant is not part of ICANN’s mission, and not compatible with any of ICANN’s core values and fundamental obligations. What is more, if a separate category of health-related gTLD applications were to be considered to exist, what would be the criteria for inclusion into this category? ICANN provides no justification for creating a separate category of health-related gTLD applications, the creation of such a category was never envisioned within the new gTLD program, and it is unclear what objective criteria the ICANN Board could rely on to create this separate category that would prevent it from merely favoring one individual application over another. Furthermore, one could argue

that the application for .sport would fall within the category of health-related gTLD applications, because of the positive effects of sport on mental and physical health, and the therapeutic use of sport in the health sector.

4. In addition, if expert determinations must be consistent per sector, why has the ICANN Board not intervened with respect to certain inconsistent and unreasonable decisions in the sport sector? The Community Objection expert determination on dSL's application for .sport is incompatible with the Community Objection expert determinations for .basketball. The applications for .basketball by Little Hollow, LLC and by dSL's affiliate, dot Basketball Limited, were challenged by the Fédération Internationale de Basketball ("FIBA"), a competing applicant for .basketball. FIBA is listed by SportAccord as one of the organizations having expressed their official support for SportAccord's application for .sport (Annex 9), and it cannot be reasonably disputed that the applications for .basketball and .sport are both sport-related gTLD applications. The challenged applications for .basketball (by dot Basketball Limited) and for .sport (by dSL) are virtually identical (Annex 1 and RM 22), and FIBA raised similar concerns in its objection to .basketball as SportAccord did in its objection to .sport (RM 21 and Annex 3). Nevertheless, the outcome of both objections and the expert panel's application of the applicable standards are fundamentally different and inconsistent with each other. Claimant had good reasons to challenge the expert determination on .sport. FIBA had none and did, of course, not challenge the expert determination on .basketball.

5. **ICANN discriminated from both a contextual and a procedural point of view.** Claimant submits that the inconsistencies and unreasonableness of the expert determination regarding .sport are by themselves sufficient grounds for a finding that, by blindly accepting the expert determination, ICANN and its Board violated ICANN's AoI and Bylaws. However, the ICANN Board's violation of the AoI and Bylaws became even more apparent following its arbitrary interventions regarding the expert determinations on .car/.cars, .cam/.com, .med, .shop/.通販 and .hospital.

If the ICANN Board had elected not to intervene in a single case, there would have been inconsistent outcomes and applicants would have been subject to unfairness. However, by intervening, the ICANN Board discriminated not only substantively, but also from a purely procedural point of view. In electing to subject specific (perceived) inconsistent and unreasonable expert determinations to additional review or to simply reject them, the ICANN Board has treated specific applicants disparately from a procedural point of view. Neither ICANN nor its Board has given a valid justification – and there is no valid justification – for this preferential treatment of specific applicants. As a result, the ICANN Board has violated ICANN’s AoI and Bylaws in accepting, and refusing to review, the inconsistent and unreasonable expert determination regarding dSL’s application for .sport, while having other inconsistent and unreasonable expert determinations reviewed.

6. **ICANN has given no valid justification to discriminate.** In October 2014, the ICANN Board tried to justify limiting its review of inconsistent or otherwise unreasonable expert determinations to only two SCO expert determinations.<sup>6</sup> The ICANN Board then decided not to expand the scope of the review mechanism to include community and LPIO expert determinations, and considered that “*establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program*”. The ICANN Board argued as follows:

*“Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.” (RM 51)*

However, the ICANN Board’s argument provides no valid justification for limiting an additional review of an unfavorable expert determination to only two applicants:

- First, not all expert determinations were inconsistent or unreasonable, and parties to an

---

<sup>6</sup> .cam/.com and .shop/.通販; not .car/.cars for the reasons set out in footnote No. 3.

expert determination had the right to accept an unfavorable expert determination and abandon the right to challenge it. However, the acceptance of expert determinations by certain parties in no way affects the rights of others, like Claimant, to challenge an expert determination. And the fact that there is a challenge to one expert determination does not raise unfairness issues for other parties that have acted in reliance on other, unchallenged, expert determinations; every party to an expert determination was given the same opportunity either to accept or to challenge it.

