

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/489/ICANN/106

CLOUD INDUSTRY FORUM LIMITED

(UK)

vs/

SYMANTEC CORPORATION

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**INTERNATIONAL CENTRE FOR EXPERTISE
INTERNATIONAL CHAMBER OF COMMERCE**

Case No. EXP/489/ICANN/106

In the matter of an objection under the ICANN *New Generic Top-Level Domain
Dispute Resolution Procedure*

Between:

**CLOUD INDUSTRY FORUM LIMITED
(UNITED KINGDOM)**

Objector

and

**SYMANTEC CORPORATION
(UNITED STATES OF AMERICA)**

Applicant

EXPERT DETERMINATION

Expert Panel: Stephen L. Drymer

3 February 2014

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INTRODUCTION

1. This Expert Determination concerns a so-called community objection (“**Objection**”) by CLOUD INDUSTRY FORUM LIMITED (“**CIF**” or the “**Objector**”) to an application (“**Application**”) submitted to the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) by SYMANTEC CORPORATION (“**Symantec**” or the “**Applicant**”) in respect of the new generic top-level domain (“**gTLD**”) string “.CLOUD”.
2. The dispute arises under and is governed by the terms of ICANN's *gTLD Applicant Guidebook v. 2012-04-06* (“**Guidebook**”) and related documents, including the New gTLD Dispute Resolution Procedure (“**Procedure**”), as well as the Rules for Expertise (“**Rules**”) of the International Centre for Expertise (“**Centre**”) of the International Chamber of Commerce (“**ICC**”) and related documents. These documents, which set out the substantive and procedural rules applicable to objections to applications for new gTLD strings, are discussed at Part IV of the present Expert Determination.
3. It is important to note that the dispute in question here concerns only the Objection filed by the Objector in this case. It does not concern the merits of the Application for the .CLOUD string submitted to ICANN by the Applicant.
4. To be clear, in accordance with the applicable procedure and rules, the nature and purpose of these proceedings is strictly limited to determining the “success or dismissal of the Objection” (Article 21(d) of the Procedure). The Application itself, including the decision whether or not to delegate the applied-for gTLD string as requested by the Applicant, will be considered and determined by ICANN in due course, in accordance with its procedures, and is not in issue here.
5. It is also important to note that the entire procedure spelled out in the Guidebook – which establishes, among other things, the very procedure at issue here and the standards by which community objections are to be determined – is fairly new and largely untested. As at the moment of drafting this Expert Determination, relatively few other expert determinations in respect of a community objection have been published.
6. It is in this context that the present Expert Determination focuses on and decides only those questions – as it turns, *the* question – which must be resolved in order to determine the outcome of this particular case.

I - THE PARTIES AND THEIR REPRESENTATIVES

A. The Objector

7. The Objector, CLOUD INDUSTRY FORUM LIMITED, describes itself as follows in its Objection:

Objector is not-for-profit industry body that represents the business and public affairs needs of the cloud industry at large, including but not limited to companies and organisations that build, implement, provide, sell and support cloud computing solutions and services, or seek to consume them as end-user organisations.

8. The Objector is located at

50 Station Road
Amersham, HP7 0BD
United Kingdom

Tel: +44 7802 264 588
www.cloudindustryforum.org

9. The Objector's representative in these proceedings is its founder, Mr. Andrew Burton. For purposes of these proceedings Mr. Burton's address is: Sword House, Totteridge Road, High Wycombe HP13 6DG, United Kingdom. His email is andy@cloudindustryforum.org.

B. The Applicant

10. The Applicant, SYMANTEC CORPORATION, describes itself as follows in its Application:

Symantec ... is a leading global provider of information security and protection, serving the needs of consumers around the world, with more than 18,500 employees and operations in numerous countries.

[...]

Symantec is a leader in the Cloud industry and plans to demonstrate its leadership by operating the .CLOUD gTLD.

11. The Applicant's principal place of business is located at

350 Ellis Street
Mountain View, CA 94043
USA

Tel: +1 650 527 8000

12. The Applicant's representative in these proceedings is Mr. Philip Lodico. Mr. Lodico's address is: FairWinds Partners LLC, 1000 Potomac Street, NW, Suite 350, Washington, DC 20007, USA. His telephone number is: +1 202 223 9252. His email is: lodicosm@fairwindspartnbers.com

II - THE EXPERT PANEL

13. On 15 June 2013, the Chairman of the Standing Committee of the Centre appointed Mr. Stephen L. Drymer as sole expert ("**Expert**") of the Expert Panel ("**Panel**") in this matter.
14. The Expert's address is

Mr. Stephen L. Drymer
WOODS LLP
2000 McGill College Ave., Suite 1700
Montréal, QC H3A 3H3
Canada

Tel: +1 514 370 8745
sdrymer@woods.qc.ca
15. By letter dated 20 June 2013, the Centre notified the parties of the Expert's appointment.

III - PROCEDURAL BACKGROUND

A. Nature of Objection

16. As indicated above, the specific ground upon which the Objector has filed its Objection is a "community objection".

B. Key Procedural Steps

17. Symantec's Application was originally posted on ICANN's website on 13 June 2012.
18. The present proceedings were commenced by the filing of CIF's Objection on 13 March 2013.
19. By letter dated 18 March 2013 the Centre acknowledged receipt of the Objection. On 5 April 2013 the Centre advised the Objector that the Objection had been registered for processing.
20. Symantec's Response to the Objection was dated and filed on 16 May 2013.

21. By letter dated 30 May 2013 the Centre acknowledged receipt of the Response, informed the parties that the Response was in compliance with the applicable procedure and rules, and advised the parties of its intention to proceed with the appointment of the Panel.
22. As indicated above, the Panel was appointed on 15 June 2013 and, on 20 June 2013, the parties were notified of the appointment of the Expert.
23. On 24 July 2013, following the parties' advance payment of the estimated costs of the proceedings, the full constitution of the Panel was confirmed by the Centre and the file was transferred to the Panel.
24. On 30 July 2013 the Panel wrote the parties to invite them to provide their views as to whether a hearing would be required.
25. Neither party requested a hearing. However, on 6 August 2013 the Applicant applied to the Panel for a suspension of the proceedings. The grounds alleged in support of Symantec's request were as follows:

ICANN's New gTLD Program Committee (NGPC) has adopted a resolution stating, in relevant part, as follows: "[T]he NGPC directs staff to defer moving forward with the contracting process for applicants seeking to impose exclusive registry access for 'generic strings' to a single person or entity and/or that person's or entity's Affiliates...pending a dialogue with the GAC [ICANN's Governmental Advisory Committee]." As shown in the attached e-mail from ICANN dated July 4, 2013 to a party in another gTLD objection, ICANN has encouraged parties in relevant proceedings such as this one to "request [] an extension of time in light of the NGPC's ongoing consideration of GAC Advice relevant to [the] application."

While Applicant does not believe that its .CLOUD application is a "closed generic" string, for the reasons set forth in its Response, ICANN has nevertheless suspended further action on this application on this ground. Since the ICC will be receiving further information from ICANN with regard to the effect of the current closed generic debate in due course, it is appropriate to suspend this proceeding until such time as ICC has received such information. Any decision in this objection proceeding could be rendered moot by ICANN and/or necessitate further arguments by the parties hereto. Accordingly, allowing this proceeding to move forward before the issue discussed above has been resolved is premature, could potentially result in a decision that is made without the benefit of all relevant issues and arguments.

Whether or not to impose a suspension is within your discretion as set forth in Article 17 of the ICC Expertise Rules, which states: "In all matters not expressly provided for in these Rules, the Centre and the experts shall act in the spirit of these Rules."

26. That same day, the Panel wrote the Objector to request that it provide its views on the Applicant's request for a suspension.
27. CIF responded as follows on 7 August 2013:

Whilst we respect Symantec and their interpretation of the NGPC advice, it is our view that this advice is not applicable here because CIF's Objection is against Symantec obtaining .CLOUD period, not just as a closed generic. Although CIF's Objection focuses on the closed nature of their original Application and argument, the crux of CIF's objection is that an industry participant, including Symantec, should not have control over an industry generic term.

