

INTERNATIONAL CHAMBER OF COMMERCE

INTERNATIONAL CENTRE FOR ADR

CASE NO. EXP/619

FINAL EXPERT DETERMINATION

Sole Party:

Internet Corporation for Assigned Names and Numbers

Under the

*ICC Rules for the Administration of Expert Proceedings
in force as from 1 February 2015*

Related to the matter EXP 395/ICANN/12 concerning .CHARITY

between

Professor Alain Pellet (Independent Objector) v. Corn Lake, LLC (Applicant)

12 December 2017

Expert Panel:

Prof. Fabien Gélinas (Chair)

Prof. Luca G. Radicati di Brozolo

Mrs Deva Villanúa

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Defined Terms

Term	Meaning
Applicant/ Corn Lake	Corn Lake, LLC (United States)
Application	The new gTLD application filed by the Applicant for “.CHARITY”; application ID: 1-1384-49318
Additional Submission	IO’s Additional Submission filed with ICC on 20 August 2013; Applicant’s Additional Submission filed with ICC on 6 Sept. 2013
Beijing Communiqué /Advice	Proposed and adopted safeguards for certain sensitive strings in sectors considered by the GAC as “regulated” or “highly regulated”
Board	ICANN’s Board of Directors
BGC	ICANN’s Board Governance Committee
Centre	The International Centre for ADR of the International Chamber of Commerce
Community Objection	An objection to a gTLD application falling within the definition of “Community Objection” under section 3.2.1. of Module 3 of the Guidebook (and also contained in Article 2(e)(iv) of the Procedure)
DNS	Domain Name System
Donuts	The Applicant’s parent company, Donuts Inc.
DRSP	Dispute Resolution Service Provider
Determination	Expert Determination in case no. EXP/395/ICANN/12
EFL	Excellent First Limited (Cayman Islands)
EFL Application	The new gTLD application filed by EFL for “.慈善” [Charity] (Application ID: 1-961-6109)
Expert	The expert panel comprising the Expert, Mr Tim Portwood
GAC	ICANN’s Governmental Advisory Committee
GNSO	Generic Names Supporting Organization
Guidebook	The gTLD Applicant Guidebook issued by ICANN (version 2012-04-06)
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICDR	International Centre for Dispute Resolution

IO	Independent Objector, Professor Alain Pellet
IRP	Independent Review Process
IRP Declaration	Final The Final Declaration, dated 17 October 2016, rendered by the Independent Review Panel comprised of Mark Morril, Michael Ostrove and Wendy Miles QC (Chair)
LPI	Limited Public Interest
New gTLD	New generic top level domain
NGPC	New gTLD Program Committee
Objection	The Objection dated 12 March 2013 transmitted by the IO to the ICC on 13 March 2013 by email
PIC Spec	Public Interest Commitments Specification
Procedure	The new gTLD Dispute Resolution Procedure issued by ICANN as the Attachment to Module 3 of the Guidebook
Review Panel, This Panel	Panel constituted to review the Expert Determination in case no. EXP/395/ICANN/12
Response	Applicant's Response to the IO's Community Objection, dated 6 June 2013
Rules	The Rules for Expertise of the International Chamber of Commerce (in force as from 1 January 2003); or the ICC Rules for the Administration of Expert Proceedings (in force as from 1 February 2015)
SRL	Spring Registry Limited (Gibraltar)
SRL Application	The new gTLD application filed by SRL for “.CHARITY”; (Application ID: 1-1241-87032)

1. OVERVIEW

1. Under its New Generic Top Level Domain (“**New gTLD**”) Program, the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) invited applications for New gTLD registries. As part of the program and with a view to protecting certain existing rights and interests, ICANN established a process to open a path for formal objections to be made during the application period. The process is governed by the New gTLD Applicant Guidebook (the “**Guidebook**”), which contains, as an Attachment to Module 3, a New gTLD Dispute Resolution Procedure (the “**Procedure**”).¹
2. Dispute resolution proceedings are administered by a dispute resolution service provider (“**DRSP**”) in accordance with the Procedure and the applicable rules of the provider. Four kinds of objections are contemplated by the Guidebook: String Confusion, Existing Legal Rights, Limited Public Interest, and Community.² The dispute resolution provider responsible for Limited Public Interest and Community objections is the International Chamber of Commerce (“**ICC**”), and the applicable rules for the procedure are the Rules for Expertise of the ICC (now the ICC Rules for the Administration of Expert Proceedings) (the “**Rules**”), as supplemented by the ICC.³
3. In order to ensure that the best interest of the public would be represented in the process, ICANN also established the figure of the Independent Objector (the “**IO**”).⁴ According to section 3.2.5 of the Guidebook, the IO may file a formal objection to a

¹ gTLD Applicant Guidebook, Module 3, version 2012-06-04, at s 3.2, online: <http://newgtlds.icann.org/en/applicants/agb> [Guidebook].

² *Ibid* at s 3.2.1

³ *Ibid* at s 3.2.3.

⁴ *Ibid* at s 3.2.5.

New gTLD application. The IO's role is not to act on behalf of any particular persons or entities, but in the best interests of the public who use the global internet.⁵ The IO may file objections against "highly objectionable" New gTLD applications to which no objection has been filed, but is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections. The IO is granted standing to file objections on these enumerated grounds, but can only do so if at least one comment in opposition to the application is made in the public sphere. Professor Alain Pellet acted as the IO during the relevant period.

4. These proceedings originally arise out of a Community Objection (the "**Objection**") filed by the IO on 13 March 2013 against the application of Corn Lake, LLC ("**Corn Lake**" or the "**Applicant**") for the .CHARITY gTLD (the "**Application**").⁶ The IO, on the same day, filed substantially identical Community objections against two other applications for the .CHARITY string, namely:⁷

- i. Excellent First Limited's Application ("**EFL**"; the "**EFL Application**") for .慈善 (the Chinese Internationalized Domain Name for .CHARITY);⁸ and
- ii. Spring Registry Limited's Application ("**SRL**"; the "**SRL Application**").⁹

The three objections of the IO to the above applications raised, among other issues, a concern that the lack of an eligibility policy restricting registration to charitable or not-

⁵ *Ibid.*

⁶ IO's Community Objection to Corn Lake's Application, filed on 13 March 2013, online: <https://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-corn-lake-llc/> [*Objection*].

⁷ *Ibid* at para 46.