- Second, if other applicants have indeed taken action in reliance on (inconsistent or unreasonable) expert determinations, this is largely as a result of the ICANN Board taking so long to address the issue of inconsistent and unreasonable expert determinations. The first claims concerning inconsistent or unreasonable expert determinations were made on 23 August 2013 (**RM 57-58**). On 10 October 2013, the BGC had already established that Board action was required.<sup>7</sup> Nevertheless, the ICANN Board waited for more than a year before addressing the issue (**RM 51**). When the ICANN Board finally intervened in October 2014, the ICANN Board used its own failure of taking action in a timely manner as an excuse to limit the review of expert determinations to a few individual applicants only (**RM 51**). However, such delays cannot be used as a justification for discrimination. The point is all the stronger in view of the fact that the delays and related issues of unfairness and discrimination could have been avoided if the Board had intervened in a more coordinated and timely fashion.<sup>8</sup> As mentioned above, the BGC took action on 10

---

<sup>7</sup> The BGC reacted to the challenge of 4 September 2013 to the SCO expert determination .shop/.通販 (**RM 59**). The BGC recommended that ICANN staff provide a report to the ICANN Board, setting out the options for dealing with the situation of differing expert determination outcomes in similar disputes. The report was to be delivered within 30 days, and the applications concerned were put on hold until the Board had considered the issue (**RM 53**).

<sup>8</sup> The first gTLD string that was delegated following a (reasonable and consistent) expert determination was .direct; the .direct registry agreement was not executed before 10 April 2014 (**RM 60-61**). Assuming that the ICANN staff report was delivered within the 30 days deadline (See footnote No. 7 and **RM 53**) – i.e., on or before 9 November 2013 –, the ICANN Board had 5 months to consider the report before the .direct registry agreement was executed. Instead, the ICANN Board waited until 12 October 2014 before taking action with respect to (specific) inconsistent and unreasonable expert determinations (**RM 51, 53**). Knowing that a decision on the (Continued...)

October 2013, by making a recommendation. The BGC's action shows that the ICANN Board was aware of the issue of inconsistent and unreasonable expert determinations. At the time, ICANN had not yet delegated any gTLD string that was subject to an expert determination. Therefore, if the ICANN Board had wanted to review all expert determinations from then on, it had every opportunity of doing so without possible harm to other applicants. Instead, the ICANN Board used its own failure to take action in a timely manner as an excuse to limit the review of expert determinations to a few individual applicants only.

7. In addition, by taking a decision in 2016 to have the LPIO expert determination on .hospital reviewed, the ICANN Board abandoned its decision of 2014 not to expand the scope of the review mechanism to Community and LPIO expert determinations. This abandonment of the Board's earlier decision for the sake of an individual applicant implies that its earlier decision was not justified, and shows that there is no reason why other applicants should not benefit from the same safeguards against inconsistent and unreasonable expert determinations.

8. **ICANN's concern about delays is a charade.** The ICANN Board also expressed the concern that a review of expert determinations might delay consideration of competing applications (**RM 56**). This concern cannot justify disparate treatment. The point is all the stronger in view of the fact that the delays are attributable to the ICANN Board. The ICANN Board was informed of concerns with expert determinations as early as 23 August 2013 (**RM 57-58**), and evidence of inconsistent expert determinations was given to the ICANN Board as early as 4 September 2013 (**RM 59**). Had the ICANN Board acted "*with a speed that is responsive to the needs of the Internet*", (as the ICANN Board is required to do pursuant to Article (I)(2)(9) of the ICANN Bylaws) –and had it implicated all affected parties in its

---

review of expert determinations was forthcoming, the ICANN Board had every opportunity to take coordinated action and suspend the delegation of applications that were subject to inconsistent, unreasonable or challenged expert determinations.



decision, instead of singling out only a few specific applicants, then delays would have been insignificant and ICANN would have given all affected applicants a level playing field.

Also, the decision to broaden the scope of the review mechanism for expert determinations cannot have delayed the consideration of competing applications. Pending a request for reconsideration (“RfR”), and pending the IRP proceedings, ICANN has put relevant new gTLD applications on hold. Clearly, the review of challenged expert determinations would have resulted in less serious delays than the delays resulting from RfR and IRP proceedings. *E.g.*, the review of the expert determination on .shop/.通販 took less than two months from the appointment of the panel to the final determination (**RM 55**); the shortest throughput time of an IRP resulting in a final declaration exceeds 11 months<sup>9</sup> and that particular IRP was, like other IRPs, preceded by an RfR and a cooperative engagement process.

In any event, the delays in the present case should only affect the Claimant. There are no applications for .sport apart from the ones by Claimant and SportAccord (the objector in the challenged expert determination). As will be demonstrated below, ICANN should reject SportAccord’s application, and, thus, Claimant is the only party affected by the delay.

