

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

CASE No. EXP/399/ICANN/16

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

EXCELLENT FIRST LIMITED

(CAYMAN ISLANDS)

(Consolidated with Cases No.

EXP/395/ICANN/12

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ CORN LAKE, LLC (USA)  
and

EXP/400/ICANN/17

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) vs/ SPRING REGISTRY  
LIMITED (GIBRALTAR))

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**

**NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”)  
DISPUTE RESOLUTION PROCEDURE**

**EXP/399/ICANN/16  
(consolidated with EXP/395/ICANN/12 & EXP/400/ICANN/17)**

**BETWEEN**

**PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (France)**

Objector

**AND**

**EXCELLENT FIRST LIMITED (Cayman Islands)**

Applicant

**EXPERT DETERMINATION**

**BEFORE**

Mr. Tim Portwood

Expert Panel

TABLE OF CONTENTS

1. The Parties .....	5
2. The Expert Panel .....	6
3. Summary of the Expert Determination Proceeding .....	7
4. Issues to be Determined by the Expert Panel.....	9
4.1. IO’s Impartiality and Independence .....	9
4.1.1. IO’s Position .....	9
4.1.2. Applicant’s Position .....	9
4.2. IO’s Standing .....	9
4.2.1. IO’s Position .....	9
4.2.2. Applicant’s Position .....	9
4.3. The Community Objection .....	10
4.3.1. IO’s Position .....	10
4.3.2. Applicant’s Position .....	18
5. Expert Panel’s Determination .....	21
5.1. IO’s Independence and Impartiality .....	21
5.2. IO’s Standing .....	21
5.3. The Community Objection .....	23
5.3.1. The Community Test.....	24
5.3.2. The Targeting Test .....	25
5.3.3. The Substantial Opposition Test .....	25
5.3.4. The Detriment Test .....	28
5.3.5. Conclusion .....	30
5.4. Costs of the Expert Determination .....	30
5.5. Expert Panel’s Determination .....	30

## TABLE OF ABBREVIATIONS

Abbreviation	Definition
ACC	Association of Corporate Counsel
Applicant	Excellent First Limited
Applicant Additional Written Statement	The Additional Written Statement submitted by Applicant on 6 September 2013
Application	The new gTLD application by Applicant “.慈善” (Charity), application ID: 1-961-6109
Centre	The International Centre for Expertise of the International Chamber of Commerce
Community Objection	An objection to a gTLD application falling with the definition of “Community Objection” in section 3.2.1 of Module 3 of the Guidebook (and also contained in Article 2(e)(iv) of the Procedure)
Costs	As per the definition in Article 14(a) of the Procedure
Expert	Mr. Tim Portwood
Expert Panel	The expert panel comprising the Expert.
Guidebook	The gTLD Applicant Guidebook issued by ICANN (version 2012-06-04)
GNSO	Generic Names Supporting Organisation
ICC Practice Note	The ICC Practice Note on the Administration of Cases under the Procedure.

IO or Objector	The Independent Objector (Prof. Alain Pellet)
IO Additional Written Statement	The Additional Written Statement submitted by IO on 22 August 2013.
Objection	The Objection Form dated 12 March 2013 transmitted by IO to the Centre on 13 March 2013 by email.
Parties	The IO and the Applicant
Party	The IO or the Applicant as the case may be
Procedure	The New gTLD Dispute Resolution Procedure issued by ICANN as the Attachment to Module 3 of the Guidebook
Response	The Response (as per the meaning set out in Article 11(b) of the Procedure) submitted by Applicant on 6 June 2013
Rules	The Rules for Expertise of the International Chamber of Commerce (in force as from 1 January 2003)

**1. THE PARTIES**

1. IO:

PROF. ALAIN PELLET, Independent Objector, an individual residing at:

16, avenue Alphonse de Neuville,  
92380 Garches,  
France.

2. IO is represented in this Expert Determination proceeding by:

Ms Héloïse Bajer-Pellet  
15, rue de la Banque,  
75002 Paris,  
France

Mr. Daniel Müller  
20, avenue du Général de Gaulle,  
78290 Croissy sur Seine,  
France

Mr. Phon van den Biesen  
VDBK Advocaten,  
De Groene Bocht,  
Keizersgracht 253,  
Amsterdam, 1016 EB,  
The Netherlands

Mr. Sam Worsworth  
Essex Court Chambers,  
24 Lincoln's Inn Fields,  
London WC2A 3EG,  
United Kingdom

3. Applicant:

EXCELLENT FIRST LIMITED, a company incorporated under the laws of the Cayman Islands, with offices at:

Offshore Incorporations (Cayman) Limited,  
Scotia Centre 4<sup>th</sup> Floor,  
PO Box 2804,  
George Town, Grand Cayman,  
KY1 1112 Grand Cayman

4. Applicant is represented in this Expert Determination proceeding by:

Pam Little  
Unit 403 Block B,  
Horizon International Tower,  
No. 6 Zhichun Road,  
Haidian District,  
Beijing 100088,  
P.R. China

**2. THE EXPERT PANEL**

5. On 4 July 2013 and pursuant to Article 3(3) of Appendix 1 to the Rules, the Chairman of the Standing Committee appointed Mr. Tim Portwood as the Expert. In accordance with Article 13 of the Procedure, the Expert is the sole member of the Expert Panel.
6. On 2<sup>nd</sup> August 2013, the Centre acknowledged receipt of payment of the Parties' respective shares of the advance payment of the estimated Costs and confirmed the full constitution of the Expert Panel.
7. The Expert's contact details are as follows:

Mr. Tim Portwood  
Bredin Prat,  
130, rue du Faubourg Saint Honoré,  
75008 Paris,  
France