Specifically, the disputed TLD explicitly targets the cloud community (providers and users of cloud services) and CIF opposes the operation of the .CLOUD registry by any direct industry player because it will effectively grant them an unfair competitive advantage against the rest of the cloud community through the improper grant of a perpetual monopoly on a generic industry term in contravention of established international legal norms and to the material detriment of the community.

As we have evidenced through our Objection, there is substantial opposition within the Cloud Community to Applicant's attempt to appropriate .CLOUD and we would wish to have our Objection upheld.

We see no need for a suspension of proceedings.

28. Very shortly after CIF's response was received, the Applicant replied: "[W]e wish to highlight the fact that the Objection filed by CIF is titled 'OBJECTION TO .CLOUD GTLD as a Closed Registry.' As such, the CIF's stated position that the 'NGPC advice...is not applicable here' cannot be considered valid."
29. On 12 August 2013 the Panel issued a detailed order concerning the Applicant's request for a suspension. Having carefully considered the parties' submissions as well as the applicable rules (including the Procedure and the Rules), and after setting out its reasoning, the Panel found that in the circumstances the suspension requested by the Applicant was reasonable, would not prejudice the Objector and was allowed under the applicable rules.
30. The proceedings were suspended for 30 days "or pending ICANN's consideration of the GAC advice as provided for in the Resolution and further public clarification of its intentions, whichever is sooner". The Panel's order further entitled either party to apply for a reduction or an extension of this suspension should it consider that circumstances so warrant.
31. On 9 September 2013 Symantec applied for an extension (or continuation) of the suspension "until 30-days after ICANN issues its decision or guidance based upon the Resolution." CIF was

invited to respond to this new request and on 11 September 2013 it advised the Panel that it did not object the request.

32. On 11 September 2013 the Panel informed the parties that it considered that a continuation of the suspension was appropriate and reasonable in the circumstances, which were essentially as they were when the suspension was initially ordered. However, the Panel stated that it did not consider it appropriate to suspend the proceedings for the relatively indefinite period of time proposed by the Applicant. It therefore ordered the suspension continued for a further 30-day period.

33. On 8 October 2013 the Applicant once applied for a further 30-day extension of the suspension:

The basis for this request is the fact that ICANN's consideration of the GAC Advice and New gTLD Program Committee Resolution 2013.06.25.NG06 ("Resolution") remains ongoing. Although the NGPC responded to the GAC Advice on September 28, 2013, the main outcome put forth in Annex 1 to Resolution 2013.09.28.NG02, as it relates to the present Objection, was simply to direct ICANN staff to "prepare an analysis and proposal for how to implement the Category 2 Safeguard Advice for applicants who do intend to impose exclusive registry access for generic strings."

34. The Objector responded as follows on 9 October 2013:

It is the opinion of the Cloud Industry Forum that the suspension should not be continued beyond the 11th October 2013 because ICANN's New gTLD Program Committee (NGPC) announced on October 1 that ICANN staff should "move forward with the contracting process for applicants for strings identified in the Category 2 Safeguard Advice" and come up with a "proposal for how to implement the Category 2 Safeguard Advice for applicants who do intend to impose exclusive registry access for generic strings."

Please see <https://www.mycann.org/news/topics/13126/page/3/articles/32396>.

As .Cloud was one of the "Category 2" strings identified by the GAC, and as a result of this latest announcement, we believe that ICANN's June 25, 2013 resolution should no longer apply.

I would respectfully request that the a [sic] further suspension of proceedings not be granted as the clear message issued by ICANN was to move forward.

35. The Panel's order, dated 14 October 2013, reads:

I have reviewed ICANN's 1 October 2013 announcement (<https://www.mycann.org/news/topics/13126/page/3/articles/32396>). I have also considered the parties' submissions.

As CIF notes, the NGPC has directed staff to “move forward with the contracting process for applicants for strings identified in the Category 2 Safeguard Advice that are prepared to enter into the Registry Agreement as approved”. At the same time, however, and as Symantec observes, the NGPC also directs staff to “prepare an analysis and proposal for how to implement the Category 2 Safeguard Advice for applicants who do intend to impose exclusive registry access for generic strings”. All while the NGPC “continues its deliberations”.

In the circumstances I consider it reasonable and appropriate – and in no way prejudicial to either party – to order the continuation of the suspension of this matter for a further 30 days as of 11 October 2013, that is, until Monday 11 November 2013. It is so ordered.

36. On 7 November 2013 Symantec once again wrote to request that the suspension be continued:

The basis for this request is the fact that ICANN's consideration of the GAC Advice and New gTLD Program Committee Resolution 2013.06.25.NG06 ("Resolution") remains ongoing. On September 28, 2013, the NGPC responded to the GAC Advice. The main outcome put forth in Annex 1 to Resolution 2013.09.28.NG02, as it related to the present Objection, was simply to direct ICANN staff to "prepare an analysis and proposal for how to implement the Category 2 Safeguard Advice for applicants who do intend to impose exclusive registry access for generic strings."

ICANN staff has not put forth the above-mentioned analysis yet. As such, Applicant asserts that this Objection should be suspended for a further 30-day period in anticipation of receiving the ICANN staff analysis.

37. On 11 November 2013 CIF advised the Panel that it had no objection to Symantec's latest request, and the Panel accordingly ordered a further 30-day extension.

38. On 11 December 2013 the Applicant requested a further, very brief, *one-week* suspension, until 19 December 2013, stating that “[t]he basis for this request is the fact that the Applicant and the Objector have discussed a possible resolution of this dispute and need some additional time to determine if they are in agreement.” The Objector confirmed this information agreed to the request, and the suspension was accordingly extended until 19 December 2013.

39. Not having heard from the parties, on 8 January 2014 the Panel wrote to enquire as to the status of CIF's Objection and in particular whether the parties' settlement discussions had borne fruit. The Panel informed the parties that barring either a request for further extension or confirmation from the parties that the dispute has been settled no later than 10 January 2013, it would commence preparing its Expert Determination.

40. That same day, 8 January 2013, the Applicant advised the Panel that the parties had been unable to settle the dispute.
41. As noted above, neither party requested a hearing. Accordingly, the present dispute was therefore considered, and this Expert Determination is rendered, on the basis of CIF's Objection, Symantec's Response and the supporting evidence and materials accompanying those documents.
42. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the "constitution of the Panel." The Centre considers that the Panel is constituted when the Expert is appointed, the parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 24 July 2013 (i.e., the date on which the file was transmitted to the Expert). The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 7 September 2013 (as calculated in accordance with articles 6(e) and 6(f) of the Procedure), bearing in mind, however, that the case was suspended on several occasions as indicated above. Pursuant to article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.

C. Communications

43. All communications between the parties, the Panel and the Centre were submitted electronically, in accordance with Article 6(a) of the Procedure.

D. Language

44. The language of submissions and proceedings in this matter is English. All of the materials submitted by the parties, including all of their written submissions and supporting evidence, were submitted in English, in accordance with Article 5(a) of the Procedure.

E. Place of the Proceedings

45. The place of the proceedings is Paris, France, where the Centre is located (Article 4(d) of the Procedure).

F. Related Cases

46. By letter dated 12 April 2013 the Centre notified the parties that it was considering consolidating the present case with two other cases, involving two other applicants that had applied for the

new gTLD string .CLOUD and in which CIF had filed a community objection substantially similar to its Objection in the present case.

47. On 19 April 2013 the Centre informed the parties that it had decided not to proceed with the consolidation of the three cases on its own initiative, but invited the parties themselves to propose a consolidation should they wish to do so. No such proposal was made, and the three cases proceeded separately.
48. The Panels in the two other cases referred to above were appointed on 15 June 2013 – the same date on which the Panel in the present case was appointed. The same Expert was appointed in all three cases.
49. Although the three cases remain distinct and have been or will be decided separately – each on its own merits and on the basis of the submissions and evidence presented by the parties in each case – given that the community objection filed by CIF in all three cases is substantially the same, important elements of the Expert Determination in each case are necessarily similar.

