

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOT SPORT LIMITED,) ICDR CASE NO. 01-15-0002-9483
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS,)
)
)
Respondent.)
_____)

ICANN'S SUR-REPLY TO THE REPLY OF CLAIMANT DOT SPORT LIMITED

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21 December 2015

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Sur-Reply to the Reply submitted by claimant Dot Sport Limited (“Claimant”) on 9 November 2015.

1. Claimant submitted an application to ICANN to operate the .SPORT gTLD (“Application”). As permitted by the New gTLD Applicant Guidebook (“Guidebook”), SportAccord, an umbrella organization for international sports federations and other sport-related international associations, filed a community objection to Claimant’s Application, asserting that there was “substantial opposition to the Application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted”¹ (“Objection”).

2. An expert (“Expert”) appointed by the International Chamber of Commerce (“ICC”) – the independent dispute resolution provider that administers community objections – upheld the Objection (“Expert Determination”).

3. Claimant then filed two separate Reconsideration Requests,² seeking the ICANN Board’s reconsideration of the Expert Determination on the claims that: (i) the Expert failed to disclose various alleged conflicts of interest; and (ii) the Expert substantively erred in rendering the Expert Determination.

4. The Board denied both Reconsideration Requests, finding that neither the

¹ Guidebook § 3.2.1 (Cls Ex. RM-5)

² Reconsideration requests are an accountability mechanism available under ICANN’s Bylaws. Those who have been materially affected by actions or inactions by ICANN’s Board, staff, or a third-party service provider or expert with respect to the New gTLD Program may request reconsideration if: (1) the Board acted without consideration of material information or in reliance on false or inaccurate material information; or (2) staff or a third-party service provider or expert for the New gTLD Program acted “in contradict[ion] of established ICANN policy(ies).” Bylaws, Art. IV, § 2.2(a) (Cls Ex. RM-2); BGC Recommendation on Request 13-5 at 4 (Resp. Ex. 12), *available at* <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>.

ICC nor the Expert had violated any established policy or procedure (which, under ICANN’s Bylaws, must be shown in order to demonstrate a basis for reconsideration) with respect to either the Expert’s appointment or the rendering of the Expert Determination. Claimant’s Reply is full of insinuations and unsupported allegations about the Expert and the alleged conflicts of interest. But like its IRP Request, Claimant’s Reply presents no evidence whatsoever that the Board violated ICANN’s Articles or Bylaws in evaluating Claimant’s Reconsideration Requests.

5. Similar challenges to the determinations of third-party experts in the context of the New gTLD Program have recently resulted in final declarations denying those IRP claims – such as, *Booking.com v. ICANN* (“*Booking.com*”), *Vistaprint Ltd. v. ICANN* (“*Vistaprint*”) and *Merck KGaA v. ICANN* (“*Merck*”).

6. A final declaration that is consistent with the holdings in *Booking.com*, *Vistaprint* and *Merck* is appropriate here. ICANN’s Board has not taken, or failed to take, **any** action that violates any provision of ICANN’s Articles or Bylaws. ICANN’s Board was not involved in the appointment of the Expert, or with the rendering of the Expert Determination. Rather, the Board properly limited its review of Claimant’s Reconsideration Requests to assessing whether the ICC or the Expert had violated established policy and procedure, and correctly concluded that they had not.

ARGUMENT

I. CLAIMANT’S PROCEDURAL ARGUMENTS ARE FLAWED AND HAVE BEEN REJECTED BY OTHER IRP PANELS.

7. Claimant devotes a significant portion of its Reply to procedural issues, such as the “scope” of this IRP Panel’s mandate, whether this IRP Panel’s Declaration is “binding” on ICANN, and whether this IRP Panel can grant “affirmative relief.” Yet

none of these issues are relevant to the question at hand: Whether ICANN’s Board acted contrary to ICANN’s Articles or Bylaws. And more to the point, Claimant’s positions on these procedural issues are flawed and have been repeatedly rejected by other IRP panels.

