

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-6

13 March 2014

The Requester (Dot Rugby Limited) seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, upholding the community objection to the Requester's application for .RUGBY.

I. Brief Summary.

The Requester, as well as Atomic Cross LLC and the International Rugby Board, through its wholly-owned and operated subsidiary IRB Strategic Developments Limited, all applied for .RUGBY. The International Rugby Board objected to both the Requester's and Atomic Cross' applications and won. The Requester claims that the Panel failed to apply the requisite standards "neutrally and objectively, with integrity and fairness." Specifically, the Requester contends that the Panel failed to follow the standard for evaluating a community objection by finding a likelihood of material detriment based on the Requester's alleged association with gambling.

With respect to the claims asserted by the Requester, there is no evidence that the Panel misapplied the standard for evaluating the likelihood of material detriment. Because the Requester has failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure, the BGC concludes that Request 14-6 be denied.

II. Facts.

A. Background Facts.

The Requester, Dot Rugby Limited ("Requester"), a subsidiary of portfolio applicant Domain Venture Partners PCC Limited ("DVP"), applied for .RUGBY. Atomic Cross, LLC

(“Atomic Cross”), a subsidiary of portfolio applicant Donuts, Inc., and the International Rugby Board through its wholly-owned and operated subsidiary IRB Strategic Developments Limited (collectively “IRB”) also each applied for .RUGBY.¹ IRB’s application appoints another portfolio applicant, Minds and Machines/Top Level Domain Holdings Limited (“TLDH”), to provide back-end registry services for its applied for gTLD.

On 13 March 2013, IRB filed community objections with the ICC² to the Requester and to Atomic Cross’ applications (“Objections”) asserting that there is “substantial opposition to [each] gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).)

On 7 May 2013, the ICC consolidated the Objections.

On 5 and 6 June 2013, the Requester and Atomic Cross, respectively, each responded to IRB’s Objections.

On 26 August 2013, the ICC appointed Mark Kantor as the Expert (“Expert” or Panel”) to evaluate the consolidated Objections.

On 31 January 2014, the Panel rendered an Expert Determination in favor of IRB. The Panel determined that IRB had standing to object and that IRB established each of the requisite four elements to prevail on a community objection against both the Requester’s and Atomic Cross’ applications for .RUGBY. (Determination, ¶¶ 33, 78, 103 & 105.)

On 3 February 2014, the ICC notified the Requester of its Determination.

On 17 February 2014, the Requester filed Request 14-6.

B. The Requester’s Claims.

¹ A portfolio applicant is an applicant who has applied for multiple gTLD strings.

² International Centre for Expertise of the International Chamber of Commerce.

The Requester claims that the Panel’s decision was made without applying documented policies “neutrally and objectively, with integrity and fairness,” resulting in “manifest unfairness and damage.” (Request, Section 10.b, Pg. 7.) Specifically, the Requester contends that the Panel failed to follow the requisite standards for evaluating a community objection by finding a likelihood of material detriment based on the Requester’s alleged association with gambling.

The Requester claims that the Panel unfairly required the Requester to:

1. Persuasively demonstrate efforts to avoid cross promotion, cross staffing, and commingling of resources between gambling and sports domains proposed by its parent company, DVP;
2. Deny links with gambling companies outside of Gibraltar; and
3. Address, through DVP’s “Acceptable Use Policy,” whether DVP and its affiliates intend to enter into links with gambling companies.

(Request, Section 10.b, Pgs. 7-8 (Table 1).)

C. Relief Requested.

The Requester asks that ICANN send the Objections back to a “freshly convened panel,” which the ICC must demonstrate received “substantial training in the Applicant Guidebook processes and standards” and would be able to apply the “standards and protocols in a non-arbitrary way.” (Request, Section 9, Pg. 5.).

III. Issue.

In view of the claims set forth in Request 14-6, the issue for reconsideration is whether, in contravention of established policy or process, the Panel incorrectly applied the standard for evaluating the likelihood of material detriment as reflected in Section II.B. above.

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

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.³ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC⁴ agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. As the Requester notes, ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁵

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel's substantive conclusion that the Requester's application for .RUGBY creates a likelihood of material detriment to the rights of a significant portion of the targeted

³ Article IV, Section 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

⁴ New gTLD Program Committee.

⁵ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

community. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that conclusion.

To prevail on a community objection, the Requester must establish, among other things, 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.” (Guidebook, Section 3.5.4.) The Guidebook (as the Panel correctly notes) includes a list of six factors that could be used by a panel in making this determination. (*Id.*; *see also* Determination, Pg. 10, ¶ 24.) The factors include but are not limited to the following:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

(Guidebook, Section 3.5.4.)

V. Analysis and Rationale.

A. The Requester Failed To Demonstrate That The Panel Applied The Wrong Standard In Contravention Of Established Policy or Process.

1. The Panel did not Unfairly Require the Requester to Persuasively Demonstrate Efforts to Avoid Cross Promotion, Cross Staffing, and Commingling of Resources between Gambling and Sports Domains.

