

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

CASE No. EXP/500/ICANN/117

UNIVERSAL POSTAL UNION

(SWITZERLAND)

vs/

CHARLESTON ROAD REGISTRY INC.

(USA)

(Consolidated with cases No.

EXP/494/ICANN/111

UNIVERSAL POSTAL UNION (SWITZERLAND) vs/ VICTOR DALE, LLC (USA)

and

EXP/496/ICANN/113

UNIVERSAL POSTAL UNION (SWITZERLAND) vs/ WHITEPAGES TLD LLC (USA)

and

EXP/497/ICANN/114

UNIVERSAL POSTAL UNION (SWITZERLAND) vs/ GMO REGISTRY, INC. (JAPAN))

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 CHAMBER OF COMMERCE  
INTERNATIONAL CENTRE FOR EXPERTISE  
EXP/500/ICANN/117  
(c. EXP/494/ICANN/111, EXP/496/ICANN/113, EXP/497/ICANN/114)

**EXPERT DETERMINATION  
(Community Objection)**

In the matter

**UNIVERSAL POSTAL UNION (Switzerland)**

vs/

**Charleston Road Registry Inc. (United States)**

Issued by the Expert Panel composed of  
Professor Catherine KESSEDJIAN, Expert

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## ACRONYMS AND DEFINITIONS

### General

Appendix III:	Appendix III to the Rules, Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure
Centre:	The ICC Centre for Expertise
Guidebook:	ICANN gTLD Applicant Guidebook, Module 3 (version of 4 June 2012)
ICANN 2007 Report:	ICANN Final Report on the Introduction of New Generic Top-Level Domains, 8 August 2007, last updated 4 September 2009 (referred to in section 3.2.1. of Module 3)
ICC Practice Note:	ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure
Module 3:	Module 3 of the ICANN gTLD Applicant Guidebook
Procedure:	Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure
Rules:	The Rules for Expertise of the ICC
UPU:	Universal Postal Union or the Objector
CRR	Charleston Road Registry Inc. or the Applicant

### Pleadings and Other Procedural Elements

Annex (followed by a number):	Annexes to the Applicant's response
Annex (followed by a letter and 27 August 2013)	Annexes to Applicants' answer to the Expert's request for clarification
Applicant:	Charleston Road Registry Inc. or CRR
Closed gTLD:	A gTLD which is proposed to be operated for the sole benefit of the Applicant
DNS:	Domain Name System
DNSSEC:	Domain Name System Security Extensions
DPO:	Designated Postal Operator
Established Institution:	An Institution, as defined in section 3.2.2. of Module 3
Exhibit (followed by number):	Annexes to the Objector's Objection
GAC:	Governmental Advisory Committee to ICANN
IO:	The Independent Objector appointed by ICANN
Objection:	The Objection filed by UPU on 13 March 2013
Objector:	UPU
Response:	The response to the Objection filed by CRR on 31 May 2013
Sponsored gTLD:	A gTLD in the meaning defined by the ICANN 2007 Report
USPS	United States Postal Service

## I. INTRODUCTION

### A. THE PARTIES

1. The Objector

**UNIVERSAL POSTAL UNION**

Mr. Ricardo Guilherme Filho

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3000 Berne 15

Switzerland

[ricardo.guilherme@upu.int](mailto:ricardo.guilherme@upu.int)

hereinafter referred to as “UPU” or “the Objector”

2. The Applicant:

**Charleston Road Registry Inc.**

Ms Sarah Falvey

1600 Amphitheatre Parkway

Mountain View, CA 94043

United States

hereinafter referred to as “CRR” or “the Applicant”

**represented by**

Katten Muchin Rosenman LLP

Mr. Brian Winterfeldt

2900 K Street NW

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United States

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3. The Objector and the Applicant are hereinafter collectively referred to as “**the Parties**”.

### B. THE EXPERT PANEL

4. By letter of 10 July 2013, the Centre informed the Parties that the Chairman of the Standing Committee appointed the Expert Panel on 1 July 2013, pursuant to Article 3(3) of Appendix I to the Rules, the Expert appointment was made in the person of Prof. Catherine Kessedjian.
5. On 12 July 2013, the Applicant objected to the appointment of the Expert.
6. On 16 July 2013, the Expert answered the concerns expressed by the Applicant regarding her independence and impartiality.

7. The Applicant answered on 19 and 23 July 2013.
8. On 7 August 2013, the Centre confirmed the appointment of the Expert.
9. The Expert Panel is composed of one Expert:

**Prof. Catherine Kessedjian**

19 villa Seurat  
Boîte/Porte B  
75014 Paris  
France

## **C. THE BACKGROUND OF THE DISPUTE**

### **1. The New gTLDs**

10. After a long consideration with several rounds of public comments and consultation, ICANN has decided to open the way for a large number of new generic top-level domain names (“gTLDs”), while they were before very limited in number (22 as of 13 June 2012). The goal set by ICANN is to “open up the top-level of the Internet namespace to foster diversity, encourage competition and enhance the utility of the DNS”<sup>1</sup>.
11. On 13 June 2012, ICANN publicly released a listing of approximately 1900 new gTLDs Applications. These Applications were made by persons and entities that want to manage the new gTLDs in a manner described in the Applications, only part of which is known by the public.
12. After all Applications were published, there was a period for objections from persons and entities that opposed the attribution of some of the new gTLDs.
13. ICANN also appointed an Independent Objector (“IO”) in the person of Professor Alain Pellet. The present case is not stemming out of an IO’s objection.
14. The present dispute arose out of UPU’s Objection to the .mail new gTLD for which CRR filed an application posted on 13 June 2012, under reference N° 1-1141-82929.
15. Before going into the details of the Objection and the Response, it is worth mentioning that this dispute is a “**Community Objection**”, as defined by Article 2(e)(iv) of the Procedure and further explained in the Applicant Guidebook. We will set out below the tests which

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<sup>1</sup> Preamble to Applicant Guidebook, p.2.

must be met for the Objection to prevail as set out in Module 3 of the Applicant Guidebook<sup>2</sup>.

## **2. The Agreement to the Dispute Resolution Mechanism**

16. By filing an Application, an Objection or a Response under the Dispute Resolution mechanism defined by ICANN, both the Objector and the Applicant agree on the set of procedural rules listed in the Centre's letter of 13 August 2013, all of them being available on the Centre's website. For the sake of clarity, these rules are:

- The Rules for Expertise of the ICC ("Rules")
- Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure ("Appendix III")
- ICC Practice Note on the Administration of Cases ("ICC Practice Note")
- Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure")
- Module 3 of the gTLD Applicant Guidebook ("Guidebook").

17. Particularly, the Parties agree that the Expert Determination is binding upon them.

18. It is unclear, however, whether the Expert Determination is binding upon ICANN. This point need not be decided because it falls outside the scope of this Expert Determination.

## **3. The Objection and the Response**

19. UPU filed the Objection to the .mail gTLD Application by CRR on 13 March 2013.

20. The Centre acknowledges receipt of the Objection on 18 March 2013, which was registered for processing on 5 April 2013, according to Article 9(b) of the Procedure.

21. During the month of April 2013, there was discussion between the Parties and the Centre as to the possible consolidation of the present case with other cases filed for the same .mail gTLD, according to Article 12 of the Procedure. Consolidation was requested by UPU and the Applicant did not oppose.

22. On 3 May 2013, the Centre wrote to the Parties informing them that it decided to proceed with the consolidation of the present case with three other cases relating to the .mail gTLD,

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<sup>2</sup> See, notably, p.7 and 8 below.

namely cases EXP/494/ICANN/111, UPU vs. Victor Dale LLC; EXP/496/ICANN/113, UPU vs. WhitePages TLD LLC; EXP/497/ICANN/114, UPU vs. GMO Registry Inc.

23. Therefore, the present case was prepared in a consolidated manner. However, this Determination was drafted separately, as instructed by the Centre.

#### **D. THE SCOPE OF THE PRESENT EXPERT DETERMINATION**

24. The present Expert Determination is limited to the examination of the standards defined by ICANN for a **Community Objection** in Module 3.