## **II. ICANN’S PREFERENTIAL TREATMENT OF SPORTACCORD’S APPLICATION CONSTITUTES A VIOLATION OF ICANN’S ARTICLES OF INCORPORATION AND BYLAWS**

9. ICANN not only discriminates Claimant, it also gives preferential treatment to Claimant’s competing applicant. As already explained in Claimant’s Request for IRP and Reply, there are serious issues with the challenged expert determination. In addition to the issues that existed already at the time of Claimant’s RfR’s, SportAccord’s claim in the Community Objection proceedings that it is representative of a clearly delineated community is no longer tenable. ICANN knows that the “community” SportAccord claimed to represent has fallen apart. In this IRP, ICANN brought forward evidence showing the disintegration of SportAccord as an

---

<sup>9</sup> The *Despegar et al.* case has the shortest throughput time. The Requests for IRP were filed on 4 and 13 March 2015, and the IRP Declaration was issued on 11 February 2016. (**RM 62-64**)

umbrella organization of international sports federations (**Resp. Ex. 09**). In this context, the challenged expert determination has no value whatsoever. Yet, ICANN takes no action and continues favoring SportAccord by refusing to reexamine and reject the challenged expert determination.

In addition, while this IRP has been pending, new events have come to light, which the ICANN Board must investigate, and which, in light of ICANN's core mission, constitute strong grounds for ICANN to reject SportAccord's application for .sport; yet ICANN takes no action. ICANN has the critical task of ensuring the stable and secure operation of the Internet's unique identifier systems (**RM 2**, Article I(1)). The global public interest in the operational stability of the Internet cannot be underestimated; the importance of the Internet for today's global society becomes greater every day. When ICANN became the custodian of the Internet's technical infrastructure, ICANN committed itself *inter alia* to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law" (**RM 1**, Article 4). In the development of the New gTLD Program, ICANN recognized its duty "to protect the public interest in the allocation of critical Internet resources" and ICANN affirmed the right to deny an otherwise qualified application in protection of the public interest (**RM 5**, Module 1-24). ICANN developed background screening criteria and required applicants to give information on all executives (directors, officers and partners). Apart from the closed background screening questions, applicants were required to "[p]rovide an explanation for any additional background information that may be found concerning the applicant or any individual named in the application, which may affect eligibility" (**RM 5**, Attachment to Module 2, A-9). Applicants had to warrant that "the statements and representations contained in the application [...] are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating [the] application." (**RM 5**, Module 6-2) Applicants further had to acknowledge "that any misstatement or misrepresentation (or

*omission of material information) may cause ICANN to reject the application”, and had to keep ICANN informed of material changes by notifying “ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading” (RM 5, Module 6-2).*

In the case at hand, SportAccord has kept critical information from ICANN. One of SportAccord’s executives (Annex 39), Mr. Kirsan Ilyumzhinov, has been put on the Syria Designations sanctions list by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. The reasons for putting Mr. Ilyumzhinov on a sanctions list are material, as evidenced by the information OFAC published on 25 November 2015 (Annexes 40-41).

SportAccord did not inform ICANN; the latest update of the posted changes to SportAccord’s application for .sport dates from 11 January 2013 (Annex 42). SportAccord did not even inform ICANN that Mr. Mr. Ilyumzhinov is one of SportAccord’s executives (Annex 43), thus making it impossible for ICANN to perform useful background screening. As a result, SportAccord failed to notify ICANN in writing of a material change in circumstances that rendered the information provided in the application false and misleading, hereby violating its duties as an applicant.

Claimant informed ICANN and its Board about this critical issue with SportAccord’s application on 8 March 2016 (Annex 44). ICANN reacted on 15 March 2016 (Annex 45). Its reaction was worrying. ICANN informed Claimant that it was going to review the information and “*work with the applicant [i.e., SportAccord] directly if action is required*” (Annex 45). On 18 March 2016, Claimant explained that it cannot be disputed that action is required and raised its concern about the fact that ICANN had the intention ‘to work on this with’ SportAccord (Annex 46). ICANN risked violating U.S. sanctions law. ICANN’s intention was also worrying in view of the fact that ICANN has previously engaged in undisclosed one-to-one discussions with the IOC regarding the .sport gTLD (Annexes 5-8), which was applied for by

SportAccord with the support of the IOC at the time (**Annexes 2 and 9**). In the Applicant Guidebook, ICANN informed applicants that it must comply with U.S. sanctions law and that it “*generally will not seek a license to provide goods or services to an individual or entity on the SDN List [i.e., sanctions list]*” (**RM 5**, Module 1-25). One would have expected ICANN to refrain from working with SportAccord immediately, and certainly in view of the clear violations of SportAccord’s duties as an applicant and in view of the gravity of the reasons given by the OFAC for putting SportAccord’s executive on the Syria Designations sanctions list. Instead, ICANN informed Claimant that it “*will not share information about the processing of specific applications with parties other than the primary contact for the application in question*” (**Annex 47**). In other words, ICANN continues to give special treatment to SportAccord by working with SportAccord behind closed doors.

