Final Activity Report

The Independent Objector and ICANN's New Generic top-Level Domains Program

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INTRODUCTION

ICANN is a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system. One of its foundational principles is to promote competition in the domain name marketplace while ensuring Internet security and stability. Following these principles, one of ICANN's key policy making bodies, the Generic Names Supporting Organization (GNSO), developed a policy for the introduction of new generic Top Level Domains (gTLDs). This policy was meant to allow for more innovation and greater choice in the Internet's addressing system. ICANN adopted the policy in June 2008. This decision was made after extensive public discussion and consideration. A detailed and lengthy consultation process with all constituencies of the global Internet community including representation by a wide variety of stakeholders – governments, individuals, civil society, business and intellectual property constituencies, and the technology community, followed. In June 2011, the Board of Directors authorized the launch of the new gTLD Program.

The program protects certain interests and rights and provides a path for parties to file formal objections to gTLD applications on certain specified grounds. There are four types of objection, aiming at the protection of different interests: Community Objections, Limited Public Interest Objections, Legal Rights Objections and String Confusion Objections. A formal objection triggers a dispute resolution proceeding by an Expert Panel in the relevant subject area.

One component of the objection process is providing for an Independent Objector (IO). The IO's main mission is to object to gTLD applications that would be contrary to the public interest if approved. In light of this public interest goal, he or she[1] can file Limited Public Interest Objections and Community Objections:

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

[1] Since the first IO is a male, I will only use the masculine hereinafter.

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

On 14 May 2012, ICANN announced the appointment of Professor Alain Pellet as the Independent Objector for the New Generic Top-level domain program. He has been engaged through a 16-month contract with ICANN, which was prolonged for four months until end of January 2014 in order to correspond with the end of the proceedings before the ICC Expert Panels.

Presently, it is planned that the Independent Objector will be limited to serving for a maximum of three rounds, which will occur over a period of several years. At the conclusion of each round, and if the IO is interested in continuing to serve in that role, ICANN should conduct an evaluation to determine whether to contract with the IO for another round.

The IO has a dedicated budget to cover the necessary cost of the objection proceedings, including filing fees and panel fees as required. In addition, he had the opportunity to use a portion of the dedicated budget for administrative assistance as needed. Accordingly, he requested the appointment of an assistant, Julien Boissise, a PhD candidate at the University Paris Ouest, Nanterre La Défense, who was also engaged through a contract with ICANN.

As all proceedings engaged by the IO are now terminated, the present report is aimed at describing program experiences, the extent to which the Independent Objector position meets New gTLD Program goals, and recommendations for the improvement of the program with a particular emphasis on the functions of the IO and the dispute resolution process.

THE INDEPENDENT OBJECTOR'S ROLE

The IO was mandated to review new gTLD applications filed during the first round of the New gTLD Program in order to determine whether objections should be filed against any gTLD application. Following his reviews, he engaged legal assistance to prepare and file objections. He managed objections through the dispute resolution service provider selected to administer the proceedings, the International Chamber of Commerce (ICC).

Mandate and Scope

According to his mandate, the IO is empowered only to file objections against "highly objectionable" gTLD applications to which no objection has been filed.

The IO is also limited to filing two types of objections: Limited Public Interest Objections and Community Objections. However, the Applicant Guidebook (AGB) granted the IO standing to file objections on these enumerated grounds, notwithstanding the regular standing requirements for such objections.

Furthermore, in light of the public interest goal of his mandate, the IO can only file an objection to an application if at least one comment in opposition to the application was already made in the public sphere. Therefore, when making his independent assessment whether an objection was warranted, the IO had to consider comments made in the public sphere. It was his policy, published on his website, to consider that "public comments made in the public sphere" are not limited to the ones made on ICANN webpage dedicated to such comments. They can notably include articles published on the Internet or other public materials, as well as letters from individuals, public institutions (including Governments) or international and regional organizations, provided that those references are accessible to the public.

- **Rules specifically designed for the Independent Objector**

The Independent Objector is not an objector like others. When objecting, the IO does not defend its own interests but acts only in the best interests of the public who use the global Internet. In light of the specificities of his mission, the IO is granted standing to file

objections on the Limited Public Interest and Community grounds notwithstanding the regular standing requirements.

In particular, the IO may file:

- A Limited Public Interest Objection against an application even if a Community Objection has been filed, and vice versa;
- An objection against an application, notwithstanding the fact that a String Confusion Objection or a Legal Rights Objection was filed;
- In case of a Community Objection, other objectors have to prove, *inter alia*, "an ongoing relationship with a clearly delineated community"; since the IO is acting in the interests of the public in general and not a specific community, he is not bound by this rule;
- Absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection had already been filed on the same ground.