⁸ IO's Community Objection to Excellent First Limited's Application, filed on 13 March 2013, online: <https://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/%E6%85%88%E5%96%84-cty-excellent-first-limited/> [*EFL Objection*].

⁹ IO's Community Objection to Spring Limited's Application, filed on 13 March 2013, online: <https://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-spring-registry-limited/> [*SRL Objection*].

for-profit organizations created the likelihood of a detriment to the rights or legitimate interests of the charity community, to users, and to the general public.¹⁰ The ICC consolidated all three .CHARITY community objections and appointed the same Expert (Mr Tim Portwood) to serve in all three objection proceedings.

5. In April 2013, shortly after the filing of the objections concerning the .CHARITY strings, the GAC issued its Beijing Communiqué, advising that ICANN’s Board (the “**Board**”) adopt certain eligibility restrictions for sensitive strings in some regulated sectors including the charity sector (the “**Beijing Advice**”). On 29 October 2013, the Chair of the Board, Stephen Crocker, on behalf of the New gTLD Program Committee (the “**NGPC**”), wrote to Heather Dryden, in her capacity as Chair of the GAC, that the NGPC intended to accept the Beijing Advice. Attached to the letter was a document describing how ICANN intended to implement the required safeguards through appropriate language in the public interest commitments specifications (the “**PIC Spec**”) of the New gTLD Registry Agreement.
6. On 9 January 2014, the Expert rendered his determinations for all three .CHARITY Community objections. The Expert upheld the objection against the Corn Lake Application and rejected those against the other two applications. It is these different outcomes, the circumstances in which they were reached, and the impact of the adoption by ICANN of the GAC Advice that gave rise to this review procedure.
7. The Board formally adopted the Beijing Advice by Resolution of 5 February 2014.¹¹ By the same Resolution, the Board directed ICANN’s President and CEO to initiate a public comment period with respect to a proposed review mechanism to address certain perceived inconsistent or unreasonable objection determinations (the “**Final Review Procedure**”). The scope of the Final Review Procedure as initially proposed

¹⁰ See Objection, para. 46.

¹¹ Approved Resolutions, Meeting of the New gTLD Program Committee, online: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

was limited to certain string confusion determinations. In March 2014, Corn Lake’s parent company, Donuts Inc., used the public comment process to ask that the Board extend the Final Review Procedure to other determinations, including community objection determinations such as the one under review here, and limited public interest determinations including one concerning .HOSPITAL. ICANN implemented the Final Review Procedure on 12 October 2014 without extending its scope beyond the few string confusion determinations originally contemplated in the initial proposal. In February 2016, however, the Board resolved to extend the Final Review Procedure to .HOSPITAL.¹²

8. Corn Lake then initiated an Independent Review Process (“**IRP**”) against ICANN challenging: (1) the Corn Lake Determination, (2) the Reconsideration Determination of the Board Governance Committee (the “**BGC**”, from which Corn Lake had unsuccessfully sought relief), and (3) the Board’s decision not to include the Corn Lake Determination concerning .CHARITY in the scope of the Final Review Procedure.¹³ On 19 October 2016, the IRP Panel, in its Final Declaration (the “**IRP Final Declaration**”) denied as untimely the first two challenges, but accepted the third, declaring that the Board’s failure to extend the Final Review Procedure to the Determination under review was inconsistent with ICANN’s Bylaws, notably its non-discrimination provisions.¹⁴ On 8 November 2016, the Board accepted the findings in the IRP Final Declaration, including the recommendation that “the Board extend the [Final Review Procedure] to include review of Corn Lake’s .CHARITY Expert Determination”¹⁵ and directed that all necessary steps be taken to implement it.

¹² See <https://features.icann.org/consideration-expert-determination-re-objection-application-hospital>.

¹³ IRP Final Declaration in *Corn Lake, LLC & ICANN*, ICDR Case No. 01-15-0002-9938, 17 October 2016, para 7.2.

¹⁴ IRP Final Declaration.

¹⁵ ICANN, Adopted Board Resolutions, 8 November 2016, online: <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b> [*Board resolution*].

2. THIS FINAL REVIEW PROCEDURE

9. The basis for this Final Review Procedure is a “Request for the administration of Expert proceedings regarding the Final Review of the Community Objection against Corn Lake LLC’s application for .CHARITY” (“**ICANN’s Request**”), filed by ICANN on 3 March 2017 (and followed by the payment of the required filing fee on 24 March 2017) pursuant to the Board’s decision of 8 November 2016, a decision which was itself taken as a consequence of the IRP Final Declaration of 17 October 2016 in *Corn Lake. LLC v. ICANN*.¹⁶

2.1. The Sole Party and Related Persons and Entities

10. The sole party in these proceedings is:

INTERNET CORPORATION FOR ASSIGNED NAME AND NUMBERS (ICANN)
Mrs Amy Stathos (amy.stathos@icann.org)
Mrs Elizabeth Le (elisabeth.le@icann.org)
Mr Jared Erwin (jared.erwin@icann.org)
Mr Christopher Bare (christopher.bare@icann.org)
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USA

ICANN is not represented by outside counsel in this matter.

11. The parties to the proceedings that led to the Determination under review are CORN LAKE, LLC (USA) and the Independent Objector, namely, Professor Alain Pellet (France). For the purpose of conflict verification, the additional related persons and entities listed by ICANN, which include the representatives of the parties, are:

- DOMAIN VENTURE PARTNERS PCC LIMITED (Gibraltar);
- DONUTS, INC. (USA);

¹⁶ *Ibid.*

- DOZEN DONUTS, LLC (USA);
- EXCELLENT FIRST LIMITED (Cayman Islands);
- FAMOUS FOUR MEDIA LIMITED (Gibraltar);
- Mr Daniel Müller (France);
- Mr Daniel Schindler (USA);
- Mr Don C. Moody (USA);
- Mr John Genga (USA);
- Mr Jon Nevett (USA);
- Mr Pam Little (China);
- Mr Phon Van den Biesen (The Netherlands);
- Mr Sam Wordsworth (UK);
- Mr Tim Portwood (UK);
- Ms Héloïse Bajer-Pellet (France);
- SPRING REGISTRY LIMITED (Gibraltar);
- THE IP AND TECHNOLOGY LEGAL GROUP, P.C. (USA);
- Van des biesen kloostra advocaten (The Netherlands); and
- ZODIAC HOLDINGS INC (Hong Kong).