### **III. ICANN’S LACK OF TRANSPARENCY REGARDING THE PREFERENTIAL TREATMENT OF SPORTACCORD’S APPLICATION CONSTITUTES A VIOLATION OF ICANN’S ARTICLES OF INCORPORATION AND BYLAWS**

10. ICANN working behind closed doors with the IOC and SportAccord is a violation of ICANN’s obligation to be open and transparent<sup>10</sup>. In a previous case, ICANN has assisted an applicant in drafting a letter that was critical to its application and allegedly gave strategic advice on how to get a competing applicant disqualified<sup>11</sup>. In the present case, it is known that ICANN had confidential discussions with the IOC on .sport, that the IOC supported SportAccord, and that ICANN intends to discuss the matter further with SportAccord. The content of these discussions remains unknown. ICANN did not disclose anything about the content of these discussions, although ICANN must have kept track of these discussions (meeting minutes, notes, correspondence, etc.). The fact that ICANN keeps this information confidential creates a procedural imbalance and imposes an unfair limitation on Claimant’s opportunity to present its claims and defenses. As a result, unless the Panel considers, as

---

<sup>10</sup> See Request for IRP, paras. 60-63; AoI, Article 4; ICANN Bylaws, Articles I(2)(7) and III.

<sup>11</sup> **RM 33**, para. 80; **RM 65**, paras. 13, 42; **RM 66**.

Claimant submits, that the available evidence is sufficient to grant Claimant's request for relief, the Panel is requested 1) to order, pursuant to Articles 20 and 21 of the ICDR Rules that ICANN produce all documents related to the discussions with the IOC and SportAccord, and 2) to draw adverse inferences from the fact that ICANN did not submit these documents of its own volition.

11. Furthermore, ICANN is using its lack of transparency and the imbalance in information to argue that Claimant has failed to prove that the ICANN Board did not act with due diligence and care in considering Claimant's RfRs<sup>12</sup>. As a matter of fact, there is no evidence that the Board did exercise any diligence or care in considering the serious issues raised in the RfRs. The *Despegar et al.* Panel was very clear in this respect: in light of serious allegations, openness and transparency require that the ICANN Board should properly investigate the allegation, and that it should make public the fact of the investigation and the result thereof<sup>13</sup>. In the case at hand, the Board was given ample opportunity to investigate the issue properly, but no investigation took place.

#### **IV. COMMISSIONING TASKS TO A THIRD PARTY DOES NOT REMOVE ICANN'S RESPONSIBILITY**

12. Pursuant to Article II(1) of the ICANN Bylaws, the powers of ICANN must be exercised by the ICANN Board. The power to decide whether or not to allocate a new gTLD to an applicant is one of ICANN's most fundamental responsibilities.<sup>14</sup> It is not a power that the ICANN Board intended to, or was entitled to, delegate to third party panels through rulings on expert determinations.<sup>15</sup> The Board may only delegate its powers in so far as is provided for in the AoI and Bylaws.<sup>16</sup> ICANN must make well-informed decisions, based on expert advice<sup>17</sup>,

---

<sup>12</sup> ICANN's Sur-Reply, paras. 39 and following.

<sup>13</sup> **RM 64**, *Despegar et al.* IRP Declaration, paras. 134-135.

<sup>14</sup> AoI, Article 3; ICANN's Bylaws, Article I(1).

<sup>15</sup> See **RM 5**, Modules 5-4, 6-2 and 6-3 confirming ICANN's authority to approve or reject a new gTLD application.

<sup>16</sup> ICANN Bylaws, Article II(1).