A. The Scope Of This IRP And The Applicable Standard Of Review Are Set Forth Clearly In ICANN’s Bylaws.

8. In its Reply, Claimant argues that this IRP Panel “controls ICANN and its Board’s exercise of its discretion.”³ There is no support for this claim anywhere in ICANN’s Articles or Bylaws, or in the Supplementary Procedures applicable to this IRP. Moreover, IRP panels have repeatedly determined that their mandate is not nearly as broad as Claimant suggests.

9. ICANN’s independent review process is an internal corporate accountability mechanism that ICANN voluntarily established via its Bylaws. California law expressly authorizes California non-profit public benefit corporations, such as ICANN, to establish such mechanisms and to define the scope and form of those mechanisms.⁴ Pursuant to this explicit authority, ICANN defined the procedures and standard of review that would govern the independent review process.

10. Two critical IRP principles are found in ICANN’s Bylaws with respect to the scope of this IRP and the applicable standard of review.

11. First, the scope of an IRP is limited to challenging the actions or inactions of ICANN’s Board.⁵ As the *Vistaprint* Panel declared, “the Panel’s review is limited to addressing challenges to conduct by ICANN’s Board, the Panel is not tasked with

³ Reply at 13.

⁴ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

⁵ Bylaws, Art. IV, § 3.11(c) (“The IRP Panel shall have the authority to...(c) declare whether an action or inaction **of the Board** was inconsistent with the Articles of Incorporation or Bylaws.”) (emphasis added) (Cl’s Ex. RM-2).

reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint* [string confusion objection]).”⁶ Likewise, the *Booking.com* Panel declared: “There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws....”⁷ The *Merck* Panel agreed, declaring: “The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency.”⁸

12. Second, ICANN’s Bylaws specifically identify the standard of review that the IRP panel must apply when evaluating the actions and inactions of the Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. [D]id the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. [D]id the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁹

13. As the IRP panels in *Booking.com*, *Vistaprint* and *Merck* each found, this defined standard of review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board. As the *Booking.com*

⁶ *Vistaprint* Final Declaration ¶ 127 (Cls Ex. RM-34).

⁷ *Booking* Declaration at ¶ 110 (Resp. Ex. 1).

⁸ *Merck* Final Declaration ¶ 17 (Resp. Ex. 13).

⁹ Bylaws, Art. IV, § 3.4 (Cls Ex. RM-2); Reply ¶ 37.

Panel explained: “There can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN.”¹⁰ In the words of the *Vistaprint* Panel: “The Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”¹¹ And in the view of the *Merck* Panel, “it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.”¹²

14. Thus, with respect to scope, the only Board action relevant to this IRP is the Board’s denial of Claimant’s two Reconsideration Requests.¹³ With respect to the applicable standard, Claimant has presented no evidence demonstrating that ICANN’s Board acted with a conflict of interest, failed to exercise due diligence or care, or failed to exercise independent judgment.¹⁴

B. IRP Declarations Are Not “Binding” On The ICANN Board.

15. Claimant continues to argue that this IRP Panel’s declaration will be “binding” on ICANN’s Board, meaning the ICANN Board must accept and implement all decisions and recommendations of this IRP Panel.¹⁵ Yet ICANN’s Bylaws are clear – an IRP panel’s authority is limited to “declaring whether the Board has acted consistently

¹⁰ *Booking.com* Final Declaration ¶ 108 (Resp. Ex. 1).

¹¹ *Vistaprint* Final Declaration ¶ 124 (Cls. Ex. RM-34).

¹² *Merck* Final Declaration ¶ 21.

¹³ Insofar as Claimant seeks to challenge the Board’s approval of the Guidebook, that claim, as discussed further below, is long since time-barred.

¹⁴ *Merck* Final Declaration ¶ 18 (“The phrase ‘defined standard of review’ undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word ‘consistent’ as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.”) (Resp. Ex. 13).