2.2. The Review Panel

12. On 27 September 2017, in accordance with Article 3(2) of Appendix I to the Rules, the President of the Standing Committee of the ICC Centre for ADR constituted the Review Panel. On 29 September 2017, the decision was notified and the file transferred to the Review Panel. Professor Fabien Gélinas, a Canadian national, was appointed as Chair of the Panel. Professor Luca G. Radicati di Brozolo, an Italian national, and Mrs Deva Villanúa, a Spanish national, were appointed as co-experts. Each of the experts had previously completed and filed with the ICC a Statement of Acceptance, Availability, Impartiality and Independence, and Statement of Insurance.
13. Prof. Fabien Gélinas holds graduate degrees and certificates from Montreal, Paris, and Oxford. He is the Sir William C. Macdonald Professor of Law at McGill University, in Canada, where he teaches arbitration and the common law and civil law of contracts. He publishes in the areas of dispute resolution and global governance, and has

experience of ICANN's dispute resolution procedures. A senior barrister, he was formerly General Counsel of the ICC International Court of Arbitration. He serves regularly as arbitrator in international matters, and occasionally as counsel.

14. Prof. Luca G. Radicati di Brozolo holds degrees in law (Parma) and in political science (Florence). He is a founding partner of ArbLit, in Milan, and a door tenant of Fountain Court Chambers in London. He is also a Full Professor at the School of Law of the Università Cattolica di Milano, where he holds the chair of Private International Law and is the Director of the Institute of International Studies. He publishes widely on arbitration and international law. He acts as arbitrator in international settings and has experience of ICANN's gTLD dispute resolution procedures.
15. Mrs Deva Villanúa holds a double degree in Law and Business Administration from University Carlos III in Madrid. She has been with Armesto & Asociados, a boutique firm of arbitrators, since 2002. She began as a lawyer and tribunal secretary and now acts as arbitrator in commercial and investment matters, having served as chair, emergency arbitrator, sole arbitrator and party-appointed arbitrator. She has experience of ICANN's gTLD dispute resolution procedures. Mrs Villanúa is a tutor in the Private Law department of Carlos III University in Madrid.
16. The experts' contact details are as follows:

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2.3. The Place, Language, and Timing of the Proceedings

17. Pursuant to Sections V and VI of ICANN’s Request, the place of these proceedings is Paris, France, and the language of the procedure is English. Pursuant to the Request, there shall be no meetings, site visits nor hearings, and the draft determination shall be submitted to the ICC within 45 days from the transfer of the file to the Review Panel or as soon as possible thereafter.

2.4. The Review Panel’s Mission

18. Pursuant to ICANN’s Request, the Review Panel is to render a “written and reasoned Final Expert Determination” the purpose of which is: “to establish whether the underlying .CHARITY Expert Determination (EXP/395/ICANN/12) was reasonable in light of [the] decisions in the other two consolidated matters through an appropriate application of the standard ... set forth in Module 3 of the Applicant Guidebook and in light of ICANN’s adoption of the Beijing Communiqué requiring each successful applicant to impose registration restrictions.” The Review Panel must either conclude that the underlying determination is supported by the applicable standard and adopt it as the Final Expert Determination in the matter; or reverse the determination under review and replace it with its Final Expert Determination. The mission, as understood by the Review Panel, does not contemplate the review of the cost allocation between the original parties effected under Article 14(e) of the Procedure.

19. In its Request, ICANN waived the obligation of the Review Panel under the Rules to prepare an Expert Mission and a Procedural Timetable.

2.5. The Documents

20. Pursuant to ICANN’s Request, the documents to be reviewed by the Panel include the Determination and its underlying case file, (EXP/395/ICANN/12); the determinations and underlying case files in the two consolidated cases (EXP/399/ICANN/16; EXP/400/ICANN/17); the IRP Final Declaration; and the 8 November 2016 ICANN Resolution¹⁷. As background, the Panel was also invited to read three Final Review Procedure Expert Determinations, namely: *VerySign Inc. v. United TLD Holdco Ltd. String Confusion Objection Final Review Determination*;¹⁸ *Commercial Connect LLC v. Amazon EU Sarl String Confusion Objection Final Review Determination*;¹⁹ and *Independent Objector v. Ruby Pike, LLC Limited Public Interest Objection Final Review Determination*.²⁰
21. After deliberation, the Review Panel decided that it was necessary to consider, as part of the underlying case file, the exchange of correspondence which took place in December 2013 between the Applicant, the IO, the Expert and the ICC. This correspondence consists of:
- An email of 3 December 2013 (received on 4 December) from the Applicant purporting to “update” the Expert concerning the adoption of the Beijing Advice;
 - An email of 5 December 2013 from the IO objecting to the submission on both procedural and substantive grounds;

¹⁷ *Ibid.*

¹⁸ ICDR Case No. 01-15-0003-3822.

¹⁹ ICDR Case No. 01-15-0003-3821.

²⁰ ICC EXP. 600, online: <https://newgtlds.icann.org/sites/default/files/drsp/07sep16/determination-3-1-1505-15195-en.pdf>.

- An email of 11 December 2013 from the ICC stating that it was for the Expert to decide whether to admit the parties' further submissions into the proceedings;
 - A letter of 13 December 2013 from the Expert dismissing the further submissions on procedural grounds.
22. The correspondence referred to above is publicly available as a result of ICANN's transparency policy.²¹ The Review Panel also obtained from the ICC the date on which the Determination under review had been submitted to the ICC for scrutiny under the Rules, namely, 16 September 2013.²²

2.6. These Proceedings

23. ICANN's Request was filed with the ICC on 27 July 2017. ICANN sent a revised Request on 3 August 2017. The Review Panel was constituted on 27 September 2017 and the file transferred to it on 29 September 2017. The Panel reviewed the relevant documents, and deliberated through email exchanges and by telephone conferencing.
24. Pursuant to the Request, the Review Panel was not permitted to contact ICANN, the IO, or Corn Lake, which it did not.
25. On 14 November 2017 (within 45 days from the transmission of the file), a draft Determination was submitted to the ICC for scrutiny in accordance with the Rules.
26. At ICANN's request and with the agreement of the Panel, this Final Expert Determination is to be posted on ICC's web page dedicated to ICANN procedures.

²¹ The correspondence can be found, for example, in the IRP and the BGC Reconsideration case files: <https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en>; <https://www.icann.org/resources/pages/14-3-2014-01-30-en>.