<sup>17</sup> See ICANN's Bylaws, Article I(2)(7).

but its Board has no authority to outsource its decision-making power to experts, who were appointed to give advice. ICANN's Bylaws require that its Board members exercise independent judgment in taking their decisions<sup>18</sup>, which prevents them from fully relying on expert advice. Moreover, even if the ICANN Board were allowed to outsource its decision-making power, *quod non*, it would not impact ICANN's responsibility for the decision. ICANN's Board has ultimate responsibility for the New gTLD Program (**RM 5**, Module 5-4).<sup>19</sup>

13. ICANN makes a specious argument, submitting that experts were selected because they had specific expertise that the ICANN Board does not have (or should not have).<sup>20</sup> The Community Objection criteria were developed entirely within the ICANN community (**RM 9**). More experts exist within the ICANN community than outside. ICANN was severely criticized by its former Chief Strategy Officer and Senior Vice President of Stakeholder Relations for not having given adequate training to so-called "experts", who were unfamiliar with the industry (**RM 26**). The ICANN Board had ample experience with community requirements from a previous round, where it elected to re-evaluate almost every application on the then-existing requirement of being sponsored by a community (**RM 68**). One could accept that the ICANN Board did not have the necessary expertise on string confusion, limited public interest and legal rights, where expertise in psycholinguistics, public international law and trademark law was required. However, that has not prevented ICANN from intervening with respect to specific SCO and LPIO expert determinations, and finding them inconsistent and unreasonable. Concerning Community Objections, the ICANN Board has intervened in one case (.med), where the Board rejected the expert determination without calling on additional

---

<sup>18</sup> ICANN's Bylaws, Article IV(3)(4)(c).

<sup>19</sup> The IRP panel in the *Despegar et al.* case failed to see why an ICANN vendor was not mandated to apply ICANN's core values and ruled that consistency must be ensured (**RM 64**, paras. 147, 150). Claimant submits that ICANN vendors must apply ICANN's core values just like any ICANN body, as ICANN recognized that third parties were subject to the same obligations as ICANN staff (**RM 67**).

<sup>20</sup> ICANN's Sur-Reply, para. 24.

experts. ICANN must exercise independent judgment in making decisions based on expert advice. But, in the case at hand, ICANN has done the exact opposite by relying completely on the ill-founded advice of a panel with an appearance of bias and with no proven expertise in ICANN's Community Objection criteria.

**V. THE IRP PANEL IS REQUESTED TO ISSUE A DECLARATION THAT BINDS ICANN TO CEASE VIOLATIONS OF ITS ARTICLES OF INCORPORATION AND BYLAWS**

14. According to settled case law, IRP Declarations are binding on ICANN.<sup>21</sup> Even IRP panels that did not specifically rule on the issue of the binding nature of IRP decisions have been sufficiently affirmative in this regard to allow the conclusion that IRP decisions are binding. *E.g.*, the *Despegar et al.* designated the prevailing party, declared that ICANN had to reimburse Claimants and that its IRP declaration may be executed in any number of counterparts<sup>22</sup>. This language is sufficiently conclusive and the explicit mention that the IRP declaration may be executed confirms its binding nature. The ICANN Board's practice of affirming in a resolution that it will adopt IRP Declarations<sup>23</sup> has no bearing on the binding nature of the decision, except in so far as the ICANN Board's explicit acceptance of the IRP Declaration might prevent ICANN from seeking an annulment of the binding IRP Declaration.

15. In addition, there is no logic to ICANN arguing that, on the one hand, it is bound by an expert determination, which was issued without oral hearing, on the basis of limited arguments and which suffered from serious issues regarding inconsistency, unreasonableness and apparent bias, while on the other hand, the much more accountable IRP decision should be advisory only.

16. In the case at hand, a binding declaration ordering ICANN to stop acting in a discriminatory manner towards Claimant is warranted. The *Vistaprint* Panel made clear that

---

<sup>21</sup> **RM 33**, DCA Final IRP Declaration, para. 23; **RM 34**, Vistaprint IRP Declaration, paras. 130 and following.

<sup>22</sup> **RM 64**, Despegar et al. IRP Declaration, p. 40.

<sup>23</sup> See ICANN's Sur-Reply, para. 16.

IRP Panels have the authority to rule that the ICANN Board has discriminated against certain applicants.<sup>24</sup> The ICANN Board had every opportunity to consider the discrimination of Claimant and to put an end to it<sup>25</sup>. And, as decided by the *Despegar et al.* Panel, the ICANN Board cannot refuse to act indefinitely<sup>26</sup>. In view of the ICANN Board's inaction, and in view of the fact that ICANN's good faith has been compromised in light of its favoring the IOC and SportAccord, the IRP Panel has no choice but to issue a binding order that ICANN end this discrimination.