IV - APPLICABLE PROCEDURE AND RULES

50. The procedure and rules governing the determination of objections to new gTLD applications are set out in two sets of documents: documents forming part of the ICANN Guidebook; and documents associated with the Rules. As indicated, these documents provide for both the substantive and procedural basis on which objections to new gTLD applications are assessed and determined.

A. ICANN New gTLD Applicant Guidebook

51. The Guidebook provides for substantive and procedural criteria, standards and rules related to virtually every aspect of the gTLD application, evaluation, objection and dispute resolution process.
52. Two elements of the Guidebook are of particular relevance to the objection process: Module 3, entitled "*Objection Procedures*" ("**Module 3**"); and the Attachment to Module 3, entitled "*New gTLD Dispute Resolution Procedure*" ("**Procedure**").

(i) Module 3

53. As stated in the introduction to Module 3:

II. [...] This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

54. Module 3 in fact describes two types of mechanisms that may affect an application for a new gTLD: the procedure by which ICANN's Governmental Advisory Committee may provide advice to the ICANN Board of Directors concerning a specific application; and the dispute resolution procedure commenced by a formal objection to an application by a third party. It is the second of these mechanisms that concerns us here.
55. Relevant extracts of Module 3 are reproduced below (underlining added):

3.2 PUBLIC OBJECTION AND DISPUTE RESOLUTION PROCESS

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts.

A formal objection can be filed only on four enumerated grounds, as described in this module.

[...]

3.2.1 Grounds for Objection

A formal objection may be filed on any one of the following four grounds:

String Confusion Objection – *The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.*

Legal Rights Objection – *The applied-for gTLD string infringes the existing legal rights of the objector.*

Limited Public Interest Objection – *The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.*

Community Objection – *There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.*

[...]

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

| Objection ground | Who may object |
|-------------------------|--|
| String confusion | Existing TLD operator or gTLD applicant in current round. In the case where an IDN ccTLD Fast Track request has been submitted before the public posting of gTLD applications received, and the Fast Track requestor wishes to file a string confusion objection to a gTLD application, the Fast Track requestor will be granted standing. |
| Legal rights | Rightsholders |
| Limited public interest | No limitations on who may file – however, subject to a “quick look” designed for early conclusion of frivolous and/or abusive objections |
| Community | <u>Established institution associated with a clearly delineated Community</u> |

[...]

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and

- *Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.*

It has an ongoing relationship with a clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- *The presence of mechanisms for participation in activities, membership, and leadership;*
- *Institutional purpose related to the benefit of the associated community;*
- *Performance of regular activities that benefit the associated community; and*
- *The level of formal boundaries around the community.*

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.2.3 Dispute Resolution Service Providers

[...]

- *The International Center of Expertise of the International Chamber of Commerce has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.*

[...]

3.5 DISPUTE RESOLUTION PRINCIPLES (STANDARDS)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

[...]

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- *The community invoked by the objector is a clearly delineated community; and*
- *Community opposition to the application is substantial; and*
- *There is a strong association between the community invoked and the applied-for gTLD string; and*
- *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. Each of these tests is described in further detail below.*

Community – *The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:*

- *The level of public recognition of the group as a community at a local and/or global level;*
- *The level of formal boundaries around the community and what persons or entities are considered to form the community;*
- *The length of time the community has been in existence;*
- *The global distribution of the community (this may not apply if the community is territorial); and*
- *The number of people or entities that make up the community.*

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition – *The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:*

- *Number of expressions of opposition relative to the composition of the community;*
- *The representative nature of entities expressing opposition;*
- *Level of recognized stature or weight among sources of opposition;*
- *Distribution or diversity among sources of expressions of opposition, including:*
 - *Regional*

- *Subsectors of community*
- *Leadership of community*
- *Membership of community*
- *Historical defense of the community in other contexts; and*
- *Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.*

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – *The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:*

- *Statements contained in application;*
- *Other public statements by the applicant;*
- *Associations by the public.*

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment – *The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.*

Factors that could be used by a panel in making this determination include but are not limited to:

- *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.*

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.

(ii) New gTLD Dispute Resolution Procedure

56. The Procedure is especially germane to these proceedings. As stated in its Preamble:

These Procedures were designed with an eye toward timely and efficient dispute resolution. As part of the New gTLD Program, these Procedures apply to all proceedings administered by each of the dispute resolution service providers (DRSP). Each of the DRSPs has a specific set of rules that will also apply to such proceedings.

57. The Procedure provides, in relevant part (underlining added):

Article 1. ICANN's New gTLD Program

[...]

(c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider ("DRSP") in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

Article 2. Definitions

[...]

(c) The "Panel" is the panel of Experts, comprising one or three "Experts," that has been constituted by a DRSP in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

[...]

(e) The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook. Such grounds are identified in this Procedure, and are based upon the Final Report on the Introduction of New Generic Top-Level Domains, dated 7 August 2007, issued by the ICANN Generic Names Supporting Organization (GNSO), as follows:

[...]

(iv) “Community Objection” refers to the objection that there is substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.

(f) “DRSP Rules” are the rules of procedure of a particular DRSP that have been identified as being applicable to objection proceedings under this Procedure.

Article 3. Dispute Resolution Service Providers

The various categories of disputes shall be administered by the following DRSPs:

[...]

(d) Community Objections shall be administered by the International Centre for Expertise of the International Chamber of Commerce.

Article 4. Applicable Rules

(a) All proceedings before the Panel shall be governed by this Procedure and by the DRSP Rules that apply to a particular category of objection. The outcome of the proceedings shall be deemed an Expert Determination, and the members of the Panel shall act as experts.

(b) The applicable DRSP Rules are the following:

[...]

(iv) For a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.

(c) In the event of any discrepancy between this Procedure and the applicable DRSP Rules, this Procedure shall prevail.

(d) The place of the proceedings, if relevant, shall be the location of the DRSP that is administering the proceedings.

(e) In all cases, the Panel shall ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position.

[...]

Article 13. The Panel

[...]

(b) Number and specific qualifications of Expert(s):

[...]

(iv) There shall be one Expert in proceedings involving a Community Objection.

(c) All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.

Article 14. Costs

[...]

(e) Upon the termination of the proceedings, after the Panel has rendered its Expert Determination, the DRSP shall refund to the prevailing party, as determined by the Panel, its advance payment(s) of Costs.

Article 17. Additional Written Submissions

(a) The Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.

[...]

Article 18. Evidence

In order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.

Article 19. Hearings

(a) Disputes under this Procedure and the applicable DRSP Rules will usually be resolved without a hearing.

(b) The Panel may decide, on its own initiative or at the request of a party, to hold a hearing only in extraordinary circumstances.

[...]

Article 20. Standards

(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

Article 21. The Expert Determination

[...]

(d) *The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.*

B. The Rules of Expertise of the ICC International Centre for Expertise

(i) The Rules

58. As indicated in Article 4 of the Procedure, all proceedings before a Panel such as the present are governed by – in addition to the Procedure itself – the rules of the relevant dispute resolution service provider. In the case of a community objection, Article 4 provides that those rules are “the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed”.

(ii) Appendix III to the Rules

59. The Rules include an Appendix III, entitled “Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure” (“**Appendix III**”).

(iii) ICC Practice Note

60. The Rules have also been supplemented by a document entitled “ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure” (“**ICC Practice Note**”).
61. The Rules and related documents (Appendix III, ICC Practice Note) are exclusively *procedural* in nature. They do not address or in any way affect the substantive principles and standards according to which objections are assessed and determined, all of which are laid down in the ICANN Guidebook.

V - SUMMARY OF THE PARTIES' POSITIONS

62. The following summary of the parties' positions is based on the parties' submissions and statements, and the supporting documents and evidence presented by them, during these proceedings. Regardless of whether they are expressly referred to here, all of the parties' allegations, evidence and arguments have been carefully considered by the Panel.

A. The Objector's Submissions

63. As declared at the outset of its Objection, the Objector

[B]rings this Community Objection on behalf of the members of the cloud community to prevent Symantec Corporation ... a leading provider of cloud security solutions, from obtaining the .CLOUD top level domain ... as a closed Registry for its sole and exclusive use. [...] Unless the Expert Panel denies the Application, Applicant will gain an unfair competitive advantage against the rest of the cloud community through the improper grant of a perpetual monopoly on a generic industry term in contravention of established international legal norms and to material detriment to the community.