²² Email from ICC to Review Panel, 20 October 2017.

3. THE PROCEEDINGS AND DETERMINATION UNDER REVIEW

3.1. The Proceedings before the Expert

27. The proceedings in the matter under review arose out of a community objection transmitted by the IO to the ICC on 13 March 2013.
28. On 12 April 2013, the ICC informed the parties that it was considering the consolidation of the Objection with two other matters initiated by the IO regarding applications for the .CHARITY string, and on 7 May 2013 notified the parties that it had consolidated the matters in question.
29. After a failed attempt to file a Response complying with the requirements of Article 11(e) of the Procedure, the Applicant transmitted by email a complying Response on 23 June 2013.
30. Having appointed the Expert on 4 July 2013, the ICC confirmed to the parties the constitution of the Panel (comprised of the Expert as the sole member) on 2 August 2013, and transmitted the file to the Expert on the same day.
31. On 2 August 2013, the IO requested leave to file an Additional Submission, to which the Applicant objected on 8 August 2013.
32. On 9 August 2013, the Expert invited each party to file an Additional Submission, the IO by 22 August and the Applicant by 2 September 2013.
33. Between 10 and 15 August 2013, the IO and the Applicant both requested brief extensions of time which resulted in the extension of the deadlines for Additional Submissions to 24 August 2013 for the IO and to 6 September 2013 for the Applicant.

34. The IO filed its Additional Submission on 22 August and the Applicant on 6 September 2013.
35. On 16 September 2013, the Expert submitted his draft Determination to the ICC.²³
36. On 3 December 2013, while the draft Determination was in the ICC scrutiny process under the Rules, the Applicant wrote to the ICC, the Expert and the IO to “update the Panel” on ICANN’s 29 October 2013 formal announcement of its decision to adopt the Beijing Advice, explaining that, as any successful applicant would now be compelled to impose the registration restrictions the IO had been arguing for to prevent material detriment, the IO’s Objection had become moot.²⁴
37. On 5 December 2013, the IO wrote to the Expert to object to the Applicant’s “unsolicited additional statement,” and, should the Panel accept the statement, to assert his right to respond. The IO added that in any event, the unsolicited statement only served to show a lack of consistency and coherence in the Applicant’s position.²⁵
38. On 11 December 2013, the ICC wrote to the parties indicating that it was for the Expert to decide whether to admit the parties’ further submissions.²⁶
39. On 13 December 2013, the Expert dismissed the further submissions including the substantive content of the IO’s response.²⁷

²³ This Review Panel asked the ICC to provide it with the date when the Expert submitted his draft Determination to the ICC for the purpose of scrutiny. The information was provided by email on 20 October 2017.

²⁴ This is referred to in the IRP Final Declaration, at p. 15, para. 6.46.

²⁵ See note 24, above.

²⁶ *Ibid.*

²⁷ *Ibid.*

40. On 9 January 2014, the three determinations in the consolidated proceedings were rendered. The IO's Objection was accepted only in respect of the Applicant, Corn Lake.²⁸

3.2. The Issues before the Expert

41. As a preliminary matter, while the IO confirmed in his Objection that he considered himself "to be impartial and independent" and that he was acting in "the best interests of the public who use the global internet," the Applicant questioned the impartiality and "true independence" of the IO in these proceedings.
42. Another preliminary matter raised by the Applicant was the question of standing. The Applicant argued that the IO lacked the standing required to bring the Community Objection.
43. The substantive issues before the Expert turned on the application of section 3.5.4. of the Guidebook, which sets out four tests that must be met cumulatively for a community objection to prevail. These yield four issues: whether the community invoked by the IO is a "clearly delineated community"; whether the community opposition is "substantial"; whether there is "a strong association between the community invoked and the ... string"; and whether the application creates "a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community."
44. The IO endeavoured to establish that his Objection met the four tests and the Applicant took the position that the IO had failed on each of the four tests.

²⁸ *Ibid.*

45. With respect to the fourth test, the material detriment test, the following new question arose for the Expert out of the events that unfolded after the filing of the last submissions contemplated in the timetable. In view of the adoption and imposition by ICANN of the registration restrictions that were at the heart of the controversy before the Expert over the material detriment test, should the Expert have re-opened the proceedings or otherwise taken account of the new facts?

4. REVIEW OF THE EXPERT DETERMINATION

4.1. Standard of Review

46. This Panel is to decide whether the Determination “was reasonable in light of [the] decisions in the other two consolidated matters through an appropriate application of the standard ... set forth in Module 3 of the Applicant Guidebook and in light of ICANN’s adoption of the GAC’s Beijing Communiqué requiring each successful applicant to impose registration restrictions.”²⁹
47. This Panel must therefore rely on the provisions of the Guidebook in deciding whether the Determination is reasonable. In doing so, however, this Panel must take into consideration the events surrounding the Beijing Communiqué that unfolded, in part, after the proceedings that led to the Determination were closed. The Panel is also invited to consider, as “background,” Final Review Procedure Expert Determinations that were rendered after the Determination.³⁰
48. This Panel will briefly assess all relevant sections of the Determination. Particular emphasis will be placed, however, on the Determination’s finding of “detriment,”

²⁹ ICANN Request, section XI.

³⁰ *Ibid.*

which the IRP Final Declaration that ultimately led to these review proceedings singled out as the potentially problematic element in the Determination.

49. This Panel will conduct its review of the Determination to assess whether its findings are reasonable, in light of the provisions of the Guidebook and the determinations in the consolidated cases, as well as of the adoption by ICANN of the Beijing Advice requiring each successful applicant to impose eligibility restrictions. If this Panel concludes that a finding of the Determination is not reasonable, it will state the reasons why, and will issue a final finding replacing the finding of the Expert.
50. This Panel notes at the outset that it was impressed with the overall quality and rigor of the Determination under review. In particular, the Expert manifestly takes careful account of the parties' representations and arguments as developed in the Objection, the Response and the Additional Submissions. The Expert carefully weighs the arguments made in those submissions, to which copious and detailed references are made in the Determination. As a result, the Panel will not rehearse the parties' positions on points other than those which may raise issues as to reasonableness.