25. Module 3 deals with Community Objection in three different parts.

26. First, section 3.2.1. describes the grounds for objection, including the Community Objection, and refers the reader to the ICANN report on the policy development process for the new gTLDs, report dated 7 August 2007, available on line on ICANN's website, for "the rationales for these objection grounds"<sup>3</sup>. This report is referred below as the ICANN 2007 Report<sup>4</sup>.

27. Second, section 3.2.2.4. describes who is eligible to file a Community Objection and defines further which factors could be taken into consideration to decide whether the Objector is an Established Institution and whether it has an ongoing relationship with a clearly delineated community.

28. Finally, section 3.5.4. defines four (4) tests which the Expert Panel must take into consideration in order to decide whether the objection prevails. These four tests are, as follows:

- The objector must be an established institution with an ongoing relationship with 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

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<sup>3</sup> This is the report referred to in Article 2(e) of the Procedure.

<sup>4</sup> It is to be noted that the online version of the ICANN 2007 Report mentions it was last updated on 4 September 2009.

- 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.
29. The four tests mentioned in the preceding paragraph are cumulative, i.e. if any one of them is not met by the Objector, the Objection must be rejected.
30. It must also be stressed that the burden of proof lies with the Objector (Article 20(c) of the Procedure).
31. The overall philosophy of the Community Objections transpires from the Public Comment Summary prepared by ICANN and dated 21 February 2011<sup>5</sup>. Notably, ICANN emphasizes that “the ultimate goal of the community-objection process is to prevent the misappropriation of a community label by delegation of a TLD and to ensure that an objector cannot keep an applicant with a legitimate interest in the TLD from succeeding.” (p.94 and again p.104 of the on line version).

## **II. THE COURSE OF THE EXPERT DETERMINATION PROCEEDINGS**

### **A. THE EXPERT MISSION, LANGUAGE AND TIMETABLE**

32. According to the Centre’s letter of 13 August 2013, the requirement for a written “expert mission” is waived in accordance with point 6 of the ICC Practice Note.
33. According to the same letter, the Expert Panel could have decided to establish such a document. However, after due consideration, the Expert Panel decided not to do so.
34. Pursuant to Article 5(a) of the Procedure, the language of the submissions and proceedings is English.
35. Pursuant to Article 6(a) of the Procedure, the correspondence between the Parties, the Expert and the Centre was entirely submitted in electronic form.
36. Pursuant to Article 4(d) of the Procedure, the place of the proceedings is Paris, France.
37. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the constitution of the Expert Panel. The Centre considers that the Panel is constituted when the Expert is appointed, the parties have paid their respective advances on costs in full and

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<sup>5</sup> Available on ICANN’s website.

the file is transmitted to the Expert. In this case, the Panel was constituted on 13 August 2013 (i.e. the date on which the file was transmitted to the Expert). Accordingly, the Centre and the Expert were to make reasonable efforts to ensure that her determination was rendered no later than 27 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure), bearing in mind, however, that the proceedings were stayed for some time.

38. On 17 September 2013, the Centre wrote to the Parties requesting additional advance payments and, therefore, stayed the proceedings until further notice.

39. On 1<sup>st</sup> October 2013, the Centre resumed the proceedings after having received the additional payments from the Parties.

40. In accordance with Article 21(b) of the Procedure, the Expert Panel sent the draft Determination to the Centre on 4 November 2013.

## **B. PARTIES' SUBMISSIONS**

41. The Expert Panel decided the present case according to the following documents filed by the parties:

- The Objection filed by UPU on 13 March 2013 with 20 exhibits. On 14 March 2013, UPU replaced the content of Exhibit 17, requesting that the “new exhibit 17” be taken into consideration instead of the one filed with the Objection.
- The Response filed by the Applicant 31 May 2013 with 21 annexes, numbered 1 to 21.
- The Applicants' amended answer of 27 August 2013 to the Expert's request for clarification of 21 August 2013, accompanied by 8 annexes numbered A to H<sup>6</sup>.
- The Objector's comment of 30 August 2013, on the Applicants' answer, with one annex numbered annex A<sup>7</sup>.

42. According to the Procedure, both the Objection and the Response and all of the exhibits and annexes were transferred to the Expert Panel in electronic form.

43. Pursuant to Article 19 of the Procedure, the Expert Panel decided not to hold a hearing.

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<sup>6</sup> To distinguish these annexes from those filed with the initial response by the Applicant, they will be referenced « Answer of 27 August 2013, Annex X ».

<sup>7</sup> For the sake of clarity, Annex A will be referenced hereinafter as Exhibit A.

44. The Expert Panel decided to request additional evidence from the Parties on 21 August 2013. The Parties filed their answer and comment as described in § 41 above.

### **III. THE DISPUTE**

#### **A. THE OBJECTOR'S MAIN ARGUMENTS**

##### **1. UPU has standing as it is an established institution which represents a “clearly delineated community”**

45. UPU argues that it is an Established Institution, in the meaning of section 3.2.2. of the Guidebook, since it is in existence as an intergovernmental organization for over 118 years and is, since 1948, a specialized agency of the United Nations. It is composed of 192 member countries which have designated altogether 199 DPOs (Exhibit 1).

46. UPU argues that it serves the Postal Community which is a clearly delineated community as requested by the Guidebook. UPU acts via a number of bodies and the Universal Postal Congress, held every four years (Exhibits 3 and 5). It also claims that it serves the general public because “the Postal Community functions to protect the interests of the public in strong, secure and trustworthy mail services and to facilitate international cooperation in the mailing field” (Objection, p.8).

##### **2. Community opposition to the application is substantial**

47. UPU's mandate is, among others, “to stimulate the lasting development of efficient and accessible universal postal services of quality, in order to facilitate communication between the inhabitants of the world” (Objection, p.7). UPU's mandate also directs the organization to adopt “fair common standards and the use of technology, the cooperation and interaction among stakeholders, the promotion of effective technical cooperation and the satisfaction of customers' changing needs” (Objection, p.7).

48. Because of that mandate, several Posts have asked the UPU to file the Objection “with the approval of the Director General”. In consequence, UPU argues that “the filing of this Objection by the UPU on behalf of the Postal Community alone demonstrates substantial opposition to the Application from the Postal Community” (Objection, p.10).

49. In order to prove that there is substantial opposition from the Postal Community, UPU argues that five Posts filed over eighty Public Comments against the Application (Exhibit 7), having invested “significant time, efforts and funds” for that purpose. Among the Posts

opposed to the Application is USPS which handles more than 40% of the world's mail volume (Objection, p.10).

50. Therefore, according to the UPU, there is a substantial opposition by the Community invoked.

### **3. There is a strong association between the community invoked and the .mail string**

51. UPU argues that the operation and interests of the Postal Community are implicitly targeted by the proposed gTLD .mail because it threatens to interrupt the smooth and secure provision of mail services (Objection, p.8).

52. UPU argues further that the Applicant, which is wholly owned by Google Inc., intend to “provide the marketplace with direct association to the term ‘mail’ which is intended to be short for ‘email’” (Objection, p.11). According to UPU, the Applicant intends to restrict second-level domains in the .mail string only to verified email service operators (Objection p.11). UPU adds that the Applicant intend to create a direct association in the mind of the public, but that the same public does already associate the term “mail” with the inherently governmental function provided by the members of the Postal Community (Objection, p.12).

53. UPU also claims that the public associates the term “mail” with the goods and services provided by members of the Postal Community (Objection, p.12 and 18, Exhibit 13). In most countries, “mail” and “post” are associated, says UPU, and they refer to a “regulated industry”. However, the manner in which the Applicant proposes to run the .mail TLD means that it “would be skipping over the entities that actually provide mail services” (Objection, p.13).

54. Consequently, there is a strong association between the community invoked and the .mail string.

### **4. CRR's application does create a likelihood of material detriment**

55. UPU argues that the Applicant's proposed operation of the .mail TLD “would substantially damage the Postal Community's reputation by failing to meet the public expectations regarding the reliability, privacy and security of “mail” which has been established through great effort by the Postal Community” and through regulations which make mail exchanges “secret and inviolable” (Objection, p.14). This is why Posts are often considered as “trusted institutions” thanks to security strategies put together by the UPU through its Postal

Security Group (Exhibit 5) which have raised the level of expectation of the public in the privacy and security of “mail” (Objection, p.15 and Exhibits 15 and 16).