64. The Objector's submissions are presented in its Objection. The Objector submits that it has standing to file a community objection, and that its Objection must prevail on the merits. Its submissions in respect of these questions explicitly refer to and rely on the various principles, standards, rules and, in particular, "factors" explicitly identified in the Guidebook. It invokes no other relevant principles, standards, rules or factors by which, it submits, the Objection is to be evaluated and determined.

(i) Standing

65. The Objector submits as follows with respect to the question of its standing to bring a community Objection:

- The Objector is an established, not-for-profit institution registered with the England and Wales Registrar of Companies.
- The Objector has existed almost as long as the cloud industry itself.
- The Objector enjoys widespread, global recognition through representation of industry members, its Certification Program, government consulting and participation in industry events.

- The Objector is widely considered one of the leading independent voices, if not the leading independent (“vendor agnostic”) voice, when it comes to cloud service provider matters, independent research and best practice advice.
- The Objector has an ongoing relationship with a clearly delineated community.
- According to the ICANN Independent Objector (“**Independent Objector**” or “**IO**”), “the notion of ‘community’ is wide and broad” and can be defined as a group of individuals or entities who “have something in common and/or share common values, interests or goals”.
- The community in question here is the “*cloud computing industry*”.
- Cloud computing is “a means of delivering software and information technology (e.g., infrastructure, platform, communications, network) as a service, through the cloud (i.e., the internet), as opposed to on-site ... The ‘cloud’ is built on infrastructure that is operated to host IT services that are provided as a service and accessed over the internet”.
- The cloud computing community, “while constantly evolving with new types of cloud services”, is defined by certain “key characteristics and actors”. More specifically, the community is defined by five “essential characteristics” of cloud computing, and consists of three “distinct actors ... [that] encompass the participants in the cloud computing industry”.
- The five essential characteristics of cloud computing, according to the US Department of Commerce National Institute of Science and Technology (“**NIST**”) “Definition of Cloud Computing”, are: on-demand service; broad network access; resource pooling; rapid elasticity or expansion; and measured service.
- The actors/participants in the cloud computing industry community – i.e., *the members of the community* – are “cloud service users”, “cloud service providers”, and “cloud service partners”. These include “retailers of cloud-based software and IT services, cloud infrastructure providers, cloud service providers, cloud resellers, cloud systems integrators, and cloud standard organisations” as well as “those that operate in the cloud services market”, “entities that represent the interests of end-users”, and “advisory entities such as law firms specializing in the field”.
- The community is bound by shared interests and goals: its members are “all driven by the enhancement, adoption and use of this new technology [cloud computing]”.
- Although concentrated in Western Europe and North America, the community is recognised at a global level.

- CIF's "every activity relates to cloud computing, so to say that the Objector has an 'ongoing relationship' with the Community is an understatement ... the Community is the very reason for the Objector's existence".

(ii) Merits of the Objection

66. As regards the merits of its Objection, and whether the Objection meets the standards and satisfies the "four tests" established in the Guidebook, the Objector submits:

- Community – The Objector's argument in respect of standing (summarised above) "establishes that the cloud computing industry is a clearly delineated community with global recognition, formal boundaries, and many members with shared interests, expertise and goals, namely the provision, enhancement, adoption and use of cloud computing services".
- Substantial opposition – The community's substantial opposition to the Application is demonstrated by: (i) the breadth of the Objector's membership, comprised of "33 vendor entities and 13 legal practices", all "leading members of the cloud computing and services industry"; (ii) the global coalition of 11 organisations and user groups that support the Objection and that cover "a huge swath of the community, in virtually all geographic regions, representing 1000s of Cloud Service Providers (CSPs), Cloud Service Users (CSUs) and Cloud Service Partners (CSNs), cloud standards organisations, and independent cloud commentators"; and (iii) the response from the community generally, including from the Government of Australia, to the notion of "closed generics".
- Targeting – The issue is "open and shut". The Application reveals that Symantec is a leading provider of cloud-based security solutions and that the applied-for gTLD .CLOUD plays an integral part in the Applicant's business goals. The Application also "demonstrates that .CLOUD explicitly targets the community". Symantec itself states that :

(i) "Symantec is a leader in the Cloud industry and plans to demonstrate its leadership by operating the .CLOUD gTLD. ... Services include: Email Security.cloud, Web Security.cloud, and Symantec Endpoint Protection.cloud"; (ii) "Symantec is applying for four generic-term gTLDs: .PROTECTION and .SECURITY, which correspond with Symantec's core competencies, and .CLOUD and .ANTIVIRUS, which correspond to Symantec's products."; (iii) "The potential use of the .CLOUD gTLD will also be driven by Symantec's future business strategies as identified in its annual report and investor filings."; and (iv) "The primary mission and purpose of the .CLOUD gTLD is to provide a trusted, hierarchical, secure, and intuitive online marketplace to deliver Symantec content, services, and information about our business and focus, as well as other goods and services."

- Detriment – The Applicant’s stated goal of excluding others from this generic industry term fundamentally contradicts the interests of the community as a whole. The Application will result in other members of the community being “prevented from pursuing their independent business and policy interests within this TLD”. “No rational argument can be made that this benefits the community.” The Applicant seeks to “sidestep international legal norms that prohibit the exclusive ownership of common generic terms”. Ownership and control of .CLOUD will “result in “industry-wide confusion” and “barriers to entry”, will “disrupt the core activities of the community” and allow the Applicant to “gain an unfair competitive advantage over other members of the industry ...”. This detriment is “real, tangible and very likely to occur if the Disputed TLD [.CLOUD] is delegated”; in fact, the likelihood of this detriment occurring, should .CLOUD be delegated, is “near-certain” .

B. The Applicant’s Response

67. In the introduction to its Response, CIF states:

Change is frightening and uncomfortable for many people and businesses alike. However change can lead to innovation and new business models. Applicant Symantec Corporation (“Symantec”) here seeks to benefit users of cloud computing services, their ability to find the best information on an expanding industry, and the security of their online experience. The exaggerated claims and speculative harms expressed by Objector are understandable and result from the fears of the unknown and challenges to traditional norms. Further, in light of the staged approach which Symantec plans for this gTLD registration it is improper to characterize it as “closed” since it is likely to eventually be open to a wide range of owners beyond merely Symantec and its licensees. As for the stages in which the registry will, in fact, remain closed, the possibility of companies applying for closed generic TLDs was planned by ICANN and the policy-making community long before the gTLD application window even opened. During the year-long community discussion about registry-registrar vertical integration¹, the possibility of closed generics (and many other possible business models) was acknowledged and heavily debated leaving no room for alleged surprises in the current round of gTLD applications. Objector’s fears and the harms it claims will befall the cloud computing industry have all been considered and are unfounded. To the contrary, delegation of the <.CLOUD> gTLD to Symantec will eliminate the potential for cybersquatting and create a secure and trusted space for consumers. To deny Symantec its gTLD will only deny such progress and the very competitive spirit and public benefit which ICANN sought to promote in opening up the gTLD space. Finally, in light of continued evolving advice from ICANN’s Government Advisory Committee (GAC), the staged approach that Symantec plans for this gTLD registration is the most prudent as it allows for any appropriate business changes.

68. It goes on to respond to the Objection “point-by-point”, as set out below.

(i) The Objector's Standing

69. The Applicant submits:

- It does not contest that the Objector is an established institution. Nor does it contest that there is a strong association between the community invoked and the applied-for gTLD string.
- However, the Objector's members represent only "a specific sector of the cloud computing industry. There are other sectors and businesses in the industry which are not members of the Objector and which have not otherwise voiced any concerns to Symantec's <.CLOUD> gTLD application."
- Because the "cloud computing community must be viewed more broadly than presented by the Objector," any "on-going relationship which the Objector has is not with a 'clearly delineated' community".