**3. SUMMARY OF THE EXPERT DETERMINATION PROCEEDING**

8. The present Expert Determination proceeding concerns IO's Community Objection to Applicant's application for the new gTLD ".慈善" (Charity).
9. The Expert Determination is governed by and has been conducted in accordance with the Procedure and the Rules, supplemented by the ICC Practice Note.
10. IO transmitted to the Centre its Objection on 13 March 2013.
11. On 28 March 2013, the Centre informed IO that it had conducted the administrative review of the Objection pursuant to Article 9 of the Procedure and confirmed that the Objection was in compliance with Articles 5 to 8 of the Procedure and with the Rules. The Objection was therefore registered for processing under Article 9(b) of the Procedure.
12. The Centre wrote to the Parties on 12 April 2013 informing them that the Centre was considering consolidating the Objection with two other cases, namely EXP/395/ICANN/12 – a Community Objection filed by IO against an application by Corn Lake, LLC (USA) for a new gTLD ".Charity" – and EXP/400/ICANN/17 – Community Objection filed by IO against an application by Spring Registry Limited (Gibraltar) for a new gTLD ".Charity".
13. On 7 May 2013, the Centre informed the Parties that it had decided to consolidate the Objection with the two other above-referenced cases.
14. The Chairman of the Standing Committee having appointed the Expert on 4 July 2013, on 2 August 2013, the Centre confirmed to the Parties the full constitution of the Expert Panel (comprising the Expert as sole member). On the same day, the Centre forwarded the file to the Expert Panel.
15. On 2 August 2013, IO wrote to the Expert Panel requesting leave to file an Additional Written Statement.
16. On 9 August 2013, having considered the Parties' submissions, the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the Parties each to submit an Additional Written Statement in accordance with the following timetable: IO to file his Additional Written Submission on or before 22 August 2013 and Applicant to file its Additional Written Submission on or before 2 September 2013.



17. On 10 August 2013, IO wrote to the Expert Panel requesting an extension of two days to the timetable for the Additional Written Submissions.
18. On 11 August 2013, Applicant wrote to the Expert Panel stating that it had no objection to IO's requests for a 2 day extension to the timetable.
19. On 13 August 2013, the Expert Panel granted IO's request, extending the deadline for the filing of IO's Additional Written Submission to 24 August 2013 and the deadline for the filing of Applicant's Additional Written Submission to 4 September 2013.
20. On 15 August 2013, the applicant in EXP/395/ICANN/12 requested a further extension of 2 days (i.e., 6 September 2013) for the filing of its additional written statement to which IO indicated on the same day that it had no objection and that such extension would benefit all of the applicants in the consolidated cases, including the Applicant. That extension was therefore extended to Applicant.
21. On 22 August 2013, IO filed by email its Additional Written Statement.
22. On 22 August 2013, the Expert Panel acknowledged receipt of IO's Additional Written Statement and confirmed that the deadline for the filing by Applicant of its Additional Written Submission was 6 September 2013.
23. On 6 September 2013, Applicant filed by email its Additional Written Statement.
24. No hearing took place.
25. The Expert Panel submitted the draft Expert Determination to the Centre for scrutiny under Article 21(b) of the Procedure within the time limit contained in Article 21(a) of the Procedure.
26. In accordance with Article 5(a) of the Procedure, the language of the proceedings is English.
27. In accordance with Article 6(a) of the Procedure, all communications by the Parties with the Centre and the Expert Panel were submitted electronically.

#### **4. ISSUES TO BE DETERMINED BY THE EXPERT PANEL**

##### **4.1. IO's Impartiality and Independence**

###### ***4.1.1. IO's Position***

28. IO confirms that he is acting exclusively in the best interests of the public who use the global internet and not in accordance with what he himself might prefer or with self-interest<sup>1</sup>.

###### ***4.1.2. Applicant's Position***

29. Applicant does not contest IO's impartiality and independence.

##### **4.2. IO's Standing**

###### ***4.2.1. IO's Position***

30. IO confirms that he meets the standing requirements and other admissibility conditions in section 3.2.5 of the Guidebook<sup>2</sup>.

###### ***4.2.2. Applicant's Position***

31. Applicant argues that IO has failed to show that the Application is "highly objectionable" as required by section 3.2.5 of the Guidebook relying on a single public comment – the GAC Early Warning from Australia which according to Applicant is not an opposition comment but intended to open a dialogue for the Applicant to clarify its intended protections to address the potential for misuse of the applied-for string<sup>3</sup>.

---

<sup>1</sup> IO Additional Written Statement, para. 2.

<sup>2</sup> Objection, paras. 1 to 3.

<sup>3</sup> Response, pages 5 to 6.

### 4.3. The Community Objection

32. IO's objection is a Community Objection to Applicant's Application of ".慈善" (Charity) as a new gTLD.
33. The Expert Panel is therefore to determine whether there is substantial opposition to the Application from a significant portion of the community to which the gTLD string ".慈善" (Charity) may be explicitly or implicitly targeted (Article 2(e)(iv) of the Procedure).
34. Under section 3.5.4 of Module 3 of the Guidebook, the Expert Panel must be satisfied that IO has proven that (i) the community invoked by IO is a clearly delineated community; (ii) community opposition to the Application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string (".慈善" (Charity)); and (iv) 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.

#### 4.3.1. IO's Position

35. According to IO, an objector making a Community Objection must satisfy four tests under section 3.5.4 of the Guidebook. IO states these four tests as: (a) a Community test, namely that the community invoked by the objector is a clearly delineated community; (b) a Substantial opposition test, namely that community opposition to the application is substantial; (c) a Targeting test, namely that there is a strong association between the community invoked and the applied-for gTLD string; and (d) a Detriment test, namely that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant of the community to which the string may be explicitly or implicitly targeted<sup>4</sup>.
36. IO argues that the four tests are met<sup>5</sup>. He submits that the applied-for gTLD string ".慈善" (Charity) targets the charity sector such that the Targeting test is satisfied, even though the Application has not been framed as a community based TLD for the benefit of the charity community<sup>6</sup>. IO states that the charity sector constitutes a clearly delineated

---

<sup>4</sup> Objection, para. 6.