56. The risk of confusion of the public is important, says UPU, as the .mail TLD “and the associated websites” would be given the same level of trust by the public as they give to the mail when, in fact, those websites would not warrant the same security and privacy (Objection, p.16). Having that in mind, UPU predicts that “Posts will [...] have to commit time and resources to complaints directed at them by mistake as a result of unregulated activities conducted at the .mail TLD” (Objection, p.16).
57. UPU insists that “the Applicant’s proposed use of the .mail TLD ignores the public interest in protection of smooth, secure delivery of the world’s mail by the Postal Community” (Objection, p. 16-17) which was ICANN’s mandate to UPU with the .post sponsored TLD. Moreover, the establishment of the .mail TLD will misdirect “consumers from the websites of the Posts or from .post websites to websites on the .mail TLD, thereby disrupting the activities of the Postal Community and harming the public” (Objection, p.17).
58. Finally, UPU argues that the Postal Community depends on the DNS for its core activities and that the use of .mail TLD by the Applicant would “unfairly encroach” on the Postal Community’s goods and services (Objection, p.18-19 and Exhibits 19 & 20).

## **B. THE APPLICANT’S MAIN ARGUMENTS**

### **1. UPU lacks standing**

59. While the Applicant does not deny that UPU is an established institution, it argues that the claimed “Postal Community” is not a clearly delineated community as requested by ICANN’s Guidebook.
60. For the Applicant, the Community invoked by UPU is nothing more than UPU’s own membership and does not comprise the several private companies (such as FedEx, UPS etc...) whose activities are to propose mail services to a multitude of businesses and individuals. Hence, the Postal Community claimed by UPU is, at best, a very small portion of the actual players. This is particularly true because private companies not included in the Postal Community claimed by UPU “provide critical services to both customers for time-sensitive deliveries and to USPS as key suppliers, with UPS actually delivering more parcels per year” (Response, p.5, Annex 1).

61. The Applicant further argues that “to accept UPU’s narrow definition of the alleged community would be to allow any organization to self-servingly define the community as being solely comprised of the organization’s membership”.
62. For the Applicant it is even doubtful that a clearly delineated community can be at all defined in the present case. It bases its argument essentially on the IO’s statement on closed gTLDs (Response, p.5 and 6, Annex 2) and the fact that many other actors are even more active in mail related services than UPU members (Annexes 3 to 8).
63. In addition, the fact that UPU obtained .POST sTLD (Annex 9) is a sign that the Community for which it acts is a very narrow one and has nothing to do with the more diverse MAIL community (Response, p.6).

## **2. The Objector demonstrates no substantial opposition**

64. The Applicant argues that only a subset of the alleged postal community has expressed opposition to the .mail TLD (Response, p.7).
65. In fact, even if one considers USPS’ opposition, it appears that it has been expressed without “coordination with the United States Government as evidenced by the letter of the Department of Commerce to ICANN” (Annex 10).
66. Against the argument by UPU that USPS represents close to half the world’s mail volume, the Applicant shows that “physical mail volume peaked in 2006 (Annex 11) and has been declining in overall volume since” then (Response, p.7). Other evidence filed by the Applicant show that “physical mail will continue to have a decreasing share and place in the overall mail industry” (Annexes 8, 12 and 13).
67. The Applicant also estimated at \$100.000 the cost probably incurred by UPU and its members who have opposed the new TLD. This represents less than 0.3% of the budget of UPU and hardly can be said to be a high cost, as UPU argues (Response, p.7, Annex 14).

## **3. There is no strong association between the community invoked and the .mail string**

68. Even if one would accept that the Community alleged by the Objector is clearly delineated, “the level of association between the term mail and the services provided by its members” is not such that the Postal Community could be targeted by the Application (Response, p.8).

69. The Applicant further argues that “the evidence shows that there is actually a strong association between the term mail and e-mail services” as indicated by the search results from various Internet search engines for the term mail (Annexes 15 to 17).
70. In fact, “a community that would be associated with the concept of “mail” rather than “post” would offer a wide array of services that re replacing or are providing an alternative to traditional postal functions, thus the public has multiple associations with the term mail.” (Response, p.8). Even though the Applicant recognizes that mail may once have been primarily associated with UPU’s members, “with the global emergence of the Internet, the public’s association of mail is increasingly shifting to e-mail and the various other services that are replacing postal services.” (Response, p.8, Annex 18).
71. The Applicant also argues that the existence of the .POST sTLD “allows users to easily distinguish between a narrowly defined community of national postal organizations and the alternative community of e-mail service providers represented by the .MAIL gTLD.” (Response, p.8).

#### **4. The Objector does not prove material detriment**

72. Even though the Applicant recognizes that physical mail has decreased in the past is still decreasing now (Annex 18), it argues that “the delegation of an online asset like .MAIL is likely to cause zero economic harm” to the operations and reputation of UPU or its members.
73. In general, UPU’s alleged detriment is speculative, particularly because “CRR has plans to implement protections above and beyond those required by ICANN and which alleviates any concern for harm alleged by UPU.” Response, p.9). Because CRR is part of the Google group and Google “is one of the most trusted brands in the world”, [...] “there is no reason to assume that CRR and Google would risk its reputation to operate the .MAIL gTLD improperly (Annex 19). (Response, p.9).
74. In addition, the Applicant argues that any “alleged detriment is minimized or negated by UPU’s ability to operate the .POST sTLD in a manner that protects the alleged postal community”. The mere fact that UPU’s members activities do not depend on the DNS is exemplified by the fact that, “so far, UPU’s members have made virtually no use of the .POST TLD” (Response, p.9 and Annex 20).

75. As far as UPU's argument that the system could become overrun by third parties trading off the goodwill of the Posts, the Applicant answers that it has stated in its Application that it "intends to provide second-level domain access only to verified e-mail service providers and not to potential 'rogue' unsponsored postal delivery service providers" Response, p.9).

76. Finally, concerning the issue of security raised by the Objector, CRR lists all the procedures and practices, which meet or exceed ICANN's standards for new gTLDs, it intends to put in place so that the TLD will "grow in a responsible manner and promote consumer trust and confidence [...]" (Response, p.9 § 39).

77. Consequently, the Objection must be rejected.

#### **IV. THE FINDINGS OF THE EXPERT PANEL**

78. The Expert Panel will examine consecutively the four tests outlined above<sup>8</sup>.

##### **A. Does UPU have standing?**

79. In order to decide on this question, the Expert Panel must answer two separate questions: 1) Does the Objector invoke a "clearly delineated community"? 2) Is the Objector an Established Institution?

##### **1) Does the Objector invoke a "clearly delineated community"?**

80. In order to decide on the first test, i.e. whether the community invoked by the Objector is a "clearly delineated community", the Expert must first find out what a "community" in the meaning used by ICANN is.

81. Module 3 proposes five (5) factors which, *inter alia*, an Expert Panel could balance to decide on the first test, but none of these factors readily defines what a community is. Hence, the Expert had to resort to other sources.

82. First, the Applicant files screenshots of Dictionary.com (Annex E) which gives all the many common definitions of the concept of "community". The meanings run from "people living in one locality or village", to "the public in general", or society (used normally in the singular), but also lists "community of interests" or "a group of associated nations sharing common interests or a common heritage".

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<sup>8</sup> See above § 28.

83. If anything can be drawn from Annex E, it is that the Objector indeed represents a community, at least according to one of the common meanings listed there. Having said that, however, the Expert found it was not sufficient to use a common definition for the purpose of this Determination.
84. Instead, the Expert decided that the best definition of what is a community, for the purpose of a Community Objection, is the one found in the ICANN 2007 Report. This definition is as follows: “Community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.” (p.5 of the online document and Recommendation 20).
85. It is true that the NCUC Minority Statement criticizes the definition and the guidelines by saying that allowing a broad definition of the concept of community allows “for the maximum number of objections” (Annex C to the ICANN 2007 Report, p. 21 of the on-line document). Further it explains that “there is no requirement that the objection be reasonable or the belief about impact to be reasonable. There is no requirement that the harm be actual or verifiable. The Standard for ‘community’ is entirely subjective and based on the personal beliefs of the objector” (same reference).
86. The Expert Panel is of the opinion that, notwithstanding the criticisms expressed towards the definition proposed by ICANN, such definition is the best possible to match the philosophy of community objections as expressed above<sup>9</sup>.
87. UPU says that the community it invokes is the “Postal Community” (Objection, p.6 and several times thereafter). However, in the same paragraph, it also says that “the public is directly affected by the proposed operation of a .mail TLD that does not originate from a trusted governmental source and does not actually provide any regulated mail services.”. Therefore, there is some doubt about what is the exact delineation of the community invoked by UPU. Is it the Postal Community? Is it the public at large?