(ii) Merits of the Objection

Community

- The community invoked by CIF is not clearly delineated. "While Objector, itself, appears to be a clearly delineated group, the cloud computing industry and community, as a whole, is not so."
- The true "community" includes regulators, standards bodies, infrastructure providers, application developers, sales channels, and end users. "Within this broad range there are few formal standards and no certifications or licenses which are required of those claiming to operate in the cloud computing field."
- Also, this technology is "quite recent and open-ended, and there are many thousands of companies claiming to provide cloud computing services – most of which are not represented by Objector".
- Nearly one-third of the Objector's members are law firms, "which is rather surprising for an industry group claiming to represent providers rather than legal services."
- The Objector ignores members of the community in Asia, Australia, South America and the rest of the world beyond North America and Western Europe.

- CIF quotes Amazon.com's Chief Technology Officer as saying "[t]he ecosystem is more important than the services themselves...it's all about the ecosystem." "This supports the view that any cloud community cannot be viewed so narrowly as to contain only Objector and its members but must also include the vast number of small industry players and end-users of cloud services, most of whom are not represented by Objector ...".
- Contrary to Section 3.2.2.4 of the Guidebook, there exist "no 'mechanisms for participation in activities, membership, and leadership' for the full scope of cloud computing regulators, standards bodies, infrastructure providers, application developers, sales channels, and end users and there are no 'formal boundaries' for such entities and individuals who are not members of the Objector.

Substantial Opposition

- The Objection does not disclose substantial community opposition to the Application. As indicated above, the Objector does not have substantial representation in many areas of the world. "More telling is the fact that Amazon.com and Google, two of the largest global cloud computing providers (see, Annex A hereto), are notably absent from Objector's roster." Moreover, certain of the Objector's own members have filed applications for generic gTLDs. "Microsoft Corporation, by far the largest member of Objector, has, itself, filed applications for a number of generic-significance gTLDs such as <.LIVE>, <.DOCS>, and <.OFFICE> as restricted gTLDs. Therefore, it seems that Objector and its members have objections to generic gTLDs only some of the time. This would indicate that opposition to [Symantec's Application] is not 'substantial' within the community but is due to other interests."

Detriment

- The Objector's claims regarding the likelihood of material detriment are "exaggerated and unfounded". There exist a number of specific considerations which favor Symantec's .CLOUD Application and indicate that there is in fact no likelihood of material detriment. For example, the Objector's "blanket characterization of the <.CLOUD> gTLD as 'closed'" is not entirely accurate and "fails to account for Symantec's planned Stage 3 of its registry operation [extension of registration rights to a broader class of parties]".
- The "grave harms" foretold by the Objector are "highly speculative and not supported by past experience". In fact, "[e]xclusive ownership of generic domains, by individual businesses within an industry, has been accepted for decades with none of the resulting harms feared by Objector".

- Delegation of the .CLOUD gTLD will not have any improper or undue impact upon the use of the DNS by the cloud computing community for its core activities.
- There is no requirement in the Guidebook that a generic gTLD, closed or otherwise, benefit the entire community of the industry to which it pertains. “The argument that all generic gTLDs should only be open and available to members of a given industry is meritless and ignores the fact that many words which are generic in one context, act as trademarks in others and thus exclude many registrants.”
- Trademark law is not applicable to this Objection. The Applicant is not seeking trademark protection for its .CLOUD gTLD or (obviously) for the word “cloud”. “Objector’s members and, indeed the rest of the world, will still be free to use the word “cloud” in relation to cloud computing activities.”
- Delegation of the .CLOUD gTLD to Symantec will not violate competition or antitrust law.
- It would be “manifestly unfair to all closed generic gTLD applicants to effectively change the rules at this late stage in the process” by outlawing closed generic gTLDs. Relying on the Guidebook and other ICANN communications that have encouraged closed gTLDs, Symantec invested significant amounts of money in its Application, far in excess of the \$185,000 ICANN application fee.
- As a matter of “deference to stakeholders and in the interests of uniformity of Policy”, the ICANN process should be allowed take its course. If ICANN issues a position statement in response to the PCP or the GAC advice it will, presumably, include a process and criteria for dealing with closed generic gTLDs”.

VI - DISCUSSION AND FINDINGS

A. Nature of these Proceedings; Remedies Available

70. As a preliminary comment, the Panel recalls the limited nature and purpose of these proceedings. As stated in the Introduction to this Expert Determination, the issue to be determined here is the success or dismissal of the Objection. The merits of the Application itself, and the Application’s ultimate success or failure, are not for this Panel to decide. Article 21 of the Procedure is unequivocal: “The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection ...”.

71. The Procedure is equally plain as regards the basis for determining the “success or dismissal” of an objection: “The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the ... Guidebook” (Procedure, Article 2(e)). Furthermore, “For each category of Objection ... the Panel shall apply the standards that have been defined by ICANN” (Procedure, Article 20(a)).
72. The role of the Panel, therefore, is to determine whether the Objection satisfies the requirements for success set out in the ICANN Guidebook and Procedure. Those requirements involve a determination by the Panel of the Objector’s “standing” to bring an objection; and, if the Objector is able to demonstrate that it does have such standing, a determination of the merits of the Objection itself, specifically, whether the Objection meets the substantive “standards” – embodied in the “four tests” – established by ICANN.

B. Burden and Standard of Proof

73. A second preliminary comment relates to the notion of “burden of proof”. This is no mere legal abstraction. Nor is it a concept imported into these proceedings by an “Expert Panel” whose sole member/expert is a lawyer. On the contrary, the question of the burden of proof is of the essence of the procedure and rules laid down by ICANN and reiterated throughout the Guidebook.
74. Section 3.5 of Module 3, for example, provides that in the process of evaluating the merits of each type of objection (not only a community objection), “[t]he objector bears the burden of proof in each case”. The Procedure similarly states at Article 20(c): “The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.” The same applies to a determination of a would-be objector’s standing to file a community objection. As set out in Section 3.2.2.4 of the Guidebook: “To qualify for standing to a community objection, the objector must prove ...”.
75. What this means, in concrete terms, is that it is the Objector in these proceedings, not the Applicant, that must prove its case. The Objector must prove that it has standing; and, if it is successful on that score, the Objector must prove that its Objection meets the tests required by the Guidebook. It can only do so on the basis of compelling evidence which it adduces and musters in support of its arguments.
76. It also means that in determining these questions, in particular under a procedure and rules that provide for an expert determination to be rendered on the basis of limited written submissions, the Panel is fairly strictly bound to consider the case *as put by the parties* – that is, as set out in the parties’ submissions and supporting documents. A panel certainly enjoys an important

degree of discretion in its appreciation and weighing of the statements and evidence submitted, and in its interpretation and (in appropriate cases) selection of the “rules or principles that it determines to be applicable” (Procedure, Article 20(b)). A panel obviously also exercises a certain discretion when it comes to the “balancing of the factors” listed in Sections 3.2.2.4 and 3.5 of Module 3. Nevertheless, it is not for a panel in these proceedings to “investigate” on its own the facts and issues at stake or independently to compile evidence on the basis of which it then grounds its decision. It is, as noted, limited to an important degree to the consideration of the evidence and submissions put before it by the parties.

77. Finally, it is useful to address very briefly the applicable “standard” of proof, that is, the standard by which an alleged fact will be considered to be proven. The standard of proof is not addressed in either Module 3 or the Procedure. Nonetheless, the Panel has no hesitation in stating that the appropriate standard of proof is a “balance of probabilities” or a “preponderance of evidence”. Stated simply, the standard is met if the evidence demonstrates that it is more likely than not that an alleged fact is true.
78. With the forgoing considerations in mind, the Panel turns to the essential issues to be determined.