The concept of "highly objectionable" applications

With regard to the formulation "highly objectionable", the Expert Determination in Case EXP/399/ICANN/16, and the Explanatory Memorandum on the Description of Independent Objector for New gTLD Dispute Resolution Process dated 18 February 2009, are helpful. As the Expert noted, the Explanatory Memorandum refers to different concepts to explain what is a "highly objectionable" application. Thus, it refers to "clearly objectionable", "controversial applications", "highly controversial strings", "valid objections" and "strings considered objectionable across many jurisdictions". In this particular case, the Expert addressed the question to know if the "highly objectionable" criterion was an issue for determination *in limine*, on the merits or at all. The Panel referred to the Explanatory Memorandum which states that "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 Panel concluded 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."[2]

I fully agree with the Expert finding and suggest that **it should be explicitly stated in the AGB that the IO has a discretionary power in deciding if an application is "highly objectionable" or not.** However, as it is well known by lawyers (at least in civil law countries), "discretionary" does not mean "arbitrary" power; it simply implies a wide margin of appreciation limited *e.g.* by the principle of reasonableness.

The concept of "extraordinary circumstances"

I am of the opinion that it is also the responsibility of the IO himself to assess whether there are extraordinary circumstances at hand. I have also publicly indicated on my website that such extraordinary circumstances could occur if an objection was filed on the community or the limited public interest grounds while the IO might considers it necessary to file an objection on the same ground but for different reasons.[3]

It is my understanding that the functions of the IO have been specifically designed to address particular needs. Acting in the best interests of the public who use the global Internet, the IO is not like other parties and does not defend his own interests. Having special responsibility towards the global community of Internet users, I deem it necessary that the IO is in a position to appreciate whether objections filed by other objectors address similar issues and are based on similar arguments in comparison with his own objections and are making them persuasively enough. Given the particular importance of the interests defended by the IO, I deem it indispensable that he be able to conduct an assessment of the soundness and prospect of success of other objections before taking a decision on the maintenance or withdrawal of his objections.

I note that there is nothing in the AGB that envisages providing the IO with copies of other parties' objections, nor is there anything that prohibits the IO from asking the relevant parties to provide objections voluntarily.

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[2] http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/慈善-cty-excellent-first-limited/

[3] See: http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/

The question was raised for my Community Objection against ".Hospital". On 21 May 2013, I have withdrawn my objection since an objection had been filed by another objector against the same gTLD string and on the same ground. However, I did so only after careful review of this objection to make sure that there were no extraordinary circumstances which could justify that I maintain my objection. Even though I considered that their objection was too "US-oriented", I decided that there were no specific reasons to proceed any further with my objection.[4] Without access to the other objection, I would not have been able to justify the withdrawal of my objection.

I am therefore of the opinion that **the AGB should follow its reasoning through, develop the concept of "extraordinary circumstances" and explicitly grant the IO access to other objections within reasonable time, prior to making the decision to withdraw his own objections** (see however my general remarks below on the timing for making the IO's objections). It is crucial that, before taking a decision on the maintenance or withdrawal of an objection, the IO be in a position to conduct an assessment of the potential success of the other objection.

A different deadline for objections filed by the IO

In the same spirit, I think there should be different deadlines to file objections as between the IO and other objectors. Some applicants have requested that the IO publish a list of his objections before the objection deadline. Given the costs involved in the objection process, this is not an option – nor would it be in keeping with the general spirit inspiring the role of the IO. Indeed, in most cases, a party which was about to file an objection, would simply not lodge it for reasons of economy if it becomes aware that the IO will also file a similar objection. And reading the AGB, it is quite clear that the IO is only acting as a safety net in this process.

By contrast, it is quite logical that the IO be aware of objections filed by other parties before taking a final decision on his own objections. Thus, the rule according to which the IO cannot file an objection when an objection has already been filed against the same gTLD and on the same ground, would be particularly meaningful. Therefore, I think that **the IO should have an additional period of two months after publication of the**

[4] *Ibid.*

objection list for filing his objections.[5] This would be in line with ICANN's approach to, and my understanding of, the IO's mandate.

- **Independence as the cornerstone of the IO's mission**

As follows from his very title, the IO has to be independent. Section 3.2.5 of the ICANN Applicant Guidebook (AGB) states that "[t]he Independent Objector will be an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant" and that "the IO must be and remain independent and unaffiliated with any of the gTLD applicants. The various rules of ethics for judges and international arbitrators provide models for the IO to declare and maintain his/her independence". In my opinion, this reference to the models for judges and arbitrators should only serve as a mere guideline fort interpreting the question of the IO's independence from both ICANN and Applicants, keeping in mind that the IO is neither a judge nor an arbitrator, but a potential party to a dispute brought before an exper anel acting as a quasi-arbitrator.