***a) The Postal Community***

88. It is now necessary to decide whether the “Postal Community” invoked by the Objector is of such a nature as required for a “clearly delineated community”. The Objector explains that the Postal Community invoked is composed of its Member States (i.e. 192 States as of

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<sup>9</sup> See § 31.

1 Dec. 2011) and of the 199 Posts (Objection, p.16 and Exhibit 1). In other words, the Postal Community invoked by UPU has the same composition as the UPU itself.

89. First, CRR argues that many companies such as FedEx, DHL, UPS, PostNL, TNTExpress (Annexes 3 to 8) which provide for a very large part of the mail activities around the globe, are also part of the community interested in the .mail gTLD, so that by defining the Postal Community in the such a way as to exclude those companies, the Objector misrepresent the actual market to be taken into consideration.
90. The Expert Panel can only note, with approval that, indeed, services akin to postal services are nowadays performed by private companies which compete with the traditional public postal services. However, if one agrees that there are now both private and public companies which offer postal services, UPU does not pretend to represent the entirety of these companies. In fact, when one considers the market of postal services in 2013, it is clear that it is divided into two communities: the first one is the traditional postal community composed of public entities which, for the sake of this Determination, will be called the “public sector postal community”; the second one may be composed of the private companies mentioned by CRR plus any other which perform similar services, which could be called the “private sector postal community”<sup>10</sup>. UPU pretends only to represent what the Expert just called “the public sector postal community” which, for the purposes of this Determination, and in view of the criteria to be taken into consideration, does constitute a “community”.
91. CRR argues further that the public sector invoked by the Objector is only “a small portion” of the postal sector. However, nowhere in Module 3 is the Expert directed to decide whether the Objector represents a majority of the community or a large majority of the community<sup>11</sup>. The only test is whether the community is “clearly delineated”. Hence, CRR’s argument does not change the determination made by the Expert above that there are two separate, clearly delineated, communities in the postal industry. Therefore it is not necessary to decide whether the public sector postal community is smaller than the private sector postal community, as CRR seems to argue. In any case, even if the Expert were to take that route, *quod non*, CRR does not propose a clear set of factors to decide which community is larger. Hence, the Expert cannot and may not engage in the calculation of whether the private sector operators’ services are larger than those from the public sector

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<sup>10</sup> Whether these private companies do form a community in the ICANN meaning of the concept remains to be demonstrated. This demonstration falls outside the scope of this Determination and is not necessary for it.

<sup>11</sup> This argument is probably more relevant for the analysis of the second test below. See §§ 103 & ff.

operators. In any case, CRR does not propose any criterion to proceed with such a calculation (number of employees? number of vehicles? number of offices? number of clients? turnover? all of them? others?) which, in any case, would be sterile in view of the test requested by the standards provided by Module 3.

92. CRR also argues further that, in fact, a generic TLD is not capable of meeting the criteria for “clearly delineated community”. In support of that statement, CRR files a statement by the IO, Alain Pellet, (Annex 2), posted on his website, where he discusses the “closed” gTLDs, and where he says that common words used for generic TLDs are not of such a nature as to target a specific community (see § 4 of IO’s statement under Community Objections).
93. The Expert Panel must note, at the outset, that the IO’s statement does not bind the Expert Panel deciding the present dispute. There are several reasons for that. First, as mentioned by the IO himself, his role is limited since he is allowed to file objections only where no one else has done so. By nature, therefore, the IO expressed no opinion as to the .mail string since UPU has filed an objection, preventing the IO to file one on its own. Second, when discussing community objections, the IO expressly stresses that “each application has to be reviewed separately” (§ 7 of IO’s statement under Community Objections). Finally, the IO says that the notion of community is “wide and broad and is not precisely defined by ICANN’s Applicant Guidebook for the new gTLDs program” (see § 3 of IO’s statement under Community Objections). Hence it seems that the IO has missed both the ICANN 2007 Report and section 4.2.3. of the Applicant Guidebook.
94. Having considered all the above, it is clear to the Expert Panel that UPU claims to represent what can be called the “public sector postal community” which is composed of both the States members of the organization and the postal services that these member States have designated to take part in the organization’s operations. In all meanings of the word “community” used in ICANN’s documents<sup>12</sup>, it is clear that UPU does represent a community of stakeholders who have common interests and strong ties among them so that they deemed fit, a long time ago, to form an organization, the UPU, the mandate of which is to reinforce the ties among them and further cooperation of their activities so that the public at large benefits from smooth services in the postal sector.
95. It is true that it is difficult to assess whether UPU members themselves are “aware” that they form a “community” in the meaning used by ICANN. This concept and the context in

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<sup>12</sup> Notably the fact that ICANN’s definition refers to an « economic sector », see § 84, above.

which it is used, however, is sufficiently new to allow a positive answer. The mere fact that States and the entities designated by them are taking part in UPU's activities, remain members of the organization over a long period of time, allows any observer, even not privy to the organization, to witness a sense of community among them.

96. Therefore the Postal Community invoked by UPU does meet the requirements of ICANN's definition of a community.

***b) The public at large***

97. While UPU does claim that it represents the Postal Community composed of public sector operators, it then proceeds to make references, all along its Objection to the "public" or "the global public" (notably, Objection p.9).

98. Considering the definition the Expert Panel has retained for the concept of "community" it does not seem that the public at large can be considered as a community so that to invoke a "clearly delineated" one, which is the test to be decided. This is not to say, however, that the public at large is completely outside the scope of the decision. Indeed, as will be explained later in this Determination<sup>13</sup>, the public must be taken into consideration for the analysis of the fourth test, but the public at large, as claimed by UPU, is not the proper factor to be taken into consideration for the first test.

99. Having said that, however, this caveat does not change the Expert Panel's conclusion that UPU invokes a clearly delineated community.

100. For the reasons explained above, the Expert Panel is of the opinion that the Objector has met the burden of proving that it represents a clearly delineated community.

**2) Is UPU an "established institution"?**

101. There is no dispute about the fact that UPU is an Established Institution (Objection, p.5, 8 and 9) and fulfils the criteria mentioned in section 3.2.2. of Module 3. This is acknowledged by CRR (Response, p.4).

**3) Conclusion on the first test**

102. The Objector has met the requirements of the first test.

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<sup>13</sup> §§ 149 & ff.

## **B. Is There a Substantial Opposition by the Community?**

103. For the second test to succeed, the Objector must show that the “Community opposition to the application is substantial”. Module 3 suggests that the Expert Panel could take into consideration, *inter alia*, the number of expressions of opposition; the representative nature of entities expressing opposition; the level of recognized stature or weight among sources of opposition; the distribution and diversity among sources of expressions of opposition; the historical defense of the community in other contexts and the costs incurred by the objector in expressing opposition.
104. In addition ICANN has warned Expert Panels that “the public comment forum should not be used as a mathematical polling mechanism [...], the quantity of comments is not in itself a deciding factor.” (New gTLDs Proposed Final Applicant Guidebook, Public Comment Summary, Feb. 21, 2011<sup>14</sup>, p.37).
105. This is why the Expert Panel decided to look at three elements: 1) the opposition by the public at large; 2) the opposition by UPU’s members, i.e. the Postal Community invoked by the Objector; 3) the opposition by UPU itself.
- 1) Expression of opposition by the public at large
106. It must be mentioned first that none of the Parties has filed evidence of public comments towards the .mail string, whether in favor or against such a gTLD.
107. Based on its 2011 Annual Report (Exhibit 6) UPU argues that the Postal Community it represents delivers mail to “82% of the world’s population or more than 5 billion people” (Objection, p.9 and Exhibit 5). In addition, UPU emphasizes that the Postal Community concerns 5 million postal employees and 663 000 postal offices around the world (Exhibit 5). These figures are not contested by CRR in any material way. However, they are not interesting as such for the decision to be taken on the second test. Indeed, it would have been more cogent if UPU had successfully triggered a large public campaign against the attribution of the .mail TLD to one or more private companies. Nowadays, with the Internet, such campaigns are easy to launch. Nothing similar has been evidenced by UPU.
108. It is true that UPU is an intergovernmental organization and, as such, thought it more appropriate to rely on its members.