C. Standing – Who May File an Objection?

79. The Guidebook provides that a party must satisfy certain “standing requirements” to be considered an objector entitled to file an objection to a gTLD application. Only a party that demonstrates that it has standing is eligible to file an objection to a gTLD application and to have that objection considered.
80. Section 3.2.2 of Module 3 provides that for a community objection, only an “established institution associated with a clearly delineated community” has standing and is eligible to object to a gTLD application.
81. Section 3.2.2.4 of Module 3 reiterates that to qualify for standing for a community objection, the objector must prove among other things that “it has an ongoing relationship with a clearly delineated community”.
82. Three facts must therefore be proven for an objector to have standing: that it is an “*established institution*”; that it is “*associated*” with or has an “*ongoing relationship*” with a community; and that that community is a “*clearly delineated community*”.
83. As indicated above, Section 3.2.2.4 identifies four particular factors, among others, on which an objector may rely to demonstrate that it has an “ongoing relationship with a clearly delineated

community” (the second part of the standing test under section 3.2.2.4 of the Guidebook); four factors that a panel may consider and on which it may rely to determine whether or not an objector meets the Guidebook’s requirements for standing. Section 3.2.2.4 goes on to state that “[t]he panel will perform a balancing of the factors ... as well as other relevant information, in making its determination.” And it provides: “It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.”

84. As noted, in their submissions to the Panel in these proceedings, both parties expressly rely on the factors listed in Section 3.2.2.4 in support of their respective arguments for and against the Objector’s standing. Neither party invokes any further factor or rule to be taken into account in the “balancing of the factors” to be performed by the Panel. Nor does the Panel consider that other factors, rules or principles are necessary to decide the question of the Objector’s standing.
85. As indicated above, of the four factors related to the test for an “ongoing relationship with a clearly delineated community” that are listed in section 3.2.2.4, three are concerned with the *institution* that wishes to object and the nature of its *relationship* or *association* with the community in question. Only one of the listed factors concerns the *community* in question. More specifically, only one of the listed factors concerns the means by which an objector may prove that it has an ongoing relationship with a *clearly delineated community*: “The level of formal boundaries around the community”.
86. The importance of this concept of a “clearly delineated community” as a group defined in part by some type and level of “boundaries” that delineate (or distinguish) it from other groups and communities is reiterated over and over again in the Guidebook.

D. Substantive Standards

87. Section 3.5 of Module 3 sets out the substantive principles and standards for adjudication of the merits for each type of objection to a gTLD application (as opposed to adjudication of the objector’s standing, or eligibility, to file an objection under Section 3.2.2). It also articulates, as mentioned, the fundamental rule that “[t]he objector bears the burden of proof in each case”.

(i) “Four Tests” for the Success of a Community Objection

88. The principles and standards according to which community objections are evaluated are found in Section 3.5.4 of Module 3. “Four tests” must be met for a community objection to be successful: the so-called “*community*” test; the “*substantial opposition*” test, the “*targeting*” test, and the “*detriment*” test.

89. Lest there be any doubt in this regard, article 2(e) states clearly that “[t]he grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook”. Article 20(a) reiterates that “the Panel shall apply the standards that have been defined by ICANN” for each type of objection set out in the Guidebook, while article 20(c) reiterates the principle repeated throughout the Guidebook that “[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards”.

(ii) The Community Test – a “Clearly Delineated Community”

90. The first of these tests – the community test – is described in two ways in Section 3.5.4: “For an objection to be successful, the objector must prove that ... the community invoked by the objector is a clearly delineated community”; and “The objector must prove that the community expressing opposition can be regarded as a clearly delineated community”. To the extent that there could be said to be a distinction between these two expressions of the test, it is a distinction without a difference.
91. Section 3.5.4 goes on to state that, just as in the matter of standing, “a panel could balance a number of factors to determine this [whether the community invoked by the objector can be regarded as a clearly delineated community]”. It lists a number of such illustrative factors: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community; what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community; and the number of people or entities that make up the community.
92. As with respect to the question of standing, neither party invokes factors others than those listed in Section 3.5.4 in support of its submissions regarding the merits of the Objection. Here too, the Panel does not consider that other factors, rules or principles are necessary to decide the question at hand.
93. Section 3.5.4 then states: “*If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.*” This, boiled down to its practical essence, is the community test.
94. For the reasons discussed more fully below, it is unnecessary to consider the other three “tests” – substantial opposition; targeting; detriment – for evaluating the merits of the Objection in this case.

E. Applying the Community Test – a Matter of Both Standing and Substance

95. From the foregoing it is clear that, although they constitute separate steps, the test for standing and the test(s) for determining the merits of a community objection share an important commonality. They require the objector to prove the existence of a “*clearly delineated community*” on whose behalf it purports to object to a particular gTLD application.
96. The Objector has failed to make such proof in this case.
97. The problem lies in the definition of the community invoked by the Objector.
98. The Objector refers to the community in question as the “*cloud computing industry*”. It submits that this industry/community can be defined, among other things, by its membership, which the Objector claims encompasses all “actors” or “participants” in the cloud computing industry, including (as identified at various places in the Objection):
- “cloud service users”
 - “cloud service providers”
 - “cloud service partners”
 - “retailers of cloud-based software and IT services”
 - “cloud infrastructure providers”
 - “cloud resellers”
 - “cloud systems integrators”
 - “cloud standards organisations”
 - “those that provide infrastructure technology and applications to build cloud solutions”
 - “those that operate in the cloud services market”
 - “entities that represent the interests of end-users”
 - “advisory entities such as law firms specializing in the field”

- “including but not limited to companies and organizations that build, implement, provide, sell and support cloud computing solutions and services, or seek to consume them as end-user organisations”

99. With respect, what the Objector is proposing here is effectively a community of *virtually anyone and everyone – individuals; businesses; private and public groups; professional, academic and government entities – having anything to do with or any interest in cloud computing.*
100. It is recalled that the Objector also describes the cloud computing industry as “a means of delivering software and information technology as a service, through ‘the cloud’ (i.e., the internet)”. It describes the industry and its community as “constantly evolving” (and presumably expanding) as new types of cloud services are developed. Furthermore, it relies for its definition of this community, in part, on the NIST’s “five essential characteristics” of cloud computing.
101. None of this is necessarily contentious on its own. However, what it means is that the community proposed by the Objector may just as well be defined as *an evolving community of people and entities having anything to do with or any interest in using or delivering software and information technology as a service, through the Internet,¹ according to a model that is currently characterised by on-demand service; broad network access; resource pooling; rapid elasticity or expansion; and measured service.*
102. Such a community is not a “clearly delineated community” within the meaning of the Guidebook.
103. Section 3.5.4 of the Guidebook lists five factors that may be taken into account to determine whether or not a community can be regarded as “clearly delineated”. Other factors may also be taken into account. In any case, the question is not whether a community may be characterised by one or other of the factors listed in Section 3.5.4, but whether a community is a “clearly delineated community”. At the risk of stating the obvious, the Guidebook requires that such a community must not only be capable of being delineated; it must be “clearly delineated”.
104. Delineation connotes differentiation, distinction, specification. As pointed out by the Applicant, the Independent Objector writes that “[a] specific community should distinguish itself from

¹ While recognising and respecting the divergence of convention regarding spelling of the term “Internet” – some capitalise the word, some do not – the Panel chooses to adopt the spelling used by ICANN in reference to the global Internet. For a summary of the issue see: http://en.wikipedia.org/wiki/Capitalization_of_%22Internet%22.

others, precisely by its characteristics or specificities” (see below). This is borne out by the Guidebook.

105. Certain of the factors listed in Section 3.5.4 appear to be concerned with features of a community that distinguish it from other groups or communities. The most obvious example is “the level of formal boundaries around the community”. Certain of the factors could be said to relate more to features of a community that emphasise what its members share in common – what might be termed the “glue” that binds members of a group together.
106. What is evident is that the Guidebook envisages a “clearly delineated community” as a group whose members clearly share a significant degree of both commonality and cohesion – of interest, values, characteristics – and as a group whose characteristics are such that it can be clearly distinguished from other groups or communities.
107. Because CIF quotes and purports to rely on certain of the published views of the Independent Objector concerning the notion of “community” in the context of a generic term or TLD string, it is useful to pause here to consider the relevant sections of the IO’s published statement on the issue of gTLDs, in full and in their proper context.
108. The Independent Objector – the eminent international jurist and legal scholar Professor Alain Pellet – was appointed by ICANN in May 2012. The IO serves as an independent decision maker, impartial and unaffiliated with any particular Internet community. With a mandate to act “in the best interests of the public who use the global Internet”, the IO is authorised to file objections – on limited public interest and community grounds – to highly objectionable gTLD applications that he considers are contrary to the public’s interests. If the IO determines that a limited public interest or community objection should be filed, he may initiate the objection on his own authority. His activities are only subject to reporting requirements to ICANN as well as the public. (<http://www.independent-objector-newgtlds.org/english-version/home>)
109. In the context of his mandate, the IO also publishes his views on relevant topics. His statements are in no way binding on other decision makers, but they are learned, thoughtful and compelling. Of particular interest for purposes of these proceedings are the IO’s published views on the issue of closed generic TLD applications. These are set out below (underlining added):

THE ISSUE OF "CLOSED GENERIC" gTLD APPLICATIONS - THE VIEWS OF THE INDEPENDENT OBJECTOR

- *Description of the issue*

1. ICANN has recently opened a 30-day public comments period to address the issue of “closed generic” gTLDs. ICANN seeks comments from interested stakeholders in order to explore potential new alternatives and provisions addressing the issue.