The Requester's parent company, DVP, a portfolio applicant, applied for a number of gambling-related and sport-related strings. The Requester claims that the Panel unfairly required the Requester to demonstrate efforts to avoid cross promotion, cross staffing and commingling of resources between the gambling and sport domains applied for by DVP. The Requester claims that it was subjected to disparate treatment because IRB is engaged with another portfolio applicant, Minds and Machines/Top Level Domain Holdings Limited⁶ that is already engaged in global promotions with gambling organizations for which there will be the same concerns regarding cross promotion, cross staffing and commingling of resources. (Request, Section 10.b, Pgs. 7-9.)

The Requester further claims that a portfolio applicant would not have any more ability or control over the crossover between gambling and sport domains than any ICANN accredited registrar would. (*See id.*) The Requester asserts that registrars are freely able to cross-advertise, cross-market, and co-mingle resources on multiple strings, and it would be discriminatory not to allow portfolio applicants to do the same. (*See id.*)

As noted above, the nature and extent of damage to the reputation of the community represented by the objector is one of the factors that a Panel may consider in evaluating the likelihood of material detriment. (Guidebook, Section 3.5.4.) Here, according to the Expert Determination, IRB asserted that the Requester's application would injure the reputation of the rugby community in two ways. The first related to a lawsuit pending against DVP in U.S. federal court and the second related to DVP's association with gambling-related strings.

⁶ IRB's application appoints Minds and Machines, the wholly-owned subsidiary of Top Level Domain Holdings Limited, to provide back-end registry services for .RUGBY. (*See* <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/269?t:ac=269>)

(Determination, ¶¶ 71-72.) The Panel rejected IRB’s first claim, determining that DVP’s involvement in a civil lawsuit was “entirely speculative” and IRB had failed to provide evidence of how the lawsuit would injure the reputation of the community. (*Id.* at ¶ 71.) The Panel found IRB’s second claim of injury relating to DVP’s association with gambling-related strings “particularly troubling.” (*Id.* at ¶ 57; *see also* ¶ 72.)

DVP seeks to operate at least five gambling-related strings (such as .BET) and simultaneously seeks to operate at least eight sports-related strings (such as .RUGBY). (*Id.* at ¶ 73.) IRB argued that DVP’s association with gambling-related strings would harm the rugby community, especially in light of the measures the rugby community has taken to minimize the potential adverse impact of gambling on the sport and to protect the integrity of the sport generally. (*Id.* at ¶ 72.) In response, the Requester characterized IRB’s assertion as “pure speculation” and noted that there is no mention in the Requester’s application for .RUGBY of any plan to associate .RUBGY with gambling. As discussed in further detail in the next section, the Requester also indicated that neither it nor any of its affiliated entities “have any link or do business with Gibraltar based gaming companies.” (*Id.* at ¶ 74.)

In the end, based on the parties’ contentions, the Panel found IRB’s arguments on this claim to be more persuasive, concluding that:

Objector’s claim that operation of the “.rugby” gTLD will create a likelihood of material detriment to the rugby community due to DVP’s proposed cross-ownership of gambling strings and sports strings, and the absence of any meaningful controls and separation in the governance structure, is persuasive.

(*Id.* at ¶ 76.) The Panel also noted that:

Moreover, DVP has made no persuasive showing of any effort to avoid cross-promotion, cross-staffing and commingling of resources between gambling domains and sports domains. To the contrary, [the Requester] is noticeably silent as to the substance of these allegations.

(*Id.* at ¶ 73.) In other words, IRB claimed that the Requester cannot avoid cross promotion, cross staffing and commingling of resources with gambling-related strings (*see* Request, Section 10.b., Pg. 7 (Table 1)), and the Panel concluded that the Requester failed to refute this claim.

With respect to the Requester's claim that IRB is partnered with a portfolio applicant (Minds and Machines/Top Level Domain Holdings Limited) that is already associated with entities "actively engaged in promotions for gambling organisations [*sic*]" for which there will be the same concerns regarding cross promotion, cross staffing and commingling of resources, or that registrars are freely able to cross-advertise, cross-market, and co-mingle resources on multiple strings (Request, Section 10.b, Pgs. 7-9), it does not appear that the Requester made these arguments in response to IRB's Objections. (Determination, ¶¶ 62-76; *see* also Exhibit 3 to Request (The Requester's Response to IRB's Objections), Section F-13, Pg. 14.) The BGC will not second-guess the substantive determination of the Panel by addressing the merits of arguments that were raised for the first time in a Reconsideration Request.

Based on the above, there is no evidence that the Panel improperly applied the standard for evaluating the likelihood of material detriment.

2. The Panel did not Unfairly Require the Requester to Deny Links with Gambling Companies Outside of Gibraltar.

The Requester claims that the Panel unfairly required the Requester to deny any link or affiliation with gambling companies outside of Gibraltar when IRB's "entire argument that the Requester was fatally associated with gambling was purely and solely predicated on the assertion that the Requester's parent company was Gibraltar based." (Request, Section 10.b., Pg. 7 (Table 1) (emphasis in original omitted).) The Requester also claims that the Panel's finding is "utterly unfair" in that members of IRB are already actively engaged in global gambling promotions. (*Id.* at Pg. 8.)