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<sup>14</sup> Available on ICANN’s website.

2) Expression of opposition by UPU members

109. This is why UPU files a number of oppositions expressed by some postal administrations or offices during the public comment period opened by ICANN (Exhibit 7). Exhibit 7 comprises copies of all oppositions filed, not only against CRR's Application, but also against applications by other companies. For the present case, the Expert Panel took into consideration only the opposition expressed against CRR's Application, i.e. p. 40 to 53 of Exhibit 7.
110. The Expert Panel can only note, that the content of Exhibit 7 does not match the text of the Objection itself. UPU argues, for example, that Brazil Post and Poste Maroc have expressed opposition to the Application (Objection, p.10). However, the Expert Panel could find no evidence of such an opposition in UPU's file for the present case. Brazil Post has filed one comment but for a different application. In addition, contrary to other postal services (for example, USPS or Poste Italiane) it has not considered important enough to replicate its comment for the other applications, even though ICANN's guidelines make it clear that comments should be made for each application (see the Application comments User Guide<sup>15</sup>, p.12). Poste Maroc has filed a very brief comment saying that it agrees with USPS, but it did so against another application which has now been withdrawn. Poste Maroc, like Brazil Post, has not considered it to be important enough to duplicate its comment against CRR's application.
111. UPU also argues (Objection, p.10) that "China Post and Macao Post separately expressed their support for the Public Comments filed against the Application. South Africa Post has equally stated its opposition to the Application"<sup>16</sup>. Notwithstanding this allegation, the Expert Panel notes that UPU's file does not show any evidence of such an expression. The Expert Panel could not find such comments notwithstanding a thorough exploration of ICANN's website.
112. UPU further argues that "a number of Posts have expressed their opposition ... through their Member Country's Governmental Advisory Committee (GAC) representatives" (Objection, p.10). Again, UPU's file does not contain any evidence supporting such an allegation.

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<sup>15</sup> This Guide is available on ICANN's website.

<sup>16</sup> The same is repeated in footnote 1 of UPU's Comment (dated 30 August 2013) on Applicants' joint answer of August 27, 2013 to the Expert Panel's August 21, 2013 letter, with no accompanying evidence.

113. Further, out of the 80 or so public comments claimed by UPU to have been filed with ICANN during the public comment period, a large part of them have been filed by the same Posts, in similar or identical terms (see, for example, the comments by Poste Italiane and USPS) for different applications. Against CRR's application UPU files three comments by Poste Italiane written in identical terms; one comment by Poczta Polska S.A. and ten comments by USPS.
114. It is true that, as recalled in § 104 above, an analysis of public comments may not be made only on a mathematical basis. However, the Expert Panel is compelled to note that out of the 199 Posts claimed to compose the Postal Community by the Objector, only a very small number has felt the need to express oppositions. Having said that, UPU's next argument is that the opposition by USPS alone is a very heavy opposition because of the weight represented by that postal service within the Postal Community.
115. Indeed, UPU relies heavily on the one opposition by USPS and seems to claim that, by itself, it does represent a substantial opposition. UPU exposes, without being contradicted by CRR<sup>17</sup>, that USPS handles more than 40% of the world's mail volume (Exhibit 8). These figures are certainly impressive but fall short of demonstrating that a substantial portion of the Postal Community has expressed opposition to CRR's application for the .mail TLD. In fact, even if USPS does represent a large portion of the world's mail volume, this is not sufficient to prove a "substantial" opposition from the Postal Community. The level of evidence required by ICANN, considering the philosophy restated above<sup>18</sup>, is higher and the Expert Panel needs to find that other sources of opposition exist.
116. In addition, CRR files a letter written by Lawrence E. Strickling, Assistant Secretary for Communications and Information of the United States Department of Commerce, dated 2 April 2013, addressed to Dr. Stephen D. Crocker, Chairman of ICANN's Board of Directors (Annex 10). The letter is very short: *"Please be advised that the objections filed by the United States Postal Service (USPS) to the seven applications for the proposed new generic top level domain, .mail, are not supported by the coordinated view of the United States Government (USG). Consistent with our commitment to the multistakeholder model, the USG will present its coordinated views to the Governmental Advisory Committee (GAC) as it forms its consensus advice to the Board on these matters"*.

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<sup>17</sup> Although CRR argues that evidence filed to exemplify the importance of USPS is "self serving promotional material" (Response p.9).

<sup>18</sup> See above § 31.

117. Having considered this piece of evidence, on 21 August 2013, the Expert asked the Parties four questions related to the second sentence of Mr. Strickling's letter, namely:

1. *Did the United States Government present its coordinated views to the GAC?*
2. *If so, provide me with the pdf version of that document clearly showing the date on which it was submitted.*
3. *If the answer to 2.1. is no, do you know of the reason(s) why the USG did not act?*
4. *If the answer to 2.1 is no, do you have any idea whether such coordinated views are to be filed in the near future, i.e. before or around 6 September 2013?*

118. On 27 August 2013, the Applicant filed a joint answer (with other Applicants in the consolidated cases<sup>19</sup>) to the Expert's questions (hereinafter, "Answer of 27 August 2013")<sup>20</sup>.

119. As to the first question, the Applicants argued that the USG "presented its coordinated views on its support for objections to specific new gTLD applications to the GAC during the ICANN meeting of April 7-11, 2013. These views did not include any support for issuing GAC Advice against any new gTLD applications for .MAIL." After explaining what the mandate of the GAC is and what are its procedural rules (Answer of 27 August 2013, Annexes A & B), the Applicants argue that "the minutes of private GAC meetings are not published online nor are they otherwise available for public access" (Answer of 27 August 2013, Annex C)<sup>21</sup>.

120. Applicants further explain that the US Department of Commerce is the sole representative of the United States Government to GAC (Answer of 27 August 2013, Annex D) and the only institution authorized to present the coordinated view of the USG on issues related to ICANN. Nevertheless, because of the private nature of GAC's meetings, "there is no public document reflecting the views presented by the USG on GAC Advice against new gTLD applications" (Answer of 27 August 2013, p. 2). However, Applicants file some email correspondence between John Nevett (Donuts) and Elizabeth Bacon and Fiona Alexander of NTIA<sup>22</sup> (Answer of 27 August 2013, Annex E) which purports to confirm that the USG presented its coordinated views to GAC in Beijing<sup>23</sup>.

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<sup>19</sup> Because the answer was filed jointly, the following paragraphs will jointly refer to "the Applicants".

<sup>20</sup> The fact that all four Applicants filed a joint answer explains that, in this section of the Determination, it is referred to "Applicants" and not each of the Applicants.

<sup>21</sup> The Expert fails to see how Annex C of Answer of 27 August 2013 confirms the point made by the Applicants. This is a minor point which the Expert thought unnecessary to pursue.

<sup>22</sup> The acronym was not explained by the Applicants. However, considering the full email address, it seems to be an agency of the US Government.

<sup>23</sup> If these proceedings were conducted in the US style, the question asked by Mr. Nevett to Fiona Alexander would be considered as a "leading question", hence inadmissible as evidence.