<sup>5</sup> Objection, para. 7.

<sup>6</sup> Objection, paras 7 & 9.

community in the sense of the Guidebook, thereby fulfilling the Community test. IO claims that the opposition to the Application is substantial, meaning that the Substantial opposition test is met<sup>7</sup>. Finally, IO pleads that the Application creates a likelihood of material detriment to the rights and legitimate interests of the charity community, fulfilling the Detriment test<sup>8</sup>.

37. IO points out that the Guidebook does not limit Community Objections to applications for a new gTLD string made as a community gTLD<sup>9</sup>, referring to section 1.2.3.2 of the Guidebook: “All applicants should understand that a formal objection may be filed against any application on community grounds, even if the applicant has not designated itself as community-based or declared the gTLD to be aimed at a particular community”<sup>10</sup>.

#### 4.3.1.1. *The Community Test*

38. IO’s position is that he must show that there exists a community identified by the objector comprising a group of persons clearly delineated from others including internet users in general<sup>11</sup>.
39. According to IO, the community in question is the charity sector<sup>12</sup>, comprising all charitable institutions, including those that are specifically registered or regulated in some form in the states where they operate such that they must be not for profit institutions<sup>13</sup>.
40. IO points out that the Guidebook does not provide a clear definition of the term “community”. Instead, the Guidebook refers to a non-exhaustive list of factors to which the Expert Panel may refer including the recognition of the community at a local/global level, the level of formal boundaries, the length of existence, the global distribution, or the size of the community<sup>14</sup>.

---

<sup>7</sup> Objection, para 7.

<sup>8</sup> Ibid.

<sup>9</sup> Objection, para. 9.

<sup>10</sup> Objection, para. 10.

<sup>11</sup> Objection, para. 13.

<sup>12</sup> Objection, para. 17.

<sup>13</sup> Objection, para. 18.

<sup>14</sup> Objection, para. 13 referencing section 3.5.4 of the Guidebook.

41. For IO, the distinctive element of a community is the commonality of certain characteristics, whatever they might be<sup>15</sup>.
42. Referring to Evaluation question No. 20 of the Guidebook, Attachment to Module 2, IO argues that a relevant criterion is whether the group of persons comprising the community can be clearly delineated from the others – including internet users in general<sup>16</sup>. Relying on the 2007 ICANN Final Report, IO argues that “community” should be given a broad interpretation<sup>17</sup>. Recognition of the community as such (by its members and others) is an important factor in this regard<sup>18</sup>.
43. IO points out that charities and charitable organizations (i.e., the charity sector) are included in the “charity business and charity organizations in Chinese community” and “businesses, entrepreneurs or individuals who believe that caring and giving is a great way to shorten the great disparity between the rich and the poor” are explicitly targeted by the Applicant<sup>19</sup> and that charities and charitable organizations exist everywhere in the world including in Chinese speaking countries<sup>20</sup>.
44. The common characteristics of the persons comprising the charity sector identified by IO are such persons’ “charitable aims”, “often the status of a not for profit institution”, exemption from a range of regulatory requirements applicable to for-profit entities and funding through donations or public money<sup>21</sup>.
45. IO accepts that the charity sector is not an organized community with an entity dedicated to the community and its activities, but argues that the meaning of community in the Guidebook is not limited to organized communities and covers less structured communities, like those based on a common place of origin or a common language or a common activity or common set of goals or interests or values<sup>22</sup> and refers to the 2007 ICANN Final Report which confirms that “community should be interpreted broadly

---

<sup>15</sup> Objection, para. 14.

<sup>16</sup> Objection, para. 18.

<sup>17</sup> Objection, para. 14.

<sup>18</sup> Objection, para. 16.

<sup>19</sup> Objection, para. 17.

<sup>20</sup> Objection, para 18.

<sup>21</sup> Ibid.

<sup>22</sup> Objection, para. 19.

and will include, for example, an economic sector, a cultural community, or a linguistic community”<sup>23</sup>.

46. IO points out that the charity sector is delineated as a recognizable community, distinct from others by both its members and the public, referring to public comments made on the community ground point<sup>24</sup>.
47. IO argues that the less developed role of regulation in China (as compared to other jurisdictions) does not detract from the shared goals and values delineating the charity community<sup>25</sup> although it should be noted that Chinese regulation of the charity sector is increasing and that the early development stage of charities and charitable organizations in Chinese speaking countries is no reason to exclude them from the otherwise clearly delineated charity community<sup>26</sup>.
48. IO underlines that his position is confirmed by the Advice contained in the GAC’s Beijing Communiqué dated 11 April 2013<sup>27</sup> which considered the charity community as a market sector delineated by clear and/or regulated entry requirements on account of the level of implied trust from consumers and risk of consumer harm associated with its activities<sup>28</sup>. The GAC included “.慈善” (Charity) in its list of sensitive strings necessitating safeguard measures<sup>29</sup>.
49. Applicant adds that the community in question extends beyond the geographical boundaries of Chinese speaking countries and the limited nature of the offering of the applied-for string as defined by the Applicant is not a yardstick for delineating the community<sup>30</sup>.

---

<sup>23</sup> Objection, para. 14.

<sup>24</sup> Objection, para.18 ;

<sup>25</sup> IO Additional Written Statement, para. 7.

<sup>26</sup> IO Additional Written Statement, para. 8.

<sup>27</sup> <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> -Annex 1 to IO Additional Written Statement; IO Additional Written Statement, para 12.

<sup>28</sup> IO Additional Written Statement, para. 12.

<sup>29</sup> Ibid.