¹⁵ Reply ¶¶ 10-18.

with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”¹⁶ Indeed, the *Vistaprint* Panel found that an IRP panel’s declaration is a “‘non-binding declaration’ when it comes to recommending that the Board take or refrain from taking any action or decision”¹⁷

16. Rather than yielding decision-making authority, the Bylaws require ICANN’s Board to “review[.]” and “consider” any IRP declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.¹⁸ This is precisely what happened in all IRPs that have gone to a final declaration to date: Following the issuance of the final declarations in the *ICM*, *Booking.com*, *DotConnectAfrica*, and *Vistaprint* IRPs, the ICANN Board promptly reviewed and ultimately determined to adopt the relevant portions of the panels’ declarations.¹⁹

17. ICANN recognizes that a single IRP panel in the *DotConnectAfrica* matter (“*DCA* Panel”) issued a finding that its declaration would be legally binding, in contrast to the findings made by the panels in the *Vistaprint* and *ICM* matters that their declarations were not legally binding.²⁰ As ICANN has emphasized repeatedly to all IRP panels, the ICANN Board has announced that it will take (and is required by the Bylaws

¹⁶ Bylaws, Art. IV, § 3.4 (Cls Ex. RM-2).

¹⁷ *Vistaprint* Final Declaration ¶ 148 (Cls. Ex. RM-34).

¹⁸ Bylaws Art. IV, § 3.11.d (Cls. Ex. RM-2).

¹⁹ NGPC Resolutions 2015.04.26.14-2015.04.26.16, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.b> (*Booking.com*); NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*); Board Resolutions 2010.03.12.39-41 (*ICM*); Board Resolutions 2015.10.22.17-19 (*Vistaprint*), available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en>. The Board has not yet had an opportunity to review the *Merck* Final Declaration, which was just recently issued on 11 December 2015.

²⁰ *DotConnect Africa Trust v. ICANN*, Declaration of the IRP Procedure ¶¶ 98-115 (Cls. Ex. RM-33); *Vistaprint* Final Declaration ¶ 148 (An IRP panel’s declaration is a “‘non-binding declaration’ when it comes to recommending that the Board take or refrain from taking any action or decision”) (Cls. Ex. RM-34); *ICM v. ICANN*, Declaration of the Independent Review Panel ¶¶ 131-134, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>. The *Booking.com* and *Merck* Panels did not address the issue of whether its declaration was binding.

to take) any declarations of IRP panels seriously and to date has adopted recommendations made by the panels in those IRP declarations.

C. IRP Panels Do Not Have The Authority To Grant Affirmative Relief.

18. Again, ICANN’s Bylaws (as well as the Supplementary Procedures that govern this IRP) limit an IRP panel to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the *opinion* of the IRP panel.²¹ Even if there were a basis for some kind of relief here (which there is not), neither this IRP Panel, nor any IRP panel has the authority to award affirmative relief.²² As the *Vistaprint* Panel recently confirmed: “[A]n IRP Panel does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”²³

19. Despite all of this, Claimant continues to argue that IRP panels have the authority to grant affirmative relief, and that the *Vistaprint* Panel “[d]id not act in accordance with the ICDR Rules, as it did not finally resolve the dispute.”²⁴ Claimant is mistaken. The *Vistaprint* Panel “[r]ecommend[ed] that the ICANN Board exercise its judgment on the question of whether an additional review mechanism [was] appropriate

²¹ Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cls. Ex. RM-2) (emphasis added).

²² Indeed, the IRP panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 133, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

²³ *Vistaprint* Final Declaration ¶ 149 (Cls. Ex. RM-34).

²⁴ Reply ¶ 24.

to re-evaluate the [expert declaration at issue in *Vistaprint*].”²⁵ This recommendation is exactly the type of “relief” that an IRP panel has authority to issue – a recommendation of how the Board should proceed. ICANN’s Board considers and determines how to act upon the recommendations of all IRP panels, and it is that action by ICANN’s Board that, in conjunction with the declaration of the IRP panel, finally resolves the dispute between the parties. Even though Claimant cites to the final declaration of the *DCA* Panel and the declarations of emergency panelists in other IRPs,²⁶ affirmative relief was not “awarded” or “mandated” by any of those IRP panels but rather by ICANN’s Board, which considered and then acted on recommendations made by those panels.²⁷

II. NOTHING IN CLAIMANT’S REPLY DEMONSTRATES THAT THE BOARD’S DENIAL OF CLAIMANT’S RECONSIDERATION REQUESTS WAS INCONSISTENT WITH ICANN’S ARTICLES OR BYLAWS.