121. Applicants further explain that the USG did not issue a GAC Early Warning against any applications for .MAIL (Answer of 27 August 2013, Annex F). Indeed, from that Annex, the USG appears to have published an Early Warning only against .army, .airforce and .navy. While the Australian Government seems to be the only government having issued an Early Warning against .mail.
122. Applicants further file two GAC's Communiqués. One released in Beijing on 11 April 2013 and one released in Durban, South Africa, on 18 July 2013 (Answer of 27 August 2013, Annex G). The Beijing Communiqué mentions no opposition from specific members of GAC and no decision to oppose the .mail string, contrary to a number of other strings such as .shenzhen, .persiangulf, .date, .spa etc..., (see p.3 of Annex G of Answer of 27 August 2013). However, the Durban Communiqué shows that GAC resolved not to object to .date and .persiangulf (point IV, §3). Again, the .mail gTLD is not discussed in the Durban Communiqué. The Expert notes that the Durban Communiqué discusses again the protection of IGOs names and acronyms (point IV, §5). However, this is not relevant here since the dispute does not relate to a .UPU gTLD.
123. Applicants further point out that the lack of any discussion (at least as referred to in the public GAC Communiqué) of the .mail TLD shows that governments are not concerned with the .mail string which is not "a pressing issue for governments" (Answer of 27 August 2013, p.2, last §).
124. Finally, Applicants stress the fact that "in the whole of 2013, [the US Department of Commerce letter of 2 April 2013] is the only letter sent to the ICANN Board on behalf of the United States related to a specific TLD application" (Answer of 27 August 2013, Annex H), "which speaks volumes as to the USG's position on this specific issue".
125. Considering the answers given to question 1 posed by the Expert, Applicants answer "no" to question 2 and "not applicable" to questions 3 and 4.
126. In its Comment of 30 August 2013 (hereinafter "Comment") to Applicants' Answer of 27 August 2013, UPU explains that it is an Observer to GAC but it is not at liberty to share information regarding closed sessions of the GAC. However, in all honesty, UPU reveals that it "did not raise its Objections to the .mail string directly within the GAC before filing the Community Objections" (Comment p.2). It justifies such a decision with a procedural argument. The gTLD Applicant Guidebook provides the proper mechanism for expressing Community concerns, which does not include the GAC. UPU strictly followed the Guidebook to file its Objections.

127. Further UPU argues that the US Department of Commerce's views on specific new gTLD applications do not speak to the merits of the UPU's Community Objections. The USG represents only one voice among the 192 countries composing UPU members. In addition, the USG "designated the US Department of State, the United States Postal Service and the Postal Regulatory Commission as the responsible government ministry, postal operator and postal regulator for international postal matters in the United States" (Exhibit A, p.15). This is why UPU argues that "with regard to international postal matters, including the protection of intellectual property, the responsibility lies with these three government entities to act within and in support of the international postal community" (Comment p.2).
128. UPU goes beyond the Expert's questions by repeating that UPU's Objections reflect the substantial opposition of the postal community to the applications for .mail gTLD. By doing so, UPU brings no further evidence than in its original files. It further explains internal operations of the UPU which will be discussed in the following section.
129. Finally, UPU argues that the US Department of Commerce letter is not relevant to its Objections (Comment p.4-5). For the UPU, the letter "addresses Legal Rights Objections filed by the United States Postal Service, not the Community Objections filed by the UPU". According to UPU, "the letter does not reference the UPU's Community Objections or the United States Postal Service's support of the UPU Community Objections. In fact, the letter simply does not relate to the UPU Community Objections at all and should be given no weight whatsoever".
130. Having considered all the arguments and evidence presented by the Parties, even those which went beyond the questions asked by the Expert, the Expert considers that the letter of 2 April 2013 by the US Department of Commerce is relevant to the present case. It would not be the first time, indeed, that a single government speaks with different voices in different international fora. Indeed, the Expert acknowledges the fact that for UPU and for ICANN two different governmental agencies speak for the US Government. Therefore, it is not entirely surprising that the US Department of Commerce tried to undermine the objections filed by USPS since its own goals, and the policies it must implement, are certainly different from the ones defended by USPS and the State Department. In the present context the US Department of Commerce's letter shows that the US Government has different views about the .mail TLD, which does not entirely annihilate USPS' objection, but add another layer to the Expert's doubts that a substantial portion of the community represented by the Objector has indeed expressed objection.

131. Having said that, a decision on the second test requires that the Expert consider yet a third factor to finally conclude whether or not the objection represents a substantial portion of the community.

3) Expression of opposition by UPU itself

132. UPU further argues that “in order to file this Objection, several Posts have asked the UPU to file this Objection with the approval of the UPU Director General” (Objection, p.10). UPU offers no evidence of this fact in its file. On the contrary, UPU argues simply that “the filing of this Objection by the UPU on behalf of the Postal Community alone demonstrates substantial opposition to the Application from the Postal Community” (same reference).

133. The Expert Panel doubts this assertion. Indeed, UPU’s General Regulations (Exhibit 3) do propose a set of clear rules concerning the functioning of the bodies of the organization. Apart from the Congress (what other organizations would call their general assembly) which meets every four years, the organization is run by a Council of Administration (art. 17) whose functions include: “to consider and approve, within the framework of its competence, any action considered necessary to safeguard and enhance the quality of and to modernize the international postal service” (art. 102, section 6.2.). The Council is composed of 41 members (art. 102). It would have been possible, for the Director General, to call the attention of the Council to the new gTLDs process and the necessity to act against the .mail TLD. There was plenty of advance warning posted by some GAC’s members. There were plenty of consultation periods all along the process. However, UPU does not evidence that such an action was ever taken.

134. The First Additional Protocol (24<sup>th</sup> Congress 2008 Geneva, also in Exhibit 3) empowers the Chairman to carry out the Council of Administration’s duties, in between sessions, in case of urgency. However, UPU does not show that the filing of the Objection has been authorized in this manner.

135. In addition, it is doubtful that the filing of the Objection would fall within the competence of the International Bureau or of its Director General. The list of duties of the Director General, provided by Article 112 of UPU’s General Regulations, shows that the great majority of them are administrative in nature. The Director General does not seem to have the power to act on its own initiative. Perhaps, with a broad interpretation, it could be said that filing the Objection could have fallen within the Director General’s duty under section 2.6. of Article 112 which provides that the Director General is entitled: “to take action to achieve the objectives set by the bodies of the Union, within the framework of the

established policy and the funds available”. However, a stricter interpretation would lead to saying that the Director General may not act *sua sponte*. This stricter interpretation is in fact in line with the text of the Objection itself, where UPU felt compelled, as stated above, to argue that “several of its members have asked it to file this Objection”. If UPU’s Director General had the power to act *sua sponte*, UPU would not have said that some of its members had asked it to file the Objection. In any case, as said before, the allegation according to which UPU’s members have asked the Director General to file the Objection is not accompanied by any evidence.

136. For that purpose, the power of attorney filed by UPU is of no use since it only shows that the Objection was filed “with the approval of the UPU Director General”. It does not provide the source of the power of the Director General to approve such filing.
137. UPU further argues that “with the March 13, 2013 deadline for filing the Community Objections approaching, the Council of Administration as well as the Postal Operations Council approved, pursuant to Article 16 of the Provisional Rules of Procedure of the CA, the respective cause of action” (Comment, p.4).
138. The difficulty with such an argument is the total lack of evidence of such an approval. It is not for the Expert to speculate why such proof was not accompanying UPU’s Comment. However, the lack of evidence renders the argument inoperative.

#### 4) Conclusion on the second test

139. Considering the small number of Posts which have filed public comments (even if one includes Poste Maroc and Brazil Post)<sup>24</sup>, and considering that it is doubtful that UPU’s Director General has the power to act *sua sponte*, without at least a clear mandate of the Chair of the Council of Administration, UPU has not met its burden of proof with respect to the second test.

### **C. Is There a Strong Association?**

140. For the third test, the Objector must prove a strong association between the community invoked and the applied-for gTLD string. This test is further characterized as “targeting” in section 3.5.4. of Module 3. The factors which the Expert Panel, *inter alia*, could take into consideration are the statements contained in the application; other public statements by the applicant and the associations by the public.

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<sup>24</sup> Considering, particularly, that UPU brings no evidence of the other posts’ alleged objections listed in footnote 1 of its comment on Applicants’ joint Answer, dated 30 August 2013.