<sup>30</sup> IO Additional Written Statement, para. 9.

#### 4.3.1.2. *The Targeting Test*

50. IO argues that the “.Charity” string targets the charity community (comprising charities and charitable organizations)<sup>31</sup> and that therefore the Targeting test is met<sup>32</sup>.
51. IO argues that the focus of the test is not what the Applicant intends but is what the average internet user perceives and expects from the string<sup>33</sup>.
52. IO notes that in the Application, Applicant explicitly targets “charity business and charity organizations in Chinese community” and “businesses, entrepreneurs or individuals who believe that caring and giving is a great way to shorten the great disparity between the rich and the poor” – which include all charitable institutions<sup>34</sup>. By virtue of Applicant’s own statements, therefore, the “.Charity” string explicitly targets the charity sector<sup>35</sup>.
53. He refers to Implementation Guideline P of the 2007 ICANN Final Report which indicates that “implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use”<sup>36</sup>. The focus of the test is not what the Applicant intends but is what the average internet user perceives and expects from the string<sup>37</sup>.
54. IO accepts that there may be issues in delimiting the members of the charity sector at the peripheries of the community as a matter of domestic law, but this does not detract from the existence of the charity sector as a community within the meaning of the Guidebook<sup>38</sup>.

---

<sup>31</sup> Objection, paras 7 and 17.

<sup>32</sup> Objection, paras 7 and 12.

<sup>33</sup> Objection, para. 11.

<sup>34</sup> Objection, para. 17.

<sup>35</sup> Objection, para. 12.

<sup>36</sup> Objection, para. 11.

<sup>37</sup> Ibid.

<sup>38</sup> IO Additional Written Statement, para. 11.

55. IO concludes that according to Applicant's own statements and the general use of the term "charity" by the public, there is a strong association between the charity sector and ".慈善" (Charity)<sup>39</sup>.

#### 4.3.1.3. *The Substantial Opposition Test*

56. According to IO, the test whether there is "substantial opposition within the community" to the Application is largely casuistic<sup>40</sup>.

57. IO refers to the non-exhaustive list of factors in the Guidebook which an Expert Panel may use to identify substantial opposition to the Application<sup>41</sup> noting that the factors are more useful in cases of well-organized and structured communities than in cases like the present of communities lacking organizational structures or clear representation<sup>42</sup>.

58. IO argues that a mere numerical criterion – the number of voiced oppositions to the Application – was not the intent of the Guidebook, the word "substantial" meaning not simply a large number but also something of "considerable importance" or "considerable worth"<sup>43</sup>. IO points out that since a condition for admissibility of an objection by an independent objector is the existence of at least one public comment in opposition, that must mean that an objection can succeed if there is just one such public comment<sup>44</sup>. According to IO, therefore, the material content of comments and oppositions and the rights and interests of those expressing those comments and oppositions must be taken into account<sup>45</sup>.

59. IO accepts that only one comment in opposition has been posted on the public comments website by the Charity Commission for England and Wales but points out that applications relating to the English language equivalent of the applied-for string have raised other opposition comments from the National Council for Voluntary Organizations and the Association of Charitable Foundations, the first being the regulator of charities in England and Wales and the last representing a membership of

---

<sup>39</sup> Objection, para. 12.

<sup>40</sup> Objection, para. 21.

<sup>41</sup> Objection, para. 22.

<sup>42</sup> Objection, para. 23.

<sup>43</sup> Objection, para. 24.

<sup>44</sup> IO Additional Written Statement, para. 15.

<sup>45</sup> Objection, para. 24.



some 330 charitable trusts and foundations in England and Wales<sup>46</sup>. IO refers also to the Australian member of the GAC having issued an Early Warning regarding “.Charity”<sup>47</sup>. According to IO, the common underlying concern of such opposition comments and Early Warning is the potential harm to the system of trust on which charities and charitable are largely dependent that would be caused in the absence of sufficient protection mechanisms such as strict eligibility criteria for users of the string<sup>48</sup>.

60. IO admits that the opposition to the Application has largely emanated from the UK and Australia but argues that the concerns that have been voiced are substantively substantial, are “without doubt ... of much more general application”<sup>49</sup> applicable to the Chinese language equivalent of “charity” (as specifically stated by the comment of the Charity Commission for England and Wales)<sup>50</sup> and include the views of one or more governments (referencing section 1.1.2.4 of the Guidebook)<sup>51</sup>.
61. IO argues that no conclusions can be drawn from non-objections since an independent objector is required to demonstrate substantial opposition from the comments that have been made<sup>52</sup>.

#### 4.3.1.4. *The Detriment Test*

62. IO emphasizes that the Detriment test requires a finding of “a likelihood of detriment”<sup>53</sup> and not of actual detriment.
63. According to IO, the likelihood of detriment must be created by the Application and therefore must take into account the Applicant and the security protection for user and community interests that Applicant has proposed or intends to adopt<sup>54</sup>.
64. IO underlines that the likelihood of detriment must be to the rights or legitimate interests of the community or to users more widely, referring to Implementation Guideline P<sup>55</sup>.

---

<sup>46</sup> Objection, para. 27.

<sup>47</sup> Objection, para. 30.

<sup>48</sup> Ibid ; IO Additional Written Statement, para. 17.

<sup>49</sup> Objection, para. 32; IO Additional Written Statement, para 17.

<sup>50</sup> Objection, para 28.

<sup>51</sup> Objection, para. 32.

<sup>52</sup> IO Additional Written Statement, para. 18.

<sup>53</sup> Objection, para. 33.

<sup>54</sup> Objection, para. 34.

He refers to the guidance in the Guidebook and summarizes that detriment may include harm to the reputation of the community, interference with the community's core activities, economic or other concrete damage to the community or significant portions of the community<sup>56</sup>.