2. As the Independent Objector, I have faced the issue of “closed generic” gTLDs from the very beginning of my review of applications. Notably, several persons and entities reported directly to me their concerns on this issue and urged me to file objections against the concerned applications. I have decided not to do so on this sole ground. As I am acting on behalf of the public who use the global Internet and committed to full transparency, I deem it necessary to briefly explain my position in this respect.

3. In my view, a “generic term” is a word associated to goods, service, activities or market sectors, which is widely used by people and commonly understood as referring to the good, service, activity or market sector in question. It is supposedly not directly associated to a brand or trademark. However, sometimes trademarks or brands become generic terms, such as “Aspirin”.

4. I note that the core question is whether applicants, generally being companies and corporate entities, can have the benefit of a new gTLD string for their own use, notwithstanding the general use of the term by the public.

5. According to the new gTLDs Program Committee of the ICANN Board of Directors and its resolution of February 2, 2013, it is understood that “members of the community term a ‘closed generic’ TLD as a TLD string that is a generic term and is proposed to be operated by a participant exclusively for its own benefit”. Where the new gTLDs “program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs”, opponents to applications for “closed generic” gTLDs argue that it would have a negative impact on competition and consumer choice.

• **The Independent Objector’s Mission**

1. On this issue, it is important to insist on the core essence of the IO’s functions and his “limited powers” as described in the Applicant Guidebook, which constitutes the basis for his mandate under the new gTLDs Dispute Resolution Process.

2. The IO is only entitled to lodge objections on the limited public interest and community grounds. For both grounds for objection, he acts in complete independence, and solely in the best interests of the public who use the global Internet.

3. In line with this public interest mission, the IO is only allowed to file objections when applications have been commented in the public sphere. He can only lodge an objection if no one else files previously an objection on the same ground, which implies that he is acting as a “safety net”.

4. When reviewing the applications, I have paid great attention to the related public comments, some of which addressed the issue of “closed generic” gTLDs.

5. While the present comment aims at explaining the reasons why I consider that the issue of “closed generic” gTLDs does not fall within the scope of my limited functions, it should be noted that the hereunder remarks are general; each application is reviewed separately and has specificities which could justify an objection from the IO for other reasons. It is also not the mission of the IO to express his personal position on the substance of the issue, nor to make suggestions and proposals to ICANN.

6. However, I acknowledge the importance of the problem. The question of the openness of new gTLDs is crucial, particularly when it comes to terms that could be profitable to a large part of the public, and this is undoubtedly the case concerning gTLDs strings such as “.search”, “.book”, “.beauty”, “.insurance”, “.blog”, “.shop”, “.music”, “.jewelry”, “.app” or “.cloud”, to mention the most commented ones.

[...]

- **Community Objections**

1. For every application I review, I also assess whether a community objection could be warranted. I examine whether there is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted. The communities in question must be strongly associated with the applied-for gTLD string in the application that is the subject of the objection.

2. I base my evaluation on four eliminatory tests, which are set out in the Applicant Guidebook in order to guide the Expert panels for the evaluation of community objections. The gTLD string must explicitly or implicitly target a specific community. The targeted community must be clearly delineated. I verify if there is a substantial opposition to the gTLD application from a significant portion of the community. Finally, I assess whether the application for the gTLD string 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.

3. As for the community test, (the IO determines if the community invoked is a clearly delineated community), the notion of “community” is wide and broad, and is not precisely defined by ICANN’s Applicant Guidebook for the new gTLDs program. It can include a community of interests, as well as a particular ethnical, religious, linguistic or similar community. Moreover, communities can also be classified in sub-communities (i.e. the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements and a community can be defined as a group of individuals who have something in common (which can include their nationality or place of residence – i.e. the French, South-East Asian or Brazilian community – or a common characteristic – i.e. the disability community), or share common values, interests or goals (i.e. the health or legal community). For the purpose of the IO evaluation, it is clear that what matters is

that the community invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities.

4. In view of the broad elements of definition mentioned above, and more pertinently in view of the very nature of a “generic term”, it is unlikely that these applications will pass this community test. Of course for a community objection, each application has to be reviewed separately. However, as a general remark and because I have reviewed all applications, it is difficult in these cases to prove the existence of a clearly delineated community. By definition, a “generic term” is a term which is used by a significant number of people, who do not necessarily share similar goals, values or interests. A specific community should distinguish itself from others, precisely by its characteristics or specificities. It cannot be the case for a “generic term” which, by definition, goes beyond specificities as it is used by very different persons. Therefore, while I fully understand the concerns expressed on behalf of the public who use the Internet, the latter cannot be considered as a clearly delineated community. When criteria for this test are not met on this basis, a community objection is not warranted.

5. I have however reviewed all the applications in order to make sure that in each case, no clearly delineated community, generally referring to a particular industry, was substantially opposed to the string and that their interests were not threatened. As a general observation, I have to note that in most cases, such a delineated community does not exist.

6. Taking “.book” as an example, the “book industry” and a hypothetical “book community” would encompass a large variety of stakeholders, who do not always share similar primary interests. Thus, it would include authors, publishers, libraries, retailers, readers, etc... In a more inclusive way, we could also include international organizations working, inter alia, for the promotion of culture such as the UNESCO. Therefore, these different stakeholders are difficult to be delineated as a single community since they are of very different nature. Some have the promotion of literature as their primary aim but for many others it is one objective among many others. It is therefore quite doubtful that they represent a clearly delineated community within the meaning of the Applicant Guidebook.

7. Therefore, I note that, in general, for the issue of “closed generic” gTLDs and my possibility to object as the IO on the community ground, it is unlikely that the applications concerned meet the four tests. However, it is important to note that for an assessment on the community ground, each application has to be reviewed separately. The present comment only affirms that a community objection cannot be lodged on behalf of the public who uses the Internet as a whole, which cannot be considered as a clearly delineated community.

8. Moreover, as for my possibility to object on the community ground, it is my clearly explained public policy not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly. This does not exclude that I could deem it

nevertheless appropriate to file a community objection in exceptional circumstances, in particular if the established institution representing and associated with the community has compelling reasons not to do so, or if several institutions could represent a single community and are in the same interest so that an application could raise issues of priority, or in respect to the modalities of the objection. The objections I have just filed are based on such assessments.