141. UPU argues that the word “mail” corresponds to a “regulated industry” (Objection, p.12). “Only certain entities, most of which are governmental or quasi-governmental in nature, are officially entrusted to deliver the ‘mail’” (Objection, p.12). UPU argues further that it could not “locate an encyclopedia entry for the term ‘mail’ that designates any goods or services referring to goods or services other than those provided by the Posts” (Objection, p.12). The same is true for several dictionaries, says UPU.
142. According to UPU, “unless the Applicant uses the .mail TLD in connection with mail-related goods and services, which would by definition require the assistance of the Posts, the Applicant would be skipping over the entities that actually provide mail services” (Objection p.13).
143. Because, “the UPU and the Posts are, collectively, the organizations globally responsible for the secure and timely delivery of what the public understands by the term ‘mail’” (Objection, p.13), UPU argues that a strong association exists between the Postal Community and the applied-for gTLD string ‘mail’.
144. CRR argues, on the contrary, that while it is true that the term “mail” “may once have been primarily associated with UPU’s members” (Response, p.8), this is no longer the case. It relies on several Internet search engines (Annexes 15-17) which show that definitions of the term mail do not support an exclusive association with traditional government sponsored postal services. In conclusion, for the Applicant, the Objector fails to show that there is a strong association.
145. It is not entirely clear to the Expert Panel whether the arguments presented by both the Objector and the Applicant about the confusion that consumers may or may not be confronted with if the .mail gTLD goes forward are really relevant to address the third test examined here. Indeed, the Expert Panel understands the test as requiring that the community invoked is directly targeted by the new generic TLD proposed. Hence, the Panel has to decide whether the Postal Community is indeed targeted by the application for the .mail gTLD.
146. Independently to what will be decided for the fourth test below about the potential public confusion between the classic, physical, mail and the future potential Internet .mail services, if CRR’s Application is granted, there is little doubt that the .mail TLD future services are targeting the Postal Community since mail services is the bulk of the services that the Postal Community provides. This is particularly true for USPS which is a pure player, unlike the French La Poste which offers other services such as financial services.

147. CRR's file itself (Answer of 27 August 2013, Annex G) emphasizes the need for public interests goals to be taken into consideration. Indeed, the GAC does advise the ICANN Board that: "For strings representing generic terms, exclusive registry access should serve a public interest goal" (Annex G, p.11). Among the strings concerned by this advice, .mail is mentioned. It does show, therefore, that there is a strong association between .mail and the interests represented by the Postal Community invoked by the Objector.
148. Considering the above, the Expert Panel is of the opinion that UPU has met the requirements for the third test.

#### **D. Does the Application create a likelihood of material detriment?**

149. Module 3 explains that the Objector must prove that there is a likelihood of material detriment "to the rights or legitimate interests of a significant portion of the community invoked". In order to analyze this test, the Expert Panel, *inter alia*, may take into consideration the nature and extent of damage to the reputation of the community; the evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or the users more widely; the interference with the core activities of the community; the dependence of the community on the DNS for its core activities; the nature and extent of concrete or economic damage to the community; the level of certainty that alleged detrimental outcomes would occur.
150. UPU argues that the Applicant's operation of the .mail TLD "would substantially damage the Postal Community's reputation by failing to meet public expectations regarding the reliability, privacy and security of "mail", which have been established through great effort by the Postal Community" (Objection, p.14) and "threatens to interrupt the smooth and secure provision of mail services" (Objection, p.8). Further, UPU argues that the Applicant does not "intend to act in accordance with the interests of the Postal Community and does not intend to institute effective security protection of user interests" (Objection, p.16), while "international mail standards [established by UPU] are critical to the successful handling and delivery of all international mail" (Objection, p.9). Finally it argues that the Applicant's intended operation of the .mail TLD will interfere with the core activities of the Postal Community which do depend on the DNS for its core activities and will suffer concrete and economic damage (Objection, p.17-19) because 'mail' represents "secure communications and transactions" for the public, because "many national laws mandate a high level of security and privacy for mail" (Objection, p.14-15 and Exhibits 5, 14, 15 and

- 16). UPU argues that “the public is likely to view the .mail TLD as identifying members of the Postal Community, much in the same way as ‘.int’ identifies only international treaty-based organizations, ‘.gov’ identifies only US government organizations and ‘.post’ identifies only verified providers of mail products and services and other members of the global postal community” (Objection, p.16).
151. UPU’s argument is essentially one of confusion by the users between the secured mail services provided by postal services around the world and the services which will be provided by .mail websites. This confusion, says UPU, could be such that the .mail TLD “could become overrun with third parties trading off the goodwill of the Posts for illicit purposes and harming both the public and the goodwill of the Posts”. The premise of UPU’s argument is that the terms “mail” and “post” are interchangeable (Objection, p.12, 17 and 18).
152. CRR’s main argument against the Objector’s claim is one of lack of evidence of any material detriment or harm to the community or its reputation (Response, pp.9 and 10). Particularly, the Applicant argues that UPU’s claim is speculative not only because CRR will put in place all the necessary procedures and measures to secure the .mail gTLD, but also because UPU does not depend on the DNS for its activities.
153. The Expert Panel considers there are four issues to be analyzed here: 1) The users’ potential confusion between “mail” and “post”; 2) The harm to the reputation of the Postal Community; 3) The lack of security in the .mail Application; 4) The material economic damage suffered by the Postal Community.
- 1) The users’ potential confusion between “mail” and “post”
154. The battle of arguments between the Objector and the Applicant on this issue is clearly one of “*anciens*” and “*modernes*”, similar to what occurred in the French intellectual life in the late XVIIth century. The battle bounces every so often, each time there is a new approach to some societal evolution. It is still referred to nowadays to signify that some persons in a society have difficulties accepting more modern ways of doing things. This is not to say, of course, that modern ways are always better and more appropriate to follow, but there is certainly something of that battle in the discussion between the Objector and the Applicant over whether the term “mail” is confused with “post” by users.
155. The Expert Panel has analyzed carefully all the dictionary and encyclopedia entries filed by the Objector (Exhibits 10 to 13) and the long list of websites and email services filed by the

Applicant (Annexes 15-17). Almost all entries do mention either as a first meaning or as a second or third meaning that “mail” is meant to be “letters and packages conveyed by the postal system” or equate “mail” with “post” (See Exhibits 10 to 13).

156. From that analysis, it appears that the automatic analogy which may have been made in the past between “mail” and “post” is now progressively vanishing. However, this is not enough to show, for certain, whether users are now, and will in future, confuse “mail” with “post” with all the consequences described by UPU in its Objection if the .mail string is attributed to the Applicant.
157. Indeed, we need some finer analysis when it comes to users’ potential confusion. As has been decided by some courts, the Expert Panel considers that the degree of consumer care is becoming more heightened as the novelty of the Internet evaporates and online commerce becomes commonplace. The criterion to be applied here should take into consideration a reasonable consumer, not a sophisticated one, but one who actually acts prudently.
158. Therefore, it is less probable that Internet users today would be likely to confuse “mail” with “post”, contrary to what the Objector argues. This may have been different a few years ago when electronic mail was introduced. Indeed, some users may have been surprised to learn, after having established an electronic mail box and after having used it for some time, that the messages received and sent via that box could be hacked and the box taken over by Trojan horses and other non-invited intruders. The Expert Panel is of the opinion that this time is slowly coming to an end, not so much because “mail” has become a common word even in a French<sup>25</sup>, but because the mentalities have evolved with the progressive use of the Internet and the added sophistication of users. It is indeed doubtful that users will tomorrow attribute the same faith to .mail websites as they do to postal services. It is also doubtful that they would attribute more faith to .mail websites and mail boxes than they do today to gmail or hotmail or any other Internet services which use already the word “mail” in their domain name.
159. Of course, one must not look at Internet users only in western, developed, countries and “users” in the meaning of section 3.5.4. of Module 3 should encompass all kinds of users. However, the Expert Panel was given no evidence that even in less developed countries,

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<sup>25</sup> In French, the word “mail” has been known since around 1000 and designates originally either a hammer (its Latin origin) or a promenade. It now has the third meaning of “electronic mail” which was introduced only very recently into the dictionary.

the confusion between “mail” and “post” would be widespread. The increase use of the Internet and mobile phone services in some less developed countries show the sophistication that these societies have reached, which is even sometimes higher than in western societies.

160. Considering the above, it is doubtful that users will indeed confuse “mail” and “post” if there are, in the future, websites associated with the .mail string.