## VI. RELIEF REQUESTED

17. Based on the foregoing, Claimant's request for IRP and Reply, 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 is continuing to act in breach of its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook, by:
  - Upholding the expert determination granting SportAccord's Community Objection;
  - Upholding SportAccord's application for .sport;
- Declare that ICANN must reject the expert determination granting SportAccord's Community Objection;
- Declare that ICANN must reject SportAccord's application for .sport;
- 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,  
Crowell & Moring LLP  
7, rue Joseph Stevens  
B-1000 Brussels, Belgium  
*Counsel for Claimant*

*Flip Petillion*  
*do April 2016*

<sup>24</sup> **RM 34**, Vistaprint IRP Declaration, paras. 177-179, 188

<sup>25</sup> That distinguishes the present case from the *Vistaprint* case, where the ICANN Board had not yet had the opportunity to consider the discrimination (**RM 34**, Vistaprint IRP Declaration, para. 191).

<sup>26</sup> **RM 64**, *Despegar et al.* IRP Declaration, paras. 135-138.



## Table of Contents

|      |  |    |
|------|--|----|
| I.   | The ICANN Board’s discriminatory interventions on expert determinations constitute a violation of ICANN’s Articles of Incorporation and Bylaws .....                         | 1  |
| II.  | ICANN’S preferential treatment of SportAccord’s application constitutes a violation of ICANN’s Articles of Incorporation and Bylaws .....                                    | 8  |
| III. | ICANN’s lack of transparency regarding the preferential treatment of SportAccord’s application constitutes a violation of ICANN’s Articles of Incorporation and Bylaws ..... | 11 |
| IV.  | Commissioning tasks to a third party does not remove ICANN’s responsibility .....  | 12 |
| V.   | The IRP Panel is requested to issue a Declaration that binds ICANN to cease violations of its Articles of Incorporation and Bylaws .....                                     | 14 |
| VI.  | Relief requested .....   | 15 |

## List of annexes

- Annex 1 - dSL's application to operate the .sport gTLD (Application ID 1-1174-59954)
- Annex 2 - SportAccord's application to operate the .sport gTLD (Application ID 1-1012-71460)
- Annex 3 - Expert Determination in ICC CASE No. EXP/471/ICANN/88
- Annex 4 - Information on Famous Four Media
- Annex 5 - Letter from IOC to ICANN of 16 March 2010
- Annex 6 - Letter from IOC to ICANN of 1 February 2011
- Annex 7 - Letter from IOC to ICANN of 4 April 2011
- Annex 8 - Letter from counsel to IOC to ICANN of 1 July 2011
- Annex 9 - List of SportAccord support
- Annex 10 - dSL's response of 21 May 2013 to SportAccord's community objection in ICC CASE No. EXP/471/ICANN/88
- Annex 11 - Letter from ICC to dSL of 25 June 2013 with *curriculum vitae* of Mr. Taylor
- Annex 12 - Email from dSL to ICC of 27 June 2013 challenging the appointment of Mr. Taylor
- Annex 13 - Letter from ICC to dSL of 25 July 2013 accepting the challenge of Mr. Taylor's appointment
- Annex 14 - Letter from ICC to dSL of 30 July 2013 with *curriculum vitae* and DAASII of Dr. Tawil
- Annex 15 - Request for Reconsideration 13-16 as filed on 8 November 2013
- Annex 16 - Letter from dSL to ICC of 15 January 2014
- Annex 17 - dSL's complaint with ICANN's Ombudsman of 6 February 2014
- Annex 18 - Email from ICANN's Ombudsman to dSL of 7 February 2014
- Annex 19 - Press release by Famous Four Media of 26 March 2014
- Annex 20 - Marksmen report on Dr. Tawil
- Annex 21 - Board Governance Committee determination on Request for Reconsideration 13-16 of 8 January 2014
- Annex 22 - Letter from ICC to dSL of 21 January 2014
- Annex 23 - ICANN's Ombudsman's Report of 31 March 2014
- Annex 24 - Request for Reconsideration 14-10 as filed on 2 April 2014
- Annex 25 - Board Governance Committee recommendation on Request for Reconsideration 14-10 of 21 June 2014
- Annex 26 - Resolution 2014.07.18.NG01 of the New gTLD Program Committee
- Annex 27 - Minutes of the Meeting of the New gTLD Program Committee on 18 July 2014, published on 9 September 2014
- Annex 28 - Indictment of 20 May 2015 at the United States District Court E.D.N.Y., *United States v. Jeffrey Webb et al.*
- Annex 29 - Letter of 15 May 2015 from SportAccord to the Board Governance Committee with a copy to Dr. Tawil
- Annex 30 - Email from ICANN's Ombudsman to dSL of 13 February 2014
- Annex 31 - Email from ICANN's Ombudsman to dSL of 29 March 2014
- Annex 32 - Email of 29 March 2014 from the ICC to dSL with copy to ICANN and ICANN's Ombudsman
- Annex 33 - IAAF lead Federations resigning from SportAccord after Vizer attack on Bach as IOC President claims it is "business as usual", <http://www.insidethegames.biz/articles/1026875/iaaf-lead-federations-resigning-from-sportaccord-after-vizer-attack-on-bach-as-ioc-president-claims-it-is-business-as-usual> (20 April 2015)