During my mandate, I have acted in full independence and I wish to pay tribute to the ICANN authorities which on no occasion have tried to exert any form of pressure on m e. However, I sometimes had the feeling that they respected my independence with some excess: several times they have refused clarifications on the meaning of certain provisions of the AGB by reference to my independence in order not to influence me in any manner. This said, an excessive caution is certainly preferable to interference; however, I have not liked that ICANN has refused to publish this Report on their website on the fallacious pretext of respect for my independence: this looks more like a restriction to the diffusion of the Report. And I must admit that, time elapsing, I have got more and more the impression that they, in fact, cared little about my work. I have been informed that they have also fully preserved my independence *vis-à-vis* some applicants who have tried to challenge it through them in order to obtain my resignation.

However, some applicants questioned my independence and have alleged that I had conflicts of interests in particular since I had been Counsel before the International Court of Justice for certain States, whose interests were alleged to be at stake in the proceedings.

[5] A shorter period would make it difficult for the IO and his legal team to assess the opportuneness to make or not an objection in case of the existence of other objections.

In the AGB, the independence requirement points rightly to independence and absence of affiliation with any of the gTLD applicants. It is therefore important to point out that none of my former or present clients was an applicant in this first round of gTDL applications**.** Therefore, there should have been no reason to disclose any business or other relationship of the IO in regard to any of the applications filed. However, in line with my full commitment to transparency, I considered it appropriate to disclose my previous working relationships which could seem to be related to certain gTLDs applied to during this first round, and I have decided to act accordingly in all my objections, even where there was no challenge.[6]

When designing the mission and mandate of the IO, ICANN rightly made a point of insisting on the independence of the IO, primarily to avoid biases or abuses of favoritism with regard to any of the applicants. For example, the IO's independence could have perhaps been called into question had there been two applications for .Patagonia and if one of the applicants were the government of Argentina or Peru. In such a case, it is not excluded that I would have had to disclose my former relationship with these governments since I had been Counsel for both before the International Court of Justice – but the case has not presented itself.

On the issue of independency and impartiality, it is important to keep in mind the role of the IO in the dispute resolution process. The IO is not a judge, nor an arbitrator. His mission is limited to a careful, independent and impartial review of all applications in the best interests of various communities and of the global public who use the Internet. When he considers that these interests could be prejudiced, and as far as he deems it appropriate, the IO's mission is to retain and supervise the work of lawyers who will represent him, and thereby the public who uses the Internet, before an expert panel appointed by the ICC. Therefore, the IO is not a judge, nor a Counsel but a party to the dispute, acting in the public interest and on behalf of internet users globally. The various rules of ethics for judges and international arbitrators should serve as models for him to declare his independence *vis-à-vis* applicants.

Of course, any applicant is free to raise any issue about the integrity of the IO before the Panel that deals with its application and the Panel must deal with it in the way it deems

[6] See the full text of my objections : http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/ .

necessary. By contrast, I believe that this sort of query should not be raised at the ICC as such. Indeed, the ICC has no business having general opinions on an officer appointed by ICANN apart from a specific case in which any issues may be raised. The role of the International Centre for Expertise of the ICC in the objection proceeding is clearly delineated. It is the institution which administers the proceedings, including, *inter alia*, the nomination of Experts, the scrutiny process of the Experts' Determinations or the management of the proceedings' costs. This said, it should not prevent *the Panels* from finding some inspiration in the ICC rules applicable to the challenges of Experts:

- According to point 9 of the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure, "challenges and replacements of an Expert shall be dealt with in accordance with Article 11 (4) of the ICC Rules. They must be filed within five (5) days …"
- ICC Rules Article 11 (1) confirms that "every Expert must remain independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties."
- ICC Rules Article 11 (4) gives the necessary competence to decide on challenges to the ICC Expertise Centre.

On the substance, the Expert Panel alone has full authority to decide in its expertise that an objection of the IO did not meet the requirements as set out in the AGB, in particular, when the Expert is convinced that the IO is acting "on behalf of any particular persons or entities" and not, as he is directed to do, "solely in the best interests of the public who use the global Internet" (AGB, Article 3.2.5 (1)). The Expert Panel is the guardian of the integrity of the process and has the duty to ensure that the Expert Determination is soundly based on the standards established by the AGB. Therefore any allegations of partiality or bias can be and are best dealt within the dispute resolution process.