65. IO points out that the Expert Panel may take into account a variety of factors, including the dependence of the community on the DNS for its core activities, the intended use of the gTLD as stated in the Application, the importance of the rights and interests exposed for the community targeted and for the public more generally<sup>57</sup> and whether the Applicant intends to act in accordance with those rights and interests<sup>58</sup>.
66. IO argues, in line with the GAC's Beijing communiqué of 11 April 2013<sup>59</sup>, that the charity sector relies on public trust without which its gift and other funding would be threatened. Public regulation exists in many jurisdictions precisely to protect and nurture that trust<sup>60</sup>. Administration of the “.慈善” (Charity) string outside such or similar protections and safeguards could, according to IO, citing the Charity Commission of England and Wales, lead to “scope for confusion, misunderstanding and, perhaps, deliberate abuse, resulting in turn in significant damage to charities if public support dropped as a result”<sup>61</sup>.
67. IO asserts that the Application does not address the specific needs of the charity community and points to three factors that demonstrate a likelihood of detriment to that community: (i) Applicant has not framed the Application as a community based gTLD, thereby avoiding certain consequences for the evaluation of the Application and the terms (such as user registration requirements) under which the gTLD would be operated<sup>62</sup>; (ii) no eligibility criteria have been proposed in the Application such that the string will be open to a broad range of businesses etc. that are not charitable organizations – Applicant's undertaking to develop and publish its policy for registration and use of second-level domain names within the TLD being non-specific, inadequate to address the raised concerns and seems to be based upon applying different criteria to

---

<sup>55</sup> Objection, para. 33.

<sup>56</sup> Objection, para. 34.

<sup>57</sup> Ibid.

<sup>58</sup> Objection, para. 35.

<sup>59</sup> IO Additional Written Statement, para. 20 and Annex 1 thereto.

<sup>60</sup> Objection, para 36.

<sup>61</sup> Objection, para. 38.

<sup>62</sup> Objection, para. 40.

different jurisdictions which would fail to protect both users and charities<sup>63</sup>; and (iii) the security mechanisms proposed by Applicant would operate ex-post facto and thus would not meet the specific needs of the charity community as is shown by their similarity to other security mechanisms proposed by Applicant's parent for strings with different features<sup>64</sup>.

#### 4.3.2. Applicant's Position

68. Applicant states that an objector making a Community objection must satisfy four tests to succeed, namely, the Community test, the Targeting test, the Substantial Opposition test and the Detriment test<sup>65</sup>.
69. Applicant's position is that only the targeting test is met by IO<sup>66</sup>. It argues, however, that the Objection must be rejected in light of the eligibility criteria it has submitted to ICANN for inclusion in all registration agreements to be entered into with ICANN as well as the safeguards that would be applied to ensure compliance with those eligibility criteria by all registry operators<sup>67</sup>.

##### 4.3.2.1. The Community Test

70. Applicant argues that IO has the burden of proof that there is a clearly delineated "charity" community and has failed for a number of reasons<sup>68</sup>.
71. Firstly, Applicant argues that the proper level of public recognition of the applied-for string should be the local (Chinese) one given the geographic targeting of the string and that in China the charity sector is emerging such that it does not qualify as "clearly delineated" at this time<sup>69</sup>.

---

<sup>63</sup> Objection, paras 41 to 43.

<sup>64</sup> Objection, paras 44 & 45.

<sup>65</sup> Response, pages 7 & 8.

<sup>66</sup> Response, page 8.

<sup>67</sup> Applicant Additional Written Statement, para. 6.

<sup>68</sup> Response, page 9.

<sup>69</sup> Ibid.

72. Secondly, Applicant claims that in Chinese speaking countries there is none of the regulation and formality which typifies the charitable sector in developed countries such that there are no formal boundaries around the community and an array of different persons of different characteristics operating in that sector<sup>70</sup>.
73. Thirdly, Applicant points out that the charitable sector in China is relatively new having emerged in the last 5 years<sup>71</sup>.
74. Fourthly, Applicant argues that although one of the factors identified in the Guidebook is the global distribution of the community, this factor does not apply if the community is territorial<sup>72</sup>.
75. Fifthly, Applicant argues that there is no register of charities in China and therefore not certainty of the number of persons making up the community with substantial crossover of the types of persons who may in developed countries be involved in charitable activity between different economic sectors in China<sup>73</sup>.
76. Sixthly, Applicant points out the English definition of the word “charity” relied upon by IO is neither the Guidebook’s definition nor of relevance to charitable activity in China which lacks delineation<sup>74</sup>.
77. Finally, Applicant challenges IO’s reliance on the GNSO 2007 Final Report for the proposition that the term “community” be interpreted broadly and refers to the ICANN Board’s rejection of the idea that community name definitions be expanded to include other sectors and regulated businesses in 2011 (<http://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>). Applicant relies on Modules 3 and 4 of the Guidebook to argue that a narrow interpretation of “community” is required<sup>75</sup>.

---

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Response, page 10.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

#### 4.3.2.2. *The Substantial Opposition Test*

78. Applicant argues that there is no opposition at all from those to which the string may be targeted<sup>76</sup>.
79. For Applicant, because the community is not delineated there can be and indeed are no opposition comments from that community – the comments relied upon being from outside the targeted community<sup>77</sup>.
80. Applicant argues that the meaning of substantial is limited to the numerical and representative criteria and does not include subjective criteria citing the Attachment to Module 2 (Evaluation questions and Criteria) where it is stated that “it is ICANN’s goal to make the criteria and evaluation as objective as possible”<sup>78</sup>.
81. Applicant adds in any event that the opposition comments express, subjectively, generalized concerns that do not reflect substantial opposition which are not relevant to the Application given its eligibility criteria and other safeguards<sup>79</sup>.