20. Claimant’s Reply repeats the arguments made in its IRP Request that ICANN’s Board violated the Articles and Bylaws by failing to “correct[] the procedural and substantial errors in the [Expert Determination].”²⁸ The fact of the matter, however, is that the Board’s evaluation of the Expert Determination through Claimant’s Reconsideration Requests fully complied with ICANN’s Articles and Bylaws, as well as the Guidebook’s procedures.

²⁵ *Vistaprint* Final Declaration ¶ 197(3) (Cls. Ex. RM-34). ICANN’s Board accepted the *Vistaprint* Panel’s recommendation on 22 October 2015. See Board Resolutions 2015.10.22.17-19, available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en>.

²⁶ Reply ¶ 21.

²⁷ See, e.g., NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*).

²⁸ Reply ¶ 38.

A. The Board Properly Declined To Conduct A Substantive Review of The Expert Determination.

21. As in its IRP Request, Claimant again argues that the ICANN Board was required to conduct a substantive review of the Expert Determination to ensure that the Board agreed with the analysis and result before accepting that Determination.²⁹ Yet, as Claimant acknowledges, there was no action by the Board with respect to the Determination, as none was required. Rather, pursuant to the Guidebook, the Expert's finding was "considered an expert determination and advice that ICANN will accept within the dispute resolution process."³⁰ Even still, the Board (both the BGC and the NGPC³¹) did in fact review the Expert Determination in conjunction with Claimant's Reconsideration Requests³² in order to assess whether the Expert had acted consistently with established policy or procedure (i.e., applied the Guidebook standard for community objections) in rendering the Expert Determination. The Board, however, specifically refrained from conducting a substantive evaluation of the Expert Determination because doing so is outside of the Board's mandate or authority on reconsideration.

22. Rather, ICANN's Bylaws provide for review of "staff actions or inactions" only to determine whether those actions or inactions "contradict established ICANN policy(ies)."³³ In the context of the New gTLD Program, the BGC recommended – and the NGPC agreed – that reconsideration requests generally be

²⁹ Reply ¶¶ 36-40.

³⁰ Guidebook § 3.4.6 (Cls Ex. RM-5); Reply ¶ 31.

³¹ The NGPC was a Board committee composed of all ICANN Board members without any conflicts with respect to any new gTLD applicants. ICANN's Board delegated the NGPC all decision-making authority with respect to the New gTLD Program. Resolutions 2012.04.10.01-2012.04.10.03, *available at* <https://www.icann.org/resources/board-material/resolutions-2012-04-10-en>.

³² Only Claimant's First Reconsideration Request challenged the substantive analysis of the Expert Determination. Claimant's Second Reconsideration Request challenged only the appointment of the Expert.

³³ Bylaws, Art. IV, § 2.2 (Cls. Ex. RM-2).

permitted with respect to the actions of third-party experts (“Third Party Providers”).³⁴ Even though ICANN’s Board has extended reconsideration to Third Party Providers (reasoning that they are essentially acting in place of ICANN staff), in no way did the Board expand the scope of the review, which is still limited to whether the Third Party Providers’ actions contradicted established policies. As the NGPC has explained:

Reconsideration is not, and never has been, a tool for requestors to seek the reevaluation of substantive decisions. . . . ***[T]he Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees.*** Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.³⁵

23. The BGC has explained in detail the reasons that it does not conduct substantive reviews of expert determinations by reiterating the NGPC’s rationale that “[the Board] is not a mechanism for direct, de novo appeal of [] decisions with which the requester disagrees,” and further explaining that “there is not—nor is it desirable to have—a process for the BGC or the Board (through the NGPC) to supplant its own determination . . . over the guidance of an expert panel formed for that particular purpose.”³⁶

24. As the BGC has indicated several times, experts – including those appointed by the ICC – were selected because they had specific expertise that the ICANN Board does not have, should not have, and was not expected to have. Further, the Board’s review was properly limited, as dictated by the Bylaws, to whether the Expert

³⁴ See Recommendation on Request 13-5 (Resp. Ex. 12). The BGC’s recommendation was adopted by the NGPC. NGPC Resolution 2013.09.10.NG02, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>.

³⁵ Rationale for NGPC Resolution 2013.05.18.NG04 (emphasis added) (Resp. Ex. 14).