- Annex 34 - Backlash: Olympic groups break with umbrella body in protest, Associated Press, <http://news.yahoo.com/iaaf-leader-diack-says-federations-dont-sportaccord-114319581--spt.html> (21 April 2015)
- Annex 35 - Thomas Bach to Marius Vizer: I'll get back to you later, Associated Press, <http://sports.yahoo.com/news/thomas-bach-marius-vizer-ill-back-later-161606295--spt.html> (20 May 2015)
- Annex 36 - Olympics-Equestrian federation joins SportAccord's growing exodus, Reuters, <http://sports.yahoo.com/news/olympics-equestrian-federation-joins-sportaccords-growing-exodus-095046563--sector.html> (21 May 2015)
- Annex 37 - Rugby joins SportAccord exodus, Reuters, <http://sports.yahoo.com/news/equestrian-federation-joins-sportaccords-growing-exodus-112624511--oly.html> (21 May 2015)
- Annex 38 - Major blow for Vizer as close allies pull organisations out of SportAccord, Inside The Games, <http://www.insidethegames.biz/articles/1027572/major-blow-for-vizer-as-close-allies-pull-organisations-out-of-sportaccord> (27 May 2015)
- Annex 39 - Composition of SportAccord's Council, <http://www.sportaccord.com/about/council/> (last accessed on 15 April 2016)
- Annex 40 - Designation of Kirsan Ilyumzhinov on U.S. Sanctions list (category strong), <https://sanctionssearch.ofac.treas.gov/Details.aspx?id=5116> (last accessed on 15 April 2016)
- Annex 41 - Press releases of 25 November 2015 by OFAC on the designation of Kirsan Ilyumzhinov on U.S. Sanctions list, <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20151125.aspx> and <https://www.treasury.gov/press-center/press-releases/Pages/j10287.aspx> (last accessed on 15 April 2016)
- Annex 42 - Application update history for SportAccord's application to operate the .sport gTLD (Application ID 1-1012-71460), <https://gtdresult.icann.org/application-result/applicationstatus/applicationchangehistory/1593> (last accessed on 15 April 2016)
- Annex 43 - Latest version of SportAccord's application to operate the .sport gTLD (Application ID 1-1012-71460), available via <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/1593> (last accessed on 15 April 2016)
- Annex 44 - Letter from dSL to ICANN and the ICANN Board of 8 March 2016
- Annex 45 - Email from ICANN to dSL of 15 March 2016
- Annex 46 - Letter from dSL to ICANN and the ICANN Board of 18 March 2016
- Annex 47 - Email from ICANN to dSL of 29 March 2016

## List of Reference Material (RM)

1. ICANN's Articles of Incorporation
2. ICANN's Bylaws of 11 April 2013
3. ICANN's Bylaws as amended on 16 March 2012, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-16mar12-en.htm>
4. Affirmation of Commitments
5. gTLD Applicant Guidebook (v. 2012-06-04)
6. Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>
7. GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005)
8. ICANN Resolution 2008.06.26.02, <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm>
9. ICANN Generic Names Supporting Organization, Final Report - Introduction of New Generic Top-Level Domains, 8 August 2007, Part A: Final Report, <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>
10. ICANN Resolution 2011.06.20.01, <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>
11. ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, <http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>
12. Information on the Applicant Guidebook as published on <http://newgtlds.icann.org/en/applicants/agb>
13. New gTLD Update (30 May 2012) on the close of the TLD Application system, <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en>
14. Background information on the International Olympic Committee
15. Media release of SportAccord of 31 May 2012
16. New gTLDs proposed final Applicant Guidebook public comment summary, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf>
17. New gTLD draft Applicant Guidebook version 3 public comments summary and analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>
18. New gTLD draft Applicant Guidebook version 4 public comment summary and analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>
19. Whois records <sport.com>
20. Screen prints of the website accessible through <sport.com>
21. Expert Determination in ICC Case No. EXP/442/ICANN/59 on .basketball
22. dBL's application to operate the .basketball gTLD (Application ID 1-1199-43437)
23. Expert Determination in ICC Case Nos. EXP/392/ICANN/9, EXP/393/ICANN/10 and EXP/394/ICANN/11 on .gay
24. Expert Determination in ICC Case Nos. EXP/447/ICANN/64 and EXP/385/ICANN/2 on .hotels
25. Expert Determination in ICC Case No. EXP/430/ICANN/47 on .islam
26. Witness statement by Kurt Pritz of 8 October 2014
27. ICDR Case No. 50 117 T 00224 08, *ICM Registry v. ICANN*, Declaration of the Independent Review Panel, 19 February 2010
28. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits)
29. Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June)