#### 4.3.2.3. *The Targeting Test*

82. Applicant accepts that the targeting test is met<sup>80</sup>.

#### 4.3.2.4. *Detriment Test*

83. Applicant argues that given the non-delineation and emerging nature of the charity sector in Chinese speaking countries there can be no showing of detriment<sup>81</sup>.

---

<sup>76</sup> Response, page 11.

<sup>77</sup> Response, pages 11 & 12.

<sup>78</sup> Response, page 12.

<sup>79</sup> Response, page 14.

<sup>80</sup> Response, page 8.

<sup>81</sup> Response, page 15.

84. In its Additional Written Statement<sup>82</sup>, Applicant argues that rejection of the Objection has been put beyond doubt on account of the eligibility criteria that it has submitted to ICANN as part of its Public Interest Commitments Specification which will be included in any registry agreement which Applicant would sign with ICANN if its Application is successful and which Applicant will therefore be contractually obliged to implement at the risk of legal action under the Public Interest Commitments Dispute Resolution Procedure in the event of breach. Applicant states that its eligibility criteria defines a “very selective group of the Chinese Internet Community” targeted by the applied-for string which will be in place before formal launch of the gTLD. Eligibility will be limited to “charitable organizations or institutions” which must represent and warrant that they are authorized to conduct charitable activities in the country where the would-be registrant is located and operates and that its registration and use of the applied-for domain name will comply with applicable laws and regulations. Applications must be supported by documentary evidence which will be verified by the registry operator who will subsequently conduct periodic checks to ensure continued compliance. Breach will result in cancellation.
85. Applicant states that the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN<sup>83</sup>.

## 5. EXPERT PANEL’S DETERMINATION

### 5.1. IO’s Independence and Impartiality

86. There being no challenge to IO’s independence and impartiality, the Expert Panel accepts IO’s confirmation of the same.

### 5.2. IO’s Standing

87. The “mandate and scope” for independent objectors are set out in section 3.2.5 of the Guidebook and comprise 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*

---

<sup>82</sup> Applicant Additional Written Statement, paragraph 6.

<sup>83</sup> Applicant Additional Written Statement, pages 4 & 5.

*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"*.

88. Only one of these elements, the first cited above, is described in terms of "standing". This is how IO reads the Guidebook, making no reference to the second element that the Application is "highly objectionable" and treating the third, at least one publicly stated opposition to the Application, as a condition to an objection by an independent objector being admissible. Applicant on the other hand treats all three elements as going to "standing" but only develops argument on the second and third.
89. Given the phraseology chosen by the authors of the Guidebook, the Expert Panel prefers IO's view and considers that there is only one criterion for the standing of an IO to make a Community Objection: namely that he or she is an independent objector within the meaning of the Guidebook, as is the case here, to whom the regular standing requirements for the particular objection do not apply.
90. The third element is not, strictly speaking, therefore, a requirement of standing, but operates as a condition of admissibility for any objection by an independent objector.
91. The Expert Panel disagrees with Applicant that IO relies only upon the GAC Early Warning (from Australia) as the public comment in opposition for purposes of section 3.2.5 of the Guidebook. IO refers to and relies on public comment in opposition to applications for the English equivalent gTLD, the contents of which raise precisely the same opposition concerns as those raised by IO to the ".慈善" (Charity) gTLD. Such public opposition comments satisfy therefore in the Expert Panel's view the third admissibility condition in section 3.2.5 of the Guidebook. The Expert Panel notes further and in any event that Applicant admits on page 6 of its Response that the ".慈善" (Charity) Application raised one substantive public comment in opposition (albeit not from a Chinese language organization, nor one located in the target geographic market)". That is sufficient for this condition to be satisfied.
92. The drafting of the second element is different from the first (phrased in terms of standing) and the third (phrased in terms of a negative condition) and uses permissive language: *"may file objections ..."*. The Guidebook drafters' decision not to craft this element as a standing requirement or negative condition distinguishes it from the first and third. That choice of different language should be given meaning.
93. That meaning can be drawn from the purpose behind the introduction of independent objectors in the new gTLD dispute resolution procedure as stated by ICANN in its Explanatory Memorandum on the Description of Independent Objector for New gTLD

Dispute Resolution Process dated 18 February 2009<sup>84</sup>. The role of independent objectors is stated to be the answer to the question “what will be done if there is an application for a highly objectionable name but there are no objections within the process?”. The Explanatory Memorandum uses various formulations for what is meant by “highly objectionable” including “clearly objectionable”, “controversial applications”, “highly controversial strings”, “valid objections” and “strings considered objectionable across many jurisdictions”. Whilst the formulation varies, therefore, the purpose is clear: to have a means of dealing with applications which raise issues that should be determined within the dispute resolution procedure but which, for whatever reason, have not attracted an objection by a person satisfying the regular standing criteria.

94. That purpose raises the more important question for the Expert Panel as to whether satisfaction of the “highly objectionable” criterion is an issue for determination *in limine*, on the merits or at all. The Explanatory Memorandum is helpful. It 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*”. The Expert Panel concludes, therefore, that this second element of the mandate refers to the discretion given to the independent objector over when to act and an indicator of how that discretion should be exercised. It is not therefore a criterion of standing to make or admissibility of an objection.
95. The Expert Panel determines, therefore, that IO has standing to make this Objection.

### 5.3. The Community Objection

96. In order for his Objection to succeed, IO bears the burden of proving that four tests are met: (a) a Community test, namely that the community invoked by the objector is a clearly delineated community; (b) a Substantial opposition test, namely that community opposition to the application is substantial; (c) a Targeting test, namely that there is a strong association between the community invoked and the applied-for gTLD string; and (d) a Detriment test, namely that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant of the community to which the string may be explicitly or implicitly targeted.