³⁶ BGC Recommendation on Request 13-5 at 9-10 (Resp. Ex. 12).

followed established policies and procedures (i.e., applied the Guidebook standard for community objections) in rendering the Expert Determination.

25. Claimant has not identified any Article or Bylaws provision that the BGC violated in determining that Claimant had not stated a basis for reconsideration of the Expert Determination or in electing not to intervene further with respect to that Determination.

26. The precise argument that Claimant asserts here was presented by the claimant in the *Vistaprint* IRP with respect to an expert determination on a string confusion objection (“SCO”), which is another type of objection that can be made under the Guidebook. There, the *Vistaprint* Panel declared that “[a]lthough the Guidebook provides in § 5.1 that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program, ***there is no affirmative duty stated in the Articles, Bylaws or Guidebook*** that the Board must review the result in each and every SCO case.”³⁷ The *Vistaprint* Panel also concluded that ICANN’s Articles, Bylaws and Guidebook do not provide for an appeal mechanism, through the BGC or otherwise, to contest the merits of an expert determination. In the words of the *Vistaprint* Panel: “ICANN’s commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal.”³⁸

27. The *Booking.com* Panel also concluded that ICANN’s Articles, Bylaws and “ICANN’s guiding principles of transparency and fairness” do not require the

³⁷ *Vistaprint* Final Declaration ¶ 153 (emphasis added) (Cls Ex. RM-34).

³⁸ *Id.* ¶ 174.

ICANN Board to substantively review every expert determination or provide some sort or appeal mechanism.³⁹

28. Similarly, in evaluating the BGC's and its own authority, the *Merck* Panel declared that the bases for seeking Reconsideration do not require "a substitute process for exploring a different conclusion on the merits."⁴⁰

29. The ICANN Board was not tasked – under the Articles, the Bylaws or the Guidebook – with substantively reviewing each and every expert determination. Moreover, the mere fact that the Board retains the discretion to conduct a review of individual applications does not require that it exercise that discretion in each case and/or at the behest of an applicant. Indeed, as the *Merck* Panel declared, "[i]t is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it."⁴¹ That the Board did not substantively review the Expert Determination is not inconsistent with the Articles, Bylaws or Guidebook. Rather not performing a substantive review is entirely consistent with the Board's scope of authority on Reconsideration as set out in ICANN's Bylaws.

B. Claimant Provides No Evidence That The ICC Or The Expert Failed To Follow Established Procedures With Respect To The Expert's Appointment.

30. The Guidebook provides that the ICC's Rules and Practice Note govern the procedure for the appointment of experts, the disclosure of potential conflicts, and challenges to the independence of experts.⁴² As explained in detail in ICANN's

³⁹ *Booking.com* Final Declaration ¶¶ 138 (fourth bullet), 128 (Resp. Ex. 1).

⁴⁰ *Merck* Final Declaration ¶ 47 (Resp. Ex. 13).

⁴¹ *Id.* ¶ 61.

⁴² Response ¶¶ 41-42. Claimant attaches and cites to a copy of the 2014 version of the IBA Conflict Guidelines. However, the 2004 version was the version in effect at the time of the Expert's appointment. The 2004 version is attached as Exhibit 8 to ICANN's Response. As explained in ICANN's Response, the NAI- 1500721401v1

Response, Claimant’s IRP Request failed to identify any violation of that established procedure by either the ICC or the Expert that might have impacted the ICANN Board’s determination on Reconsideration, which is the only thing at issue in this IRP. In particular, Claimant failed to identify any relevant information that was not disclosed prior to the Expert’s appointment.⁴³ Claimant’s Reply similarly provides no such evidence.

31. Specifically, Claimant concedes that the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration (“IBA Conflict Guidelines”) is the standard by which neutrals’ disclosure requirements are generally assessed, and then goes on to argue that the Expert’s “conflict of interest closely matches numerous situations on the IBA’s Red and Orange lists.”⁴⁴ Notably, however, Claimant offers not a single Red or Orange list situation to support this statement.