4.2. The IO's Independence and Impartiality

51. In the course of the proceedings, the Applicant informally raised a challenge to the IO's impartiality and independence. Article 3.2.5. of the Guidebook explains that the IO "does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public." It further provides that an independent objector must "be and remain independent and unaffiliated with any of the gTLD applicants."
52. The basis for what the Expert treated as a challenge is a short paragraph on page 3 of the Applicant's Additional Submission, at the end of a section in which the Applicant

characterizes the IO's position on registration restrictions as overreaching. The paragraph reads as follows:

“Such overreaching, coupled with the fact that the IO devoted the bulk of his efforts toward gTLDs applied for by Donuts in particular, has caused applicant to question the Objector's true independence. Applicant has nothing further to add on that subject, and leaves it to the Panel to deny the Objection for its lack of merit, regardless of the IO's motives in bringing it”.

53. It is doubtful whether the Applicant's comment on the IO's independence was intended as a challenge. Understandably, out of caution, the Expert treated it as such, noting that the mere statement of the Applicant concerning the alleged targeting of Donuts' applications is not a basis in and of itself to question the IO's impartiality and independence under section 3.2.5. of the Guidebook. The Expert also noted that the consolidated cases before him showed that the IO did object to applications filed by other entities.
54. As the Expert correctly found, there is no basis in the record to challenge the IO's confirmation that he was acting exclusively in the best interest of the public. This Panel concludes, therefore, that the Expert's finding concerning the IO's independence and impartiality was reasonable.

4.3. The IO's Standing

55. The Applicant challenges the IO's standing to bring the Community Objection, arguing that he must act on behalf of a 'clearly delineated community' strongly associated with the relevant string and against a "highly objectionable" application.³¹

³¹ Response, pp. 6-7.

56. The Guidebook sets out in section 3.2.5. the “mandate and scope” for independent objectors. As the Expert explains, there are three elements: (i) “The IO is granted standing to file objections on th[e] enumerated grounds, notwithstanding the regular standing requirements for such objections...” (ii) “The IO may file objections against “highly objectionable” gTLD applications to which no objection has been filed”; and (iii) the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere”.
57. The Applicant treats all three elements as standing requirements. According to the Expert, however, the first element is a standing requirement (i.e.: being the IO within the meaning of the Guidebook), but not the other two. The third element, which does not mention standing, is framed as a condition of admissibility. The second element uses permissive language (“may file”) and is best understood as referring to a discretion to be exercised by independent objectors.
58. The Expert’s position is carefully explained and finds support in ICANN’s Explanatory Memorandum on the Description of Independent Objector for the New gTLG Dispute Resolution Process of 18 February 2009. This states: “It is anticipated that in each instance the Independent Objector would make an independent assessment as to whether an objection is warranted ... It is anticipated that the Independent Objector will have the discretion and judgment to only act in clear cases where the grounds for objection seem strong.”
59. The conclusion that this second element of the mandate refers to the Independent Objector’s discretion therefore seems reasonable. The Review Panel notes that the Expert’s approach to this issue is not universally followed.³² The standard of review

³² See, for example, *Independent Objector v. Ruby Pike, LLC* Limited Public Interest Objection Final Review Determination, *supra*, note 23, paras 56-58.

applied by this Panel, however, is one of reasonableness, not correctness. The Panel finds the conclusion on standing reasonable.

4.4. The Community Objection

60. As stated in Article 2(e)(iv) of the Procedure, a “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.”
61. In conducting its review of the Expert Determination on the merits of the Objection, this Panel refers to section 3.5. of the Guidebook, which provides that the adjudicator shall “use appropriate general principles (standards)” and may also refer “to other relevant rules of international law in connection with the standards.” More specifically, section 3.5.4 provides that, for a Community Objection to succeed, 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.
62. The findings of the Expert on the merits of the Objection are analysed below in the order in which the four tests are introduced in the Guidebook, namely, the Community test, the Substantial Opposition test, the Targeting test, and the Detriment test.

4.4.1. The Community Test

63. The community invoked by the IO is the “charity sector,”³³ which includes “all charitable institutions.”³⁴ The question for determination, as accurately framed by the Expert, is “whether the IO has proven to the Expert Panel that the ‘charity sector’ comprising all ‘charitable institutions’ constitutes a ‘clearly delineated community’.”³⁵
64. The Applicant insisted that the string itself should define a clearly delineated community.³⁶ As the Expert correctly understood, however, the issue set forth in the Guidebook is whether the “community *invoked by the objector* is a clearly delineated community.”
65. It was common ground before the Expert that the Guidebook does not provide a clear definition of the term “community.” The Guidebook refers, instead, to a list of five factors which an expert “could balance” in coming to a determination, “including but not limited to”:³⁷
- 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.

³³ Objection, para 9.

³⁴ Objection, para 11.

³⁵ Determination, para 117.

³⁶ Response, p. 8.

³⁷ Guidebook, s. 3.4.5.

66. As the Expert helpfully notes,³⁸ the IO and the Applicant agree that the distinctive element of a community is commonality among members, be it of interests or of characteristics, but they disagree about the degree of “cohesion” that is required: “For IO, ‘commonality of certain characteristics’ is sufficient whereas for Applicant cohesion rather than just a commonality of interests is required.”³⁹
67. The Expert relied on the 2007 ICANN Final Report on the introduction of New gTLDs, which concludes that “community should be interpreted broadly and will include, for example, and economic sector, a cultural community, or a linguistic community.”⁴⁰ This Review Panel notes that this broad interpretation of community, including the reference to “an economic sector,” is reflected in the Implementation Guidelines set out in 2008, which contemplate the determination by a panel of substantial opposition.⁴¹ To the Review Panel, it seems reasonable to assume that if an “economic sector” can potentially be understood as a community within the meaning of the program, so can the “charity sector.”
68. In the reconsideration proceedings before the BGC, the Applicant took issue with the Expert’s application of the factors set out in the Guidebook and listed above.⁴²
69. Concerning the list of factors, the Review Panel notes that the list of factors set out in the Guidebook is neither exhaustive nor determinative.

³⁸ Determination, para 119.

³⁹ Determination, para 119; and, notably, Objection, para 41; Response, p. 5.

⁴⁰ ICANN Generic Names Supporting Organization, “Final Report: Introduction of New Generic Top-Level Domains”, 8 August 2007 (approved 6 September 2007), available here: https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm#_Toc43798015.

⁴¹ ICANN Generic Names Supporting Organization, New gTLDs Summary – Principles, Recommendations & Implementation Guidelines, 22 October 2008, available here: <https://gnso.icann.org/en/issues/new-gtlds>.

⁴² IRP Final Declaration, pp. 27-28, paras 6.38-6.44.