It is clear from the Expert Determination that IRB argued that DVP's association with gambling was based on DVP's pending applications for gambling-related strings. (Determination, ¶¶ 57, 72-73.) There is no indication that IRB was concerned only about DVP's links to or affiliation with gambling in Gibraltar, but rather, the claim was much broader and related to DVP's global association with gambling resulting from DVP's operation of gambling-related strings. Accordingly, there is no support for the Requester's claim that IRB's "entire argument" that the Requester is associated with gambling is "purely and solely predicated" on the assertion that DVP is based in Gibraltar.

In noting the Requester's response to IRB's claims of potential reputational injury to the rugby community resulting from DVP's association with gambling-related strings, the Panel stated that the Requester:

[C]haracterizes Objector's assertion of this association as "pure speculation." To support this position, [the Requester] notes that there is no mention in its Application of any plan to associate ".rugby" with gambling. [The Requester] further, and carefully, writes "Neither Applicant nor any of its affiliated entities have any link or do business with Gibraltar based gaming companies." But [the Requester] is silent about gambling links outside of Gibraltar. [The Requester] is also substantively silent in its Application and its Response as to its plans. Silence offers little comfort. Moreover, DVP's intended links with gambling-related domains is itself a red flag for the likelihood of material detriment to the rugby community.

(Determination, ¶ 74.) Without a response from the Requester that refuted IRB's claims, the Panel concluded that the Requester's operation of .RUGBY will create a likelihood material detriment to the rugby community. (*Id.* at ¶ 76.) The BGC will not second guess the Panel's conclusions in this regard.

As shown above, the Requester's argument does not support reconsideration because the Requester has failed to demonstrate how the Panel's actions contradict any established policy or process.

3. The Panel did not Unfairly Require the Requester to Address Whether DVP and its Affiliates Intend to Associate with Gambling Companies.

The Requester claims that the Panel unfairly required the Requester to address, through its “Acceptable Use Policy,” whether DVP and its affiliates intend to associate with gambling companies. (Request, Section 10.b, Pg. 8 (Table 1).) Specifically, the Requester contends that there is no process or procedure that requires the Requester to mention its parent company and affiliates in its Acceptable Use Policy and as such, the Panel erred in concluding that the Requester’s failure to mention its parent and affiliates in the Acceptable Use Policy is sufficient grounds to prove that the Requester’s parent intends to engage in gambling activities. (*Id.* at Pg. 12.) The Requester further claims that it is not aware of a sample Acceptable Use Policy from IRB’s partner, TLDH, in which TLDH sets out the non-involvement of TLDH in any of its portfolio registries which is actively promoting and cross-promoting on its site. (*Id.*) The Requester’s conclusions in this respect are not supported.

According to the Expert Determination, IRB criticized the Requester’s application for .RUGBY, as well as the Governance Council proposed by DVP for “allocating management and control entirely to DVP and its affiliates.” IRB argued that DVP’s registration policies applicable to all domain names would provide inadequate protection for brands, players, officials, sponsors and teams in the rugby community. (Determination, ¶¶ 60-61.) In response to these criticisms, the Requester, among other things, pointed to its Acceptable Use Policy as providing sufficient protection from abusive or infringing registrations. (*Id.* at ¶ 65.) The Panel was persuaded that the proposed Governance Council and Acceptable Use Policy did not provide sufficient safeguards to protect against the harms alleged by IRB. (*See id.* at ¶ 65-68.)

In evaluating IRB’s claims of likely material detriment to the rugby community’s reputation resulting from DVP’s association with gambling-related strings, the Panel later noted:

DVP's Acceptable Use Policy, moreover, only commits that *registrants* will "use in accordance with applicable law." That says nothing about the conduct of DVP and its affiliates themselves. It also says nothing about activities that are lawful but nevertheless detrimental to the sport and to participants in the rugby community, such as an improper association with gambling.

(*Id.* at ¶ 75 (emphasis in original).) The Requester put DVP and its affiliates' conduct at issue by allocating all management and control of .RUGBY to DVP and its affiliates. Moreover, the Requester relied on its Acceptable Use Policy to respond to IRB's claims and as evidence that there are sufficient safeguards to protect against the harms alleged by IRB. The Panel ultimately disagreed, concluding that the Acceptable Use Policy did not address DVP and its affiliates' conduct in that it only applied to registrants and further, it generally did not provide any protections against the improper association with gambling alleged by IRB.

While the Requester may disagree with the Panel's conclusion, the Requester's disagreement is not a proper basis for reconsideration. In sum, there is no support for the Requester's claim that the Panel improperly required it to address, through DVP's Acceptable Use Policy, whether DVP and its affiliates intend to associate with gambling companies.

VI. Decision

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies Reconsideration Request 14-6. Given there is no indication that the Panel violated any policy or process in reaching, or Staff in accepting, the Determination, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC's determination on Request 14-6 shall be final and does not require Board consideration. The Bylaws provide that

the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-6 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the NGPC) is warranted.