(<http://www.independent-objector-newgtlds.org/english-version/the-issue-of-closed-generic-gtlds/>)

110. The Panel expresses no comment regarding the IO's views. The IO's cogent statement speaks for itself and, as the IO properly notes, each case must be considered separately, on its own merits.
111. The focus here, as it must be in any given case, is not merely on the applied-for gTLD string in the abstract, but on the nature of the particular "community" that is invoked by the Objector, and more particularly, whether that community can be regarded as "clearly delineated".
112. In this light, it is not so much the generic nature of the word "cloud" or of the TLD string <.CLOUD> that is problematic, but rather the generic nature – the ubiquitousness – of the definitional elements of the so-called cloud (or cloud computing, or cloud computing industry) "community" invoked by the Objector. The ubiquity of cloud computing itself, as well as its rapidly evolving nature, as identified by the Objector, is also a problem.
113. "Ubiquitous" is defined as "existing or being everywhere at the same time : constantly encountered : WIDESPREAD" (Merriam-Webster's Collegiate Dictionary, 11th Edition, 2012). "Ubiquity" is defined more succinctly as "OMNIPRESENCE" (Id.).
114. CIF simply does not demonstrate that the vast and varied membership of the "cloud computing industry", as defined by it (or described in any of the sources on which it relies for evidence), can be defined by reference to common characteristics, values, interests or goals to any important degree. Certainly the members of such a group share "something in common", as the Objector suggests. However, what exactly that "something" is – the actual characteristics or values that these participants in the so-called cloud community can be said to share beyond their merely having something to do with or some interest in cloud computing – is not clearly or adequately identified or proven by the Objector. To the extent that the "provision, enhancement, adoption and use of cloud computing services" could even be said to comprise "shared interests, expertise and goals", or some sort of essential, defining characteristic of the proposed community, as argued by the Objector, it is certainly insufficient to demonstrate that all those involved in such activities comprise a clearly delineated community. There is, moreover, no evidence that the members of such a vast and rapidly evolving group demonstrate any sort of

“cohesion”, or that they even consider themselves part of a community as defined by the Objector. Indeed, it might more easily be assumed that a group of people and entities defined as broadly as it is defined by the Objector is more diverse than homogeneous, and that its members’ values, interests and goals are at least as conflicting as they are common.

115. Still less does the Objector prove how the community that it invokes is surrounded by any sort of barriers, formal or other, or is effectively differentiated from other individuals, entities, groups or communities associated with computing or information services, or with what the IO refers to as “the public who use the global Internet”. A community of all users, providers, partners, integrators, retailers, regulators, representatives, advisors, etc. of cloud computing, as defined, can hardly be delineated or differentiated from the universe of users, providers, partners, etc. of the Internet generally or potentially, in the not-too-distant future, of any computing or information services.
116. The Objector *asserts* that the cloud computing industry comprises a clearly delineated community. It asserts that this community enjoys “global recognition”, “formal boundaries”, and a membership with “shared interest, expertise and goals” (i.e., “the provision, enhancement, adoption and use of cloud computing services”) around which the community might be said to cohere. But it does not *prove* these assertions. Its evidence in this respect is as inadequate as the definition of its proposed community is over-vast.
117. A review of the six documents (“**Annexes**” to the Objection) adduced as evidence by the Objector in support of its assertions concerning the “clearly delineated” nature of its proposed community is telling.
- Annex H contains the statement of the IO further to his review of an application for the new gTLD “.VODKA” (one of what the IO refers to as “controversial applications” as indicated by the level and nature of public comment generated by the application). The statement reiterates certain of the IO’s views regarding the notion of “community” expressed in the IO’s publication concerning closed generic gTLDs generally, which is reproduced above.
 - Annex I contains a definition of “cloud computing” from the University of Michigan Office of the Vice President for Research. It is interesting to note that the definition commences as follows (underlining added): “Cloud computing is the next stage in the Internet’s evolution, providing the means through which everything – from computing power to computing infrastructure, applications, business processes to personal collaboration – can be delivered to you ...”.

- Annex J is the NIST Definition of Cloud Computing. It is noted, among other things, that the NIST itself declares that “[c]loud computing is an evolving paradigm”. The NIST describes the “intended audience for the document” – which is as close to a description of a “community” as found in the NIST publication – as “system planners, program managers, technologists, and others adopting cloud computing as consumers or providers of cloud services” (underlining added). The NIST actually defines cloud computing as “a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources ...”. The descriptor “*ubiquitous*” is noteworthy. The document goes on to state that this “cloud model” is composed of, among other things, the five “essential characteristics” to which the Objector refers. It is further noted that the NIST defines one of the many cloud computing “deployment models” – the so-called “public cloud” – as follows: “The cloud infrastructure is provisioned for open use by the general public. It may be owned, managed, and operated by a business, academic, or government organization, or some combination of them” (underlining added).
- Annex K comprises an excerpt from a study on cloud computing undertaken by the International Telecommunication Union. Similar to the NIST, it too defines cloud computing as “a model for enabling service users to have ubiquitous, convenient and on-demand network access to a shared pool of configurable computing resources ...”. It goes on to describe the various “actors” in the “cloud ecosystem”, which include the cloud service users, providers and partners referred to by the Objector. In a prominent note to its definition of cloud service users, it states that such users include “intermediate users [i.e., the “resellers” identified by the Objector] that will deliver cloud services provided by a cloud service provider ... to actual users of the cloud service, i.e., end-users”. It continues: “End users can be persons, machines or applications” (underlining added). The idea of a community whose membership (cloud service users, providers and partners, among others) is comprised not only of people and entities, but of machines and applications, is intriguing. However, it is presumably not what the Objector has in mind, and it is clearly not what the Guidebook envisages.
- Annex L, a press release by the consulting firm Gartner, Inc., attests to the phenomenal growth of the public cloud services market.
- Annex M is an interview with Amazon’s Chief Technology Officer, Mr. Werner Vogels, in which Mr. Vogels proposes that cloud computing is better conceived of as an “ecosystem” (a term also used by the ITU in the study mentioned above) than as a service – what the journalist/interviewer refers to as an “everything-as-a-cloud-service ecosystem”. Here too,

the recognition of the widespread if not omnipresent nature of cloud computing, and of any purported community of cloud computing users, providers and partners, etc., is noteworthy.

118. This evidence does not prove the validity of the Objector's assertions. It does not prove the existence of a community that is bound (or even considers that it is bound) by shared interests and goals, still less one that can be regarded as "clearly delineated", as the Objector claims.
119. On the contrary, the evidence presented by the Objector is largely consistent with the Applicant's own evidence, all of which serves on the whole to demonstrate that cloud computing remains an evolving paradigm or concept; one that may be defined, if at all, by the fact that as currently envisaged (whatever terms are actually used to describe it), it potentially encompasses almost "everything" having to do with the delivery or use of computing and information services over the Internet, and – on the basis of the Objector's definition – anyone who uses, provides or enables such services, or has an interest in the concept.
120. The last sentence of the community test set out at Section 3.5.4 of Module 3 is instructive – and crucial. It reads: "If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail."
121. This sentence makes plain that for purposes of a community objection the notion of a "community" is not merely a function of the number of people or entities that comprise its membership. The size of a group's membership matters; so too may its geographical distribution, the length of time it has been in existence, the level of public recognition it enjoys and the level of formal boundaries around it.
122. That said these are merely indicators of what matters most of all. For purposes of being considered a "community", the test is whether the group can be regarded as "clearly delineated". As explained above, the community proposed by the Objector fails this test.
123. In the circumstances, it is unnecessary for the Panel to consider the other elements of Module 3, or to enquire further into the merits of the Objection.

F. Costs

124. Article 14(e) of the Procedure provides that the Centre will refund to the prevailing party the amount of the advance payment(s) of costs related to these proceedings made by that party. The Procedure allows for no further or other decision by the Panel with respect to costs. As stated in Article 21(d), the remedies that the Panel may order are "limited to the success or

dismissal of an Objection and to the refund by the DRSP to the prevailing party ... of its advance payment(s) of Costs pursuant to Article 14(e) ...”

125. The Applicant is the prevailing party in this case. It is therefore entitled to have the amount of its advance payment refunded to it by the Centre.

G. Conclusion

126. For the reasons discussed above, the Panel finds that the Objector has failed to prove that the community that it invokes in its Objection can be regarded as a “clearly delineated community”.

127. On this basis, the Objector has failed to demonstrate that it has standing to bring a community objection in accordance with Section 3.2.2 of the Guidebook or that its Objection meets the community test as set out in Section 3.5.4 of the Guidebook. The Objection must be dismissed.

VII - DECISION

128. On these grounds, and for all of the foregoing reasons, I hereby render the following Expert Determination in accordance with Article 21(d) of the Procedure:

- (1) CLOUD INDUSTRY FORUM LIMITED’s Objection is dismissed;
- (2) The Applicant, SYMANTEC CORPORATION, prevails and shall be refunded by the Centre the amount of the advance payment on costs made by it to the Centre.

3 February 2014



Stephen L. Drymer
Expert