---

<sup>84</sup> <http://www.newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v2.pdf>



### 5.3.1. *The Community Test*

97. Pursuant to section 3.5.4 of the Guidebook, IO has the burden of proving to the Expert Panel that *“the community invoked by the objector is a clearly delineated community”*.
98. The “community” in question is the one invoked by the objector – it is not the community targeted by the string, the applicant or the application.
99. The objector in this case is IO. The community invoked by IO is “the charity sector” comprising all “charitable institutions”.
100. The question for determination, therefore, is whether IO has proven to the Expert Panel that the “charity sector” comprising all “charitable institutions” constitutes a “clearly delineated community”.
101. The Guidebook does not provide a definition of “clearly delineated community” but lists five factors that an Expert Panel may balance when making its determination. That list is neither exhaustive, conclusive nor imperative. None of the cited factors goes to the heart of what is a “community” but each assists in identifying a “community” when it exists: public recognition of the community, level of formal boundaries, length of existence, global distribution and number of members.
102. Whilst the Expert Panel takes note of Applicant’s arguments regarding the geographic limitation of the community targeted by the Application, such arguments are not directly relevant to the Community test as defined in the Guidebook. The Expert Panel is in any event not convinced that the targeted community can be so limited not only because use of the Chinese language oversteps those boundaries but also because the charity sector both within and outside those boundaries shares common goals and values including the shared global need for public trust and confidence identified by IO.
103. Delineation of the community is not limited to the existence of regulation of its members although this could be and indeed is a factor indicating that a community exists. Although regulation of the sector in Chinese speaking countries is new and developing, it is an indication that the community does indeed exist. Likewise, whilst the sector has only a few years of existence as being the subject to regulation, this is one factor which might militate against clear delineation but is weakened as such by the general mirroring of regulation in developed countries.
104. Indeed, the 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. The Expert Panel acknowledges differences in definition of

charitable institutions and their regulation around the world which leads to a problem of boundary definition and ascertainment of global distribution. However, it is of the view that such differences are at the periphery of the community definition and are not therefore conclusive. ICANN recognizes (for instance in its Final Report of 2007) that precise definition of communities is unnecessary. The Expert Panel notes Applicant's reference to the ICANN Board's 2011 Notes on the GAC New gTLDs Scorecard in respect of the 2007 Final Report but disagrees with Applicant's view since the Board concluded in 2011 that "the GAC can provide input on any application for any reason, eliminating the need for specific definitions" which was the reason not specifically to expand the community definition to refer to sectors and regulated businesses. In other words, ICANN's Board did not exclude the definition of a "community" by reference to a sector or regulated business activity.

105. The public comments made with respect to this and the other ".Charity" applications indicate that publicly the charity sector is considered to exist separately from other sectors of activity.
106. The Expert Panel notes that Applicant has itself in its eligibility criteria provided a definition of the charity sector which is consistent with the community delineated by IO. This supports the conclusion below.
107. Balancing these various factors and considerations, the Expert Panel finds that the charity sector, comprising all charitable institutions, constitutes a clearly delineated community within the meaning of section 3.5.4 of the Guidebook. The "Community test" has been passed therefore by IO.

### *5.3.2. The Targeting Test*

108. There is no dispute that the Targeting test is met.
109. The Expert Panel is therefore satisfied that IO has proven that the requirements of the Targeting test are satisfied.

### *5.3.3. The Substantial Opposition Test*

110. Substantial opposition is not defined in the Guidebook other than to indicate that the opposition is to be to the application (as opposed to the applicant). Instead, section 3.5.4 of the Guidebook provides a list of factors which the Expert Panel may balance to

determine whether substantial opposition to the Application exists. That list is neither exhaustive, imperative nor conclusive.

111. IO and Applicant disagree over the meaning of “substantial”. IO argues that “substantial” may refer to the number of statements of opposition relative to the composition of the community and/or to the substantive importance or worth of the statements of opposition. Applicant considers that the factors listed in section 3.5.4 of the Guidebook should be applied in accordance with their terms which exclude the substantive subjective importance of any given view.
  
112. A review of the factors listed in section 3.5.4 indicates that a mere numerical meaning for “substantial” would be wrong. Those factors include not only the relative number of statements of opposition but also the representative nature of those expressing opposition and the recognized weight or stature of the expressions of opposition. The Expert Panel disagrees therefore with Applicant that only objective criteria are to be applied.
  
113. IO relies upon public comments from the Charity Commission for England and Wales expressed directly against the applied-for string and from the National Council for Voluntary Organizations, the Association of Charitable Foundations and the Office of the Scottish Charitable Regulator (as part of a legal rights objection) against applications for the English language equivalent of the applied-for string. The Charity Commission is the regulator of charities in England and Wales. The Association of Charitable Foundations represents some 330 charitable trusts and foundations in England and Wales. The National Council for Voluntary Organizations represents just under 10,000 voluntary organizations (not all charitable institutions) in the UK. The Office of the Scottish Charitable Regulator is the regulator of charities in Scotland.
  
114. In addition IO refers to public comments by the Australian member of the GAC (in the form of an Early Warning). The Australian member of the GAC is a representative of the Australian government.
  
115. The Expert Panel is not convinced by Applicant’s argument that these comments are largely irrelevant because they do not relate specifically to the applied-for string. The Guidebook requires a finding that IO has proven substantial opposition from the community identified by IO. The opposition comments relate to the English equivalent of the applied-for string and therefore raise precisely the same concerns for the community invoked by IO as the Chinese (or any other language) version of that string as the GAC Early Warning (which references the “.慈善” (Charity) string specifically) makes clear. In the Expert Panel’s view those comments are therefore to be taken into account when considering whether the Substantial Opposition test has been passed.