32. In fact, the IBA Conflict Guidelines make clear that the Expert violated no established procedure in not disclosing the information that Claimant alleges to be a “conflict.” The first item Claimant alleges to be a “conflict” is that the Expert participated on a panel in a conference regarding dispute resolution in major sport-hosting events. While the IBA Conflict Guidelines do not address precisely this situation, the guidelines place other, less attenuated connections on the “Green List” – a “non-exhaustive [list] of specific situations where no appearance of and no actual conflict

relevant provisions of the IBA Conflict Guidelines did not materially change for the purpose of the present analysis. (*Id.* ¶ 48 fn. 66.)

⁴³ *Id.* ¶¶ 42-53.

⁴⁴ Reply ¶ 43.

of interest exists from an objective point of view” and which the neutral “has no duty to disclose”⁴⁵. For example, the Green List includes:

- The arbitrator has previously expressed a [legal opinion] (such as in a law review article or public lecture) concerning an issue [that] also arises in the arbitration (but this opinion is not focused on the case);⁴⁶ and
- The arbitrator was a speaker, a moderator or organizer in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organization, with another arbitrator or counsel to the parties.

33. Claimant makes much of its successful challenge to the first expert assigned to hear its challenge to SportAccord’s application, Jonathan P. Taylor. However, as discussed in ICANN’s Response, Mr. Taylor’s situation is readily distinguishable from the Expert’s – Mr. Taylor had represented the International Rugby Board, which had objected to .RUGBY, another string for which Claimant had applied.⁴⁷

34. The second “conflict” that Claimant asserts is an alleged relationship between the Expert and the International Olympic Committee (“IOC”) (which Claimant alleges is affiliated with SportAccord), based on two tenuous connections: (i) a client of the Expert’s firm having acquired broadcasting rights for the Olympics; and (ii) a partner at the Expert’s law firm being the president of a company that has a history of securing Olympic broadcasting rights.

35. In its Response, ICANN explained that the commercial relationships Claimant identified were with entities *adverse* to the IOC (both were negotiating across the table from the IOC), and that Claimant had therefore identified *no* commercial

⁴⁵ IBA Conflict Guidelines at 18 (Resp. Ex. 8)

⁴⁶ *Id.* at 24

⁴⁷ Response ¶ 19.

relationship between the Expert’s law firm and the IOC (much less the “significant commercial relationship” that is required under Paragraph 2.3.6 of the IBA Conflict Guidelines).⁴⁸ ICANN further explained that even if there was such a commercial relationship, the IOC is not an affiliate of SportAccord.⁴⁹

36. Nothing in Claimant’s Reply refutes this. If anything, the exhibits attached to Claimant’s Reply (which discuss discord between SportAccord and the IOC) further reinforce the point that SportAccord and the IOC cannot be considered affiliated entities.⁵⁰

37. Accordingly, the BGC and the NGPC appropriately found that the Expert had followed established policy and procedure with respect to his pre-appointment disclosures.

C. The Board Exercised Due Diligence and Care in Declining To Consider The Ombudsman’s Draft Report.

38. Claimant’s Reply also renews the argument that the BGC and NGPC improperly failed to consider a 31 March 2014 draft report issued by the Ombudsman (“Draft Report”) prior to making the determination on Claimant’s second Reconsideration Request (Request 14-10).⁵¹ Claimant first argues that the Draft Report was “final,” and then further argues that both the ICC and the Expert were given an opportunity to reply to the Claimant’s allegations regarding the Expert’s appointment before the issuance of the Draft Report.⁵² Claimant, however, fails to provide evidence to

⁴⁸ *Id.* ¶ 48.

⁴⁹ *Id.* ¶ 49.

⁵⁰ Claimant’s Annexes 33-38. The conflict between the IOC and SportAccord is also discussed in ICANN’s Response. Response ¶ 49 fn. 70.

⁵¹ Reply ¶¶ 51-55.

⁵² *Id.* ¶¶ 53-55.

demonstrate that the Board failed to exercise due diligence and care in not considering the Draft Report.