2) The harm to the reputation of the Postal Community

161. It is not at all evident, from the Objector’s file, that indeed a .mail TLD will be run in a harmful manner to the Postal Community. In fact, most of UPU’s arguments are very speculative in nature.

162. UPU heavily relies on the fact that postal services are a regulated industry to support the argument that, if the application for the .mail string is granted, its operation will bypass rules and regulations which have been in place for many years. This argument appears specifically in Poste Italiane’s, Poczta Polska’s and USPS’s public comments. To take the words of Poczta Polska: “For example, the average, reasonable consumer may be misled into believing that the unregulated owners of the .mail TLD and second level domains conform to the same industry standards as their country’s governmental regulated postal administration when, in fact, they do not.” (Exhibit 7).

163. However, several arguments run contrary to UPU’s and the Posts’ position.

164. In the first place, postal services have, for a long time, been divided between public and private operators. This is acknowledged by UPU’s website and the historical background provided in other UPU documents. It is true that the public sector has taken over from approximately the end of the XIXth century until at least the first half of the XXth century<sup>26</sup>. However, the trend towards liberalization of postal services has not given rise to major problems. Hence, privatization and more competition do not automatically lead to less regulation or protection.

165. Secondly, the GAC Communiqué already mentioned (Answer of 27 August 2013, Annex G) covers in its Annex I the question of gTLDs which are linked to “Regulated Markets” (Annex G, p.8). It says: “Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risks associated with

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<sup>26</sup> Probably with the exception of the UK, as shown by Exhibit 12.

consumer harm.”. It adds that these strings should contain a number of safeguards, notably that “Registry operators will [...] comply with all applicable laws, including those that relate to privacy, data collection, consumer protection [...]”. However, in the list that follows which includes the strings to which these safeguards should apply, the .mail TLD does not appear. It is true that the list is expressly non exhaustive, but as of 11 April 2013, the GAC did not think that the .mail string was related to a regulated sector. In itself, this is meaningful. In any case, even if later the GAC does realize that the .mail string is linked with a regulated sector, its advice clearly shows that this is not a sufficient reason to block altogether the attribution of the string, but it recommends that registry operators do not bypass applicable rules and regulations. It further recommends that registry operators “establish a working relationship with the relevant regulatory, or industry self-regulatory bodies, [...]” (Annex G, p.8).

166. It is true that, in this case, CRR did not file the description of its proposed management of the .mail string (or the public portion thereof), contrary to what other Applicants have done. Therefore, the Expert is not in a position to know whether CRR intends to follow the GAC’s recommendations, even though CRR’s Response itself does list a number of measures and procedures it intends to take.
167. However, even if one would accept that there is a potential harm to the Postal Community, that potential harm being identified in the arguments of UPU, it will be up to ICANN to follow the recommendation of the GAC so that regulations be scrupulously complied with by registry operators.

### 3) The lack of security in the .mail Application

168. This is probably the most important concern voiced by the Objector. This concern is not specific to the new gTLDs but is a recurring one with the Internet. The Objector exemplifies the level of privacy and security enjoyed by the mailing system offered by Postal services around the globe and files three regulations (USA, UK and Canada) (Exhibit 14) and one press release concerning the Sao Paulo and Curitiba Posts in Brazil (Exhibit 15). In addition, the Objector files the Ponemon Institute 2012 study on the Most Trusted Companies for Privacy (Exhibit 16), which shows that USPS is ranked fifth among the 10 most trusted companies.
169. The concern is particularly important as to the phenomenon called “data mining” which has probably been experienced by any person who has used the Internet either for some purchase of goods or services or when their mail box has been hacked.

170. It is to be noted that CRR does not offer clear policy commitments in response to UPU concerns.

171. Considering the above, and if ICANN goes ahead with the .mail string, it will have to make particularly clear that the registry is indeed managing the string with heightened security and privacy.

4) The material economic damage suffered by the Postal Community

172. Although UPU does not express it in this exact manner, it is to be expected that allowing a .mail TLD will increase the falling in mail volumes already experienced by Postal services around the world, probably due to the advent of Internet mail services mentioned by CRR. Public data, such as the Eurostat Postal Services statistics, are telling in this respect. Mail volumes have dropped by 20% since 2006, due partly to the advent of e-mail. In addition, the projection is that in 2020, the mail volume will drop to the level of 1986.

173. This trend is particularly evidenced by the Applicant's filing of a study for the US market alone (Annexes 11, 12 and 13) which shows that USPS faces mounting losses reaching over \$3 billion at the end of 2011. According to the same study, first class mailings have dropped by half in the past decade and USPS is reported to be losing \$25 million a day.

174. It is clear that this trend will only increase if the .mail TLD goes forward. In the Expert's opinion, this constitutes "a likelihood of material detriment" under Section 3.5.4. of Module 3.

175. UPU also argues that the establishment of a .mail TLD will run to the detriment of the .post sponsored TLD. Unfortunately, UPU offers no evidence in support of this argument. For example UPU does not say how much revenue, if any, the .post TLD generates for UPU and/or the postal industry around the world. Without these figures, the argument may be deemed speculative in nature.

176. Finally, USPS argues that if the .mail TLD is granted to CRR, which is a wholly owned subsidiary of Google and has applied for 101 new gTLDs, the result will be an inhibition of competition running contrary to ICANN's express policy to increase competition in the domain name marketplace (Exhibit 7, p.51). This argument is certainly a strong one, but it goes beyond what the Expert Panel has to decide, considering the limited powers it has within a community objection.

177. In light of the Expert's findings at §§ 172-174 above the economic harm is probable and satisfies the requirement that there be "a likelihood of material detriment" under Section 3.5.4. of Module 3.

5) Conclusion on the Fourth test

178. The harm is probable. However, most of the concerns expressed by the Objector can be met and corrected by a sound policy taken by ICANN and solid rules to implement that policy and control its application.

## **V. FINAL CONCLUSION BY THE EXPERT PANEL**

179. For each of the four tests which the Expert Panel had to run in order to decide on the Objection, the Expert Panel finds as follows:

- UPU has standing as it is an established institution which has an ongoing relationship with a clearly delineated community.
- The Objection does not appear to be substantial.
- The Application clearly targets the Postal Community.
- The material detriment to the community invoked by the Objector is probable. The privacy and security issues can be easily addressed by ICANN if it decides to go ahead with the attribution of the .mail TLD. The economic harm is probable and may be avoided only if the .mail TLD is not attributed.

180. Considering the above conclusions for each of the four tests and the strict rules established by ICANN, the Expert Panel has no other possibility than either reject or accept the Objection (Procedure, Art. 21(d)). In addition, as stated above, the Objector bears the burden of proof and the four tests are cumulative, i.e. if the Objector misses only one test, the Objection must be rejected. Therefore, because the Objector has not brought enough evidence on the second test, the Objection must be rejected.

181. The additional request by the Objector to reject "all other current and future applications for the .mail TLD" (Objection p.19), is dismissed pursuant to Articles 2(e)(iv) and 21(d) of the Procedure, the Expert Determination being limited to deciding on the specific application which is the subject of the proceedings.

## VI. EXPERT DETERMINATION COSTS

182. Pursuant to Articles 14(e) and 21(d) of the Procedure, the Expert Panel is compelled to follow the “costs follow the event” rule. One may regret the automaticity of the rule, particularly with regard to the complexity of the issues raised by the Objector and the Applicant. The lack of flexibility does not allow the Expert Panel to take into consideration the nuances of the Determination and the fact that the Objector raised issues which are far from being frivolous. *Dura lex, sed lex!* The Objection being rejected, albeit with many caveats, the Objector has to bear the entire costs of the proceedings.

## VII. DECISION

183. For the above reasons, and in accordance with Article 21(d) of the Procedure, I hereby render the following Expert Determination:

1. UNIVERSAL POSTAL UNION’s Objection is rejected and, accordingly, the Applicant, CHARLESTON ROAD REGISTRY INC., prevails.
2. CHARLESTON ROAD REGISTRY INC.’s advance payment on costs shall be refunded by the Centre.

Place of the proceedings: Paris, France

Date: 4 February 2014

Professor Catherine Kessedjian  
Expert