116. The Charity Commission for England and Wales, the Office of the Scottish Charitable Regulator, the Association of Charitable Foundations and the National Council for Voluntary Organizations state their opposition on the potential harm to the system of trust on which charities and charitable giving are dependent if the “.Charity” string were to be run by a for-profit organization – arguing that had the Application been made as a community-based application their concerns would be assuaged given the status requirements for a community-based Applicant. Similar concerns are expressed by the Australian member of the GAC specifically with respect to the “.慈善” (Charity) string.
117. Among the other public opposition comments made to ICANN<sup>85</sup> in respect of the English equivalent of the applied-for string are opposition from the ACC which has over 30,000 members (in-house counsel) employed by over 10,000 organizations in more than 75 countries. The Association’s Not-for-profit Organizations Committee offers a collective voice to over 1,400 in-house counsel practising law in nonprofit institutions across the globe. In addition to concerns over abuse (for which the ACC proposes two types of safeguards), the ACC points to the need for protection *“given the intimate and obvious connection between [.Charity] and our members’ organizations that operate in the philanthropy field”*.
118. Applicant’s focus on non-objecting stakeholders is unhelpful and not referenced in the Guidebook. Indeed, without evidence as to why stakeholders have not filed objections no helpful conclusions can be drawn.
119. The relative number of statements of opposition is small. Those statements come from the same or similar common law jurisdictions. These are two factors that militate against a finding that there is substantial opposition.
120. This small number of opposition statements comes from bodies that are representative of a larger number of members of the charity sector not only in jurisdictions where regulation of charitable activities is historically strong, developed and well-established but also in the case of ACC, worldwide. These are factors which militate in favour of a finding that there is substantial opposition.
121. The fact that the opposition raised by the different statements is substantively similar does not detract from the number of statements or from their representative nature or relative importance.

---

<sup>85</sup> <http://gtldcomment.icann.org/comments-feedback/applicationcomment/viewcomments>

122. On balance, the Expert Panel is satisfied that IO has provided evidence of substantial opposition to the Application such that the requirements of the Substantial opposition test are met.

#### 5.3.4. *The Detriment Test*

123. Pursuant to section 3.5.4 of the Guidebook it is for IO to prove that the Application (or rather use of the applied-for gTLD as contemplated by 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.

124. The test requires evidence of a likelihood of material detriment and not evidence of actual detriment – which would be impossible given the prospective nature of the objection process.

125. Evidence of a likelihood of something happening – cause and effect occurring in the future – is inherently difficult. It is no doubt for this reason that the Guidebook focuses on a variety of factors (none of which is imperative or conclusive) that IO may prove to lead to the conclusion that material detriment is likely. These factors include the dependence of the community on the DNS for its core activities, the intended use of the gTLD as stated in the Application, the importance of the rights and interests exposed for the community and the public, and whether the Applicant intends acting in accordance with those rights and interests.

126. The various public statements of opposition to the Application and to the applications for the English equivalent of the applied-for string are all premised on the importance of the global internet as a means of recognition and fund-raising for the charity sector. It is therefore generally accepted that the DNS is important for a core activity of the community.

127. Those public statements of opposition all focus on the need clearly to distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. They point out the absence, prior to the introduction by Applicant of its eligibility policy, of any limitation in the Application of the “.慈善” (Charity) string to not-for-profit or charitable organizations. This concern is the origin of the suggestion in the public statements of opposition that the “.慈善” (Charity) string should be treated only as a community-based gTLD.

128. The public statements of opposition identify the rights and interests of the community and the public that are exposed to the risk of harm as the need of the charity sector for

public funding to finance its activities; the trust and confidence of the public in the charity sector that donations will be used for the stated charitable ends. They point out that those rights and interests are protected outside the internet by public regulation of recourse to public giving for charitable purposes. They, and IO, emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law.

129. It is the Expert Panel's view that the eligibility criteria defined by Applicant which will be included in any registration agreement entered into by Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel's view to the Detriment test concerns raised by IO. In particular, the eligibility criteria that will be applied by Applicant defines a "very selective group of the Chinese Internet Community" targeted by the applied-for string and will be limited to "charitable organizations or institutions" which must represent and warrant that they are authorized to conduct charitable activities in the country where the would-be registrant is located and operates and that its registration and use of the applied-for domain name will comply with applicable laws and regulations. Applications will have to be supported by documentary evidence which will be verified by the registry operator who will subsequently conduct periodic checks to ensure continued compliance. Breach of the eligibility criteria will result in cancellation. In short, registration will be limited to members of the charity sector as defined by the local law where the registrant operates.
130. The Expert Panel notes that according to Applicant the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN<sup>86</sup>.
131. Provided that Applicant's undertaking is honoured, the Expert Panel considers, therefore, that there would be no material detriment as identified by IO to the charity sector – registrants being limited to the members of that sector.
132. In view of the foregoing, the Expert Panel finds that IO has failed to prove that the Detriment test has been met.

---

<sup>86</sup> Applicant Additional Written Statement, pages 4 & 5.

### **5.3.5. Conclusion**

133. Having reviewed the Parties' submissions and supporting evidence and for the foregoing reasons, one of the four tests not having been proven, the Expert Panel rejects IO's Community objection against the Application.

### **5.4. Costs of the Expert Determination**

134. Article 14(e) of the Procedure provides which of the Parties shall bear the Costs.

135. The Objection has been rejected.

136. In accordance with Article 14(e) of the Procedure, the advance payment on Costs made by Applicant is therefore to be reimbursed to it.

### **5.5. Expert Panel's Determination**

137. In light of the above and in accordance with Article 21(d) of the Procedure, I hereby render the following expert determination:

- i. The Independent Objector's Objection is rejected and therefore the Applicant Excellent First Limited prevails.
- ii. The advance payment of Costs made by Applicant shall be reimbursed to it by the Centre pursuant to Article 14(e) of the Procedure.

Done in Paris

9 January 2014



---

Mr. Tim Portwood  
Expert Panel