39. First, contrary to what it now implies, Claimant was informed that the Draft Report was not final – the BGC’s recommendation on Request 14-10 specifically notes that the Ombudsman’s report was a “draft report . . . later withdrawn pending consultation with other relevant parties” and that, as such, “it would be premature for the BGC to consider the Ombudsman’s comments”⁵³ The BGC’s recommendation also notes that:

Recognizing that pursuant to Article V, Section 2 of the ICANN Bylaws, a complaint lodged with the Ombudsman cannot concurrently be pursued while another accountability mechanism on the same issue is ongoing, ICANN has been advised that the Ombudsman sought confirmation from the Requester as to whether it was aware of these limitations in the Bylaws and how it wished to proceed. ICANN was advised on or about 13 May 2014 that the Requester confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this Reconsideration Request rather than the Ombudsman’s request.⁵⁴

Because there was no relevant final report from the Ombudsman for the BGC or NGPC to consider with respect to Claimant’s Second Reconsideration Request, the Requester has failed to demonstrate (as it must) that the Board did not act with due diligence and care in not considering the Draft Report when evaluating Claimant’s Reconsideration Request.

40. Second, Claimant has not established that the ICC or the Expert had an opportunity to respond to the Ombudsman regarding Claimant’s allegations. Claimant has produced no evidence that the Ombudsman contacted either the ICC or the Expert

⁵³ BGC Determination on Request 14-10 at 3, 8 fn. 8 (Cls Ex. Annex-25).

⁵⁴ *Id.* at 4.

prior to issuing his 31 March 2014 Draft Report (none of the communications Claimant relies upon were between the Ombudsman and either the ICC or the Expert).⁵⁵

41. As such, there was nothing for the Board to consider. Accordingly, the fact that the Board did not consider something that it was not required to consider (nor should have considered) cannot constitute failure to exercise due diligence and care in violation of ICANN's Articles or Bylaws.

III. INsofar AS CLAIMANT CONTINUES TO CHALLENGE THE GUIDEBOOK'S DISPUTE RESOLUTION PROCEDURES, SUCH CHALLENGE IS TIME-BARRED.

42. Claimant's IRP Request appeared to challenge the dispute resolution procedures set forth in the Guidebook (for instance, the lack of any Guidebook provision requiring ICANN to perform a substantive review of expert determinations). In its Reply, Claimant does not seem to renew this challenge other than to argue that the Board should have exercised its discretion to intervene further with respect to the Expert Determination. Nevertheless, insofar as Claimant does seek to challenge the Guidebook procedures (and not just the implementation of those procedures with respect to SportAccord's Objection to Claimant's Application), such challenge is time-barred.

43. The Guidebook, including the community objection procedures, was developed as part of a lengthy, open, transparent process that culminated in 2011 with the Board's approval of the New gTLD Program.⁵⁶ The current version of the Guidebook was published in 2012.⁵⁷ Claimant did not object to the community objection procedures while the Guidebook was being developed, or at any time after, until it filed its IRP Request in March 2015. As such, any challenge to the procedures set out in the

⁵⁵ Claimant's Annexes 29-32.

⁵⁶ IRP Response ¶¶ 40-47

⁵⁷ *Id.* at 42, 45.

Guidebook are long since time-barred.⁵⁸ Indeed, the only two IRP panels to consider whether challenges to procedures set out in the Guidebook were proper – the *Vistaprint* and *Booking.com* Panels – have found that such challenges are time-barred.⁵⁹


CONCLUSION

44. Claimant’s Reply, like its IRP Request, does not demonstrate that ICANN’s Board failed to act in conformance with its Articles and Bylaws. For the reasons discussed above, ICANN urges the IRP Panel to declare that Claimant has not identified any basis for independent review and to declare that ICANN is the prevailing party.

Respectfully submitted,

JONES DAY

Dated: 21 December 2015

By: 
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⁵⁸ *Booking.com* Final Declaration ¶ 129 (Resp. Ex. 1); *Vistaprint* Final Declaration ¶ 172 (Cls. Ex. RM-34). The Bylaws were amended in April 2013 to add a 30-day deadline to file IRP requests. Bylaws, Art. IV, § 3.3 (30-day deadline to file IRP request) (Cls. Ex. RM-2). Even assuming that Claimant’s time to challenge the Guidebook procedures began only at the time the Bylaws were amended, Claimant’s challenge is time-barred by almost two years.

⁵⁹ *Booking.com* Final Declaration ¶ 129 (Resp. Ex. 1); *Vistaprint* Final Declaration ¶ 172 (Cls. Ex. RM-34).