70. With respect to public recognition, the Expert found that public comments made with respect to the Application indicate “that the charity sector is considered to exist separately from other sectors of activity.” This Review Panel notes that public comments came from both private organizations, such as the Association of Charitable Foundations, and public bodies, such as the Charity Commission for England and Wales and the Office of the Scottish Charitable Regulator.⁴³ The Expert also found that “[t]he existence in many jurisdictions, such as the UK, of regulators of the charity sector is an indication that that sector is capable of delineation and is considered publicly to be different from others.”⁴⁴
71. This last finding also goes to the second factor, which refers to formal boundaries, and what persons or entities form the community. The common characteristics of those comprising the charity sector are, according to the IO: their “charitable aims,” “often the status of a not for profit institution,” exemption “from a range of regulatory requirements that apply to for-profit entities,” and funding “through donations or public money.”⁴⁵ The Expert considered these common characteristics to be so “obvious” as to not require “the support of specific evidence to be found as facts.” The Review Panel notes that support for the conclusion can be found, in the underlying record, in the specific references made by the IO to the public comments collected by ICANN as part of the process.
72. Regarding the fourth factor, which relates to global distribution, the Expert took notice of the existence of regulators “in many jurisdictions,”⁴⁶ and recognized that the charity sector is global.⁴⁷

⁴³ Objection, paras 27, 29; all comments are available here:
<https://gtldcomment.icann.org/comments/feedback/applicationcomment/viewcomments>

⁴⁴ Determination, para 121.

⁴⁵ Objection, para 20.

⁴⁶ Determination, para 121.

⁴⁷ Determination, para 123.

73. The Review Panel finds that the Expert was properly guided by those factors and reasonably came to its conclusion on the Community test.

4.4.2. The Targeting Test

74. This Panel begins by noting that, in the reconsideration proceedings before the BGC, the Applicant did not challenge the application of the Targeting test by the Expert,⁴⁸ although it had argued before the Expert that the string itself had to define or denote a clearly delineated community.⁴⁹
75. Although the string itself need not define the community invoked by the objector, “a strong association” between the community invoked and the string must be established. This is also referred to as “targeting.” According to the IO, the charities and charitable institutions comprising the charity sector are included in the target defined by the Application.⁵⁰
76. The Expert appropriately made reference to the GNSO’s Implementation Guideline “P” to introduce the notion of implicit targeting relied upon by the IO.⁵¹ This Panel agrees with the Expert that “[w]hilst that Implementation Guideline P addresses specifically the Substantial Opposition test, its reference to the possibility of implicit targeting must logically apply equally to the Targeting test... .”⁵² Implicit targeting describes situations where an assumption of targeting is made or where there may be confusion by users over the use of the relevant string.

⁴⁸ IRP Final Declaration, pp. 27-28, paras 6.38-6.44.

⁴⁹ Response, p. 8; Applicant’s Additional Submission, p. 3.

⁵⁰ Objection, para 19.

⁵¹ GNSO’s Principles, Recommendations and Implementations Guidelines:

https://community.icann.org/display/DGNGSR/4.+New+gTLD+Principles%2C+Recommendations%2C+and+Implementation+Guidelines?preview=/49351666/49417096/New%20gTLD%20Principles_Reccs_Impl%20Guidelines.pdf

⁵² Determination, para 128.

77. The Application states that the applied-for gTLD is aimed at the “millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need.”⁵³ The Expert found in that statement an implicit reference to the “charity sector,” which is the community invoked by the IO. The Review Panel finds that the community invoked by the IO is clearly included in, and is not an insignificant component of, the Application’s explicit target.
78. The Expert found that a public association is strongly suggested by dictionary definitions of the word “charity” as “charitable institution.” This suggests a public association between the string .CHARITY and charitable institutions, which supports a legitimate belief that confusion may occur. The Expert explains that the Beijing Advice constitutes further evidence that the public would associate the string with charitable institutions. In the Advice, the sensitive nature of the string is directly and explicitly linked “to the regulated nature of the charity sector and level of implied trust from consumers invoked by the string.” In this Panel’s view, this is quite reasonably taken by the Expert to imply “the strong association” required by the Targeting test.
79. The Applicant argues that its target is much broader than charitable institutions and that the word “charity is a generic term with many other meanings.” This does not detract, as the Expert quite reasonably finds, “from the strong association between “.Charity” and the charity sector or the implicit targeting of “.Charity” to that sector.” The Applicant’s argument, as the Expert finds, only shows that the association between the string and the charity sector is not exclusive; the IO’s burden was to demonstrate a strong association, not an exclusive one.
80. This Panel finds that the Expert reasonably concluded that the IO’s burden, and thus the Targeting test, had been met.

⁵³ Application, s. 18A.

4.4.3. The Substantial Opposition Test

81. This Panel begins by noting that, in the reconsideration proceedings before the BGC, the Applicant did not challenge the application of the Substantial Opposition test by the Expert.⁵⁴

82. The Guidebook indicates that substantial opposition is to be to the application (rather than the applicant), and offers a list of factors for an expert to consider.⁵⁵ The Applicant urged the Expert to focus on the number of statements of opposition to the Application. The Expert found, reasonably in this Panel’s view, that “a mere numerical meaning for “substantial” would be wrong.

83. The Expert, after listing the statements of opposition to the Application filed with ICANN, acknowledged that the relative number of statements is not large and that they came from the same, or from similar jurisdictions, a fact which militates against a finding of substantial opposition. The Expert then analysed the statements more closely to find that “[t]his small number of opposition statements comes from bodies that are representative of a large number of members of the charity sector not only in jurisdictions where the regulation of charitable activities is historically strong, developed and well-established, but also in the case of ACC [the Association of Corporate Counsel, whose Not-for-profit Organizations Committee lends a voice to

⁵⁴ IRP Final Declaration, pp. 27-28, paras 6.38-6.44.

⁵⁵ Again, the list is neither exhaustive nor determinative: “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”.

over 1,400 in-house counsel practicing law in nonprofit institutions across the globe⁵⁶], worldwide.”⁵⁷

84. This Panel concludes that the Expert reasonably weighed the relevant factors to come to his finding that the Substantial Opposition test had been met.

4.4.4. The Detriment Test

85. Under this test an objector must demonstrate 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.”⁵⁸

86. According to the Guidebook, the factors that “could be used” by an expert in coming to a determination “include but are not limited to”:⁵⁹

- 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;

⁵⁶ Determination, para 141, 143.