30. Memorandum of Understanding between ICANN and the International Chamber of Commerce of 12 June 2012
31. ICDR Case No. 50-20-1400-0247, *Booking.com v. ICANN*, Post-hearing communications
32. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Panel Declaration on the IRP Procedure, 14 August 2014
33. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration of IRP Procedure, 9 July 2015
34. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Final Declaration of the Independent Review Panel, 9 October 2015
35. ICDR Case No. 01-14-0002-1065, *GCC v. ICANN*, Interim Declaration on Emergency Request for Interim Measures of Protection, 12 February 2015
36. ICDR Case No. 01-14-0001-5004, *Dot Registry v. ICANN*, Interim Declaration on Emergency Independent Review Panelist's Order on Request for Emergency Measures of Protection, 23 December 2014
37. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Final Declaration of IRP Procedure, 9 July 2015
38. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, ICANN's response to Vistaprint's first additional submission, 2 April 2015
39. *Brown v. Gardner*, 513 U.S. 115, 122 (1994)
40. *Rapanos v. United States*, 547 U.S. 715, 752 (2006)
41. *Weaver v. Federal Motor Carrier Safety Admin.*, 744 F. 3d 142, 145 (D.C. Cir. 2014)
42. ICDR Case No. 50-20-1400-0247, *Booking.com v. ICANN*, Final Declaration of the Independent Review Process Panel, 3 March 2015
43. NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
44. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Additional submission Vistaprint, 2 March 2015
45. ICDR Case No. 01-14-0000-6505, *Vistaprint Limited v. ICANN*, Second additional submission Vistaprint, 24 April 2015
46. IBA Guidelines on Conflicts of Interest in International Arbitration
47. Expert Determination in ICC CASE No. EXP/486/ICANN/103 on .sports
48. ICDR Case No. 01-14-0001-6263, *Donuts Inc. v. ICANN*, Request for IRP re new gTLD applications for .sports, .ski and .rugby
49. NGPC Resolution 2014.02.05.NG02.
50. ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections
51. NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
52. Determination of the BGC of 21 June 2014 on Request for Reconsideration 14-1
53. Recommendation of the BGC of 10 October 2013 on Request for Reconsideration 13-9
54. Report of the Final Review Panel and Final Review Panel Determination on .cam/.com
55. Report of the Final Review Panel and Final Review Panel Determination on .shop/.通販
56. ICANN Board Resolution 2016.02.03.12 – 2016.02.03.13 on .hospital (pp. 26-33)
57. Request for Reconsideration 13-6 of 23 August 2013
58. Request for Reconsideration 13-7 of 23 August 2013
59. Request for Reconsideration 13-9 of 4 September 2013 on the SCO Expert Determination regarding .shop/.通販.
60. LRO Expert Determination of 29 July 2013 re .direct

61. Information about Registry Agreement re .direct
62. ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Claimants' Request for IRP re .hotel, 4 March 2015
63. ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Claimants' Request for IRP re .eco, 13 March 2015
64. ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration of the Independent Review Process Panel, 11 February 2016
65. ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, DCA's Memorial on the Merits, 3 November 2014
66. K. Murphy, "ICANN finally publishes THAT .africa letter, makes me look like an idiot", 1 September 2015, <http://domainincite.com/19206-icann-finally-publishes-that-africa-letter-makes-me-look-like-an-idiot> (last accessed on 15 April 2015) with attachment <http://domainincite.com/docs/dotafricaletters.pdf> (last accessed on 15 April 2015)
67. Recommendation of the BGC of 1 August 2013 on Request for Reconsideration 13-5
68. Status Report on the sTLD Application Process (Updated 03 December 2005) accessible via <https://archive.icann.org/en/tlds/stld-apps-19mar04/> on <https://archive.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf> (last accessed on 15 April 2015)