⁵⁷ Determination, para 143.

⁵⁸ Guidebook, s. 3.5.4.

⁵⁹ *Ibid.*

- 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.

87. After laying out the test and referring to the relevant factors, the Expert analysed the public statements of opposition to the Application, which he found to be premised on “the importance of the global internet as a means of recognition and fund-raising for the charity sector”.⁶⁰ In the Expert’s view, the statements focus “on the need clearly to distinguish charitable organization from enterprises in particular for-profit in public giving and fund-raising activities,”⁶¹ and they “emphasise the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law.”⁶²

88. The Expert then took the view that the public statements of opposition, which were echoed by the IO, could not be ignored because:⁶³

“[T]hey point to an important characteristic of the targeted community (including its existence and its activities) that would be harmed if access to the “.Charity” string were not restricted to persons (whether incorporated entities, unincorporated associations or entities, foundations or trusts) which can establish that they are a charity or a not-for-profit enterprise with charitable purposes.”

89. Up to this point in the Determination, the Review Panel takes no issue with the Expert’s reasoning and findings, which are very similar to those in the determinations the Expert made in the consolidated cases, and certainly meet any test of reasonableness. At this point, however, there is a bifurcation in the Expert’s treatment of Corn Lake’s position and the position of the other two applicants, a bifurcation

⁶⁰ Determination, para 149.

⁶¹ Determination, para 150.

⁶² Determination, para 151.

⁶³ Determination, para 152.

which ultimately leads to the different results mentioned at the beginning of this Review Determination.

90. The Overview provided at the beginning of this Review Determination explains that the case under review here was consolidated with two other cases: the SLR case, and the EFL case. The SLR case was about the same string, .CHARITY; the EFL case was about .慈善, the Chinese Internationalized Domain Name for .CHARITY.
91. The New gTLD applications in the three consolidated cases were initially similar in that they were all framed as applications for an open registry, without the eligibility restrictions that the IO thought necessary to protect against the likelihood of material detriment. In all three cases, the applicants eventually changed their approach in response to objections or the Beijing Advice. The three applicants did so at different times in the process, however, as follows.
92. EFL, when it filed its response to the IO's community objection, was already prepared to change its approach and to commit to imposing appropriate eligibility restrictions. EFL laid out its new approach in its response, and provided a new PIC Spec as an annex to its response. This was eventually found satisfactory by the Expert for the purpose of dismissing the community objection.⁶⁴
93. SRL, for its part, was not yet prepared to change its approach and to commit to imposing appropriate eligibility restrictions when it filed its response. In its response, SRL held on to the open-registry concept, without eligibility restrictions, deeming that such restrictions were misplaced. In its additional submission of 6 September 2013, however, SRL completely changed its approach. By then it had amended its PIC Spec to include the expected registration restrictions. Like the original PIC Spec, the

⁶⁴ EFL Determination, para 129.

amended PIC Spec contained the following language: “We reserve the right to amend or change this PIC Spec once the details of the Program are finalized.”⁶⁵ SRL’s new position was eventually also found satisfactory by the Expert for the purpose of dismissing the community objection.⁶⁶

94. The Applicant took the same approach as SLR in its Response, holding on to the open-registry concept, without eligibility restrictions, and deeming that such restrictions were misplaced. However, unlike SRL, the Applicant did not change its central position in its Additional Submission. Even there it maintained that the .CHARITY string, which it acknowledged is sensitive, should be run under an open registry principle. In its Additional Submission, however, the Applicant did state that, should the Board adopt the GAC’s concerns about registration restrictions, then “Applicant of course would, as it must, abide by that decision”.⁶⁷ In its Additional Submission, Corn Lake’s statement is bolstered by evidence of its capacity and experience with respect to the preparation and submission of amended PIC Specs and the modification of registry agreements.
95. The additional submissions filed on 6 September 2013 marked the end of the procedural calendar informally set by the Expert for the exchange of submissions in the three cases. Although there was no formal closing of the proceedings, the determinations were expected to be submitted in draft form to the ICC within 45 days from the transmission of the file to the Expert, which took place on 2 August 2013. The Expert submitted his draft determinations on 16 September 2013, within the 45-day period.
96. On 29 October 2013 ICANN formally announced its intention to adopt the Beijing Advice and to impose eligibility restrictions that would apply to the .CHARITY string

⁶⁵ Response, Annex 2, para 3.

⁶⁶ SRL Determination, para 129.

⁶⁷ Additional Submission, p. 8. See also pp. 1-2, 10.

and its Chinese equivalent. This announcement came in the form of a letter from the Chair of the Board, Stephen Crocker, on behalf of the NGPC, to Heather Dryden, in her capacity as Chair of the GAC. Attached to the letter was a document describing how ICANN intended to implement the required safeguards through appropriate language in the PIC Spec of the New gTLD Registry Agreement. As with all ICANN documents, this was a public document.

97. The Applicant wrote on 3 December 2013 to update the Expert about the adoption of the Beijing Advice by ICANN and the Applicant's consequent adaptation of its PICs, as well as of the impact of this on the Objection.⁶⁸ The Applicant concluded that the Objection had thus become moot on this point (which, as the Applicant was to learn, was the only one the Expert relied upon to distinguish this case from the other two consolidated cases and to uphold the Objection). Nevertheless, by letter of 13 December 2013,⁶⁹ the Expert refused to admit into the record the new information proffered by the Applicant, and then went on to uphold the Objection. The ICC issued the Expert's determination in each of the three cases on 9 January 2014.
98. In the SRL and EFL determinations, after coming to the bifurcation point mentioned earlier, the Expert turned to the eligibility policy provided in the additional submission and the response respectively (an eligibility policy "which will be included in any registration agreement entered into ... with ICANN") and concluded that these policies responded "to the Detriment test concerns raised by the IO". On that basis the Expert dismissed the objection in both cases.⁷⁰
99. In the Determination under review, by contrast, the Expert noted that the Application "expressly avoids such a limitation and therefore the protection that the Expert Panel

⁶⁸ Available at <https://www.icann.org/resources/pages/14-3-2014-01-30-en>, Attachment 5.

⁶⁹ Available at <https://www.icann.org/resources/pages/14-3-2014-01-30-en>, Attachment 7.

⁷⁰ EFL Determination, para 129; SRL Determination, para 129.

considers should exist,”⁷¹ leading to a conclusion of likelihood of detriment and thus to the Objection being upheld against the Applicant. The Determination was thus rendered without consideration of ICANN’s 29 October 2013 announcement concerning the Beijing Advice, and, because of the Expert’s decision of 13 December 2013 to dismiss further submissions, without consideration of the Applicant’s statement that it was relying on the announcement and modifying its PICs.

100. The IRP Panel, which recommended the extension of the Review Procedure to the Determination, took no position on the correctness of the Expert’s decision of 13 December 2013 dismissing further submissions in the matter under review.⁷² This task falls to the Review Panel.
101. The Expert’s decision is in some respects understandable in light of procedural considerations. Indeed, the process is designed to be quick and provides a window of, normally, 45 days for an expert to come to a decision. In this case, there was no formal request by the Applicant, within the 45-day period, for leave to file additional submissions and for an extension of time. Moreover, re-opening proceedings can lead to abuse and the bane of endless proceedings. The Review Panel takes these considerations very seriously. They are akin to the underlying reasons why the principle of *res judicata* is universally recognized, and why procedural justice is, in key respects, as important as substantive justice.
102. Nonetheless, the Review Panel finds that it was not reasonable for the Expert to shut out the crucial information he received from the Applicant and to go on to uphold the Objection based on the likelihood of a detriment that at that point he should have known could not materialize. The Expert’s procedural decision itself is not determinative of this Panel’s finding, however. Even if this Panel were to deem

⁷¹ Determination, para 153.

⁷² IRP Final Declaration, p. 58, para 8.59.

reasonable the Expert's refusal to admit the further submissions, this Panel's conclusion about the outcome would be the same.

103. This Panel's conclusion would be the same because the fact of the 29 October 2013 ICANN announcement was a matter of public record from the day it was made. Even if the 3 December 2013 "update" from the Applicant were deemed, for the purpose of discussion, to have been properly rejected by the Expert, it still establishes for this Panel that the Expert was aware of the public announcement of ICANN's decision. This awareness, combined with the statement already on record that Corn Lake "of course would, as it must, abide by that decision," made unreasonable the finding of a likelihood of detriment. The Applicant had already stated it would abide by ICANN's registration requirements if imposed; the fact that such requirements were going to be imposed was now in the public record; and both parties as well as the Expert were aware of that fact. In that situation, one could not reasonably distinguish the Corn Lake position from that of the other two applicants for the purpose of the Detriment test. In all three cases, the imposition of the registration restrictions by ICANN removed the likelihood of detriment.
104. The Review Panel carefully weighed several considerations before coming to its determination.
105. The Expert might for example have felt unable to call back a determination he had already submitted to the ICC. However, during the period between 16 September 2013, when the Expert submitted his draft determinations, and 9 January 2014, when the determinations were issued by the ICC, the determinations were not final. They were undergoing scrutiny as draft determinations under the ICC process. This means that they could be modified, based on an exchange between the DRSP and the Expert, as part of that process. During that period of time, subject to the DRSP's grant of a time extension, it was possible for the Expert to re-open the proceedings, which incidentally, and consistently with the Procedure, had not been formally closed, even

though all of the steps contemplated in the Procedure and the procedural calendar had been taken. Re-opening the proceedings would also have been consistent with ICC's email of 13 December 2013 reserving to the Expert the decision whether to admit further submissions by the parties.⁷³

106. Another consideration that gave pause to the Review Panel is that ICANN's 29 October 2013 letter was not equivalent to the adoption of the Beijing Advice by the Board. This formally took place on 5 February 2014, by resolution of the Board. Until that moment there could be no absolute certainty that the Board would indeed pass the necessary resolution. The announcement, however, came from the Chair of the Board, and the nature and publicity of the New gTLD process were such that Board adoption of the policy was a quasi-certainty. The announcement, at a minimum, was clearly intended by ICANN to be relied upon. The possibility that the announcement might not be followed through does not seem to have been seriously raised in any of the documents the Review Panel considered. Moreover, the Applicant made it clear to the Expert that it was indeed relying on the announcement.

107. A further consideration is that the Guidebook actually refers to the Applicant's "intent" for the purpose of the detriment analysis. Among the factors that can be weighed in the analysis, one finds this: "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." Looking at the three Applications in the consolidated cases, it is apparent that none of the applicants initially intended anything but an open registry. There was evidence in each of the applications that there was no intent to act in accordance with the interests of the community as understood by the Expert. This situation evolved differently for each of the applicants during the process, as outlined earlier. Ultimately, however, the "intent" which, according to the

⁷³ Available at <https://www.icann.org/resources/pages/14-3-2014-01-30-en>, Attachment 7.

Guidebook, could guide experts in assessing the likelihood of material detriment was here entirely taken over by the quasi-certainty that registration restrictions would be imposed irrespective of the Applicant’s original “intent”. As the IRP Panel suggestively put it, the ICANN announcement had a “levelling effect,”⁷⁴ which, in this Panel’s view, made it unreasonable for the Expert to treat the case under review differently from the other two consolidated cases and to uphold the Objection.

108. For the foregoing reasons, the Review Panel finds that the Expert’s conclusion concerning the Detriment test of the Community Objection was unreasonable. The “concerns regarding the likelihood of a detriment to the rights or legitimate interests of the charity community, to users, and to the general public” had satisfactorily been addressed by ICANN’s decision to impose registration restrictions.
109. The Expert’s conclusion concerning the Detriment test was the only ground for upholding the Community Objection in the case under review. In this Final Review Procedure, the Panel finds that the IO had not met the Detriment test and that, as a result, the Community Objection must be dismissed. The disposition of the Determination is replaced accordingly.

5. FINAL DETERMINATION

110. Although reasonable in all other respects, the Determination in case EXP/395/ICANN/12 was unreasonable in finding that the Detriment test of the Community Objection had been met.
111. The Determination in case EXP/395/ICANN/12 is reversed, and is replaced with this Final Expert Determination.

⁷⁴ IRP Declaration, p.58, para 8-58; p. 63, paras 8.72, 8.73.

112. The Independent Objector's Community Objection is dismissed and Corn Lake, LLC, is the prevailing party.

113. Pursuant to the Request, ICANN bears all the costs of these review proceedings.

Place of the proceedings: Paris, France

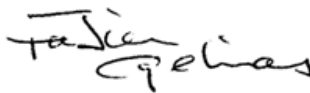
Date: 12 December 2017



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