This question was raised before and decided by the Expert, Professor Luca G. Radicati Brozolo, in the Community Objection Case EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15). The Applicant alleged that "the office of the IO exhibits a conflict of interest within the meaning of ICANN's conflict of interest policy" and that this conflict was based on the "special links" I had with the Governments of Peru, Brazil, Argentina and Bolivia. The Applicant argued that my objection was used to formalize the early warning procedures initiated by Peru and Brazil. On this basis and alleging that I was not

entitled to represent a community that is delineated and distinguishable from Internet users in general, the Applicant claimed that I should have recused myself.[7]

As I noted in my additional written submission in that case, this approach hardly makes any sense and would ultimately exclude any person having a normal average social life to serve as the IO.[8] Nobody would consider that the IO is conflicted to bring a Community Objection against a string like .Paris or .BZH only because he actually is living in Paris or in Britany. Furthermore and referring to the present case, the approach chosen by the Applicant would make it hard, not to say impossible, to find an Independent Objector who is an eminent practitioner in public international law.

This assertion made by the Applicant is misconceived and ignores the standards set out in the Guidebook. Article 3.2.5 provides indeed that the "IO is granted standing to file objections on these enumerated grounds [i.e., Limited Public Interest Objections *and* Community Objections], notwithstanding the regular standing requirements for such objections." Contrary to others objectors, the IO does not have to establish that he is or represents an established institution and that he has on ongoing relationship with a clearly delineated community described at Article 3.2.2.4 of the Guidebook.

On this crucial question, the Expert Panel rejected the Applicant reasoning and decided that "whether the IO has exceeded his role is a serious issue that can impact on the decision on an objection and that must be capable of being decided. This is all the more so because Section 3.4.6 of the Objection Procedure stipulates that Expert determinations will be accepted by ICANN, thus in essence making them final (Section 3.4.6 of the AGB reads as follows: "The findings of the Panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process"). The power to decide a challenge to the IO would therefore seem to inure to the Expert's inherent powers."[9]

The Panel also confirmed my view, pointing that the assertion made by the Applicant, that the IO may only file objection on behalf of the community of Internet users, is a too "formalistic interpretation [that] would result in an unduly restrictive conception of the

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[7] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/amazon-%E3%82%A2%E3%83%9E%E3%82%BD-%E3%83%B3-%E4%BA%9A%E9%A9%AC%E9%80%8A-cty-amazon-eu-s%C3%A0rl/ .

[8] See the IO's additionnal written statement, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/amazon-%E3%82%A2%E3%83%9E%E3%82%BD-%E3%83%B3-%E4%BA%9A%E9%A9%AC%E9%80%8A-cty-amazon-eu-s%C3%A0rl/ .

[9] Determination precited, note 7.

IO's role". He further explains that "the statement that the IO's role is to file objections when no objection has been filed can be construed in the sense that his role is to raise objections in situations where, for whatever reason, no objection will be forthcoming, even if the application is 'highly objectionable'. This could occur, for instance, if there is nobody in a position to represent the community or if those who could raise the objection are unwilling to do so for fear of negative repercussions, lack of financial means and so on. Likewise, the statement that the IO 'does not act on behalf of any person or entities' can be understood as permitting the IO to raise an objection in situations where, while not technically acting on behalf of anybody (in the sense that nobody has given him a mandate to act or would even want him to act), he takes into account what can be considered the interests of a given community that would be prejudiced by an application"[10]. This is perfectly in line with my public policy, already established during the preliminary phase of the Initial Notice Procedure and for other controversial applications such as ".Africa"[11] or ".GCC"[12].

However, on the more substantial question of the independence and impartiality of the IO, the Expert Panel considered that "if regard must be had to the standards applicable to judges and arbitrators (as predicated by Section 3.2.5 of the Objection Procedures), the relevant perspective in international arbitration nowadays is an objective one. In the words of the IBA Guidelines on Conflicts of Interest in International Arbitration (General Standard 2(c)), it is that of a 'reasonable and informed third party', whilst the ICC Rules of Arbitration refer to independence 'in the eyes of the parties' (Article 11.2). By such standards, the IO's ties to two prominent members of the Amazon community could give rise to a presumption of conflict in this case, completely regardless of whether, in filing the objection, the IO acted 'on behalf' of his clients, as contended but in no way substantiated by the Applicant". It led the Expert to the regrettable conclusion that "objectively considered, the links between the IO and two major representatives of the Amazon community lead to justifiable doubts as to his independence in the eyes of the Applicant and of the broader public. Given the importance of ensuring the perception of neutrality, independence and impartiality of the office of the IO and of the entire gTLD dispute

[10] *Ibid*.
[11] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/africa-general-comment/ .
[12] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/gcc-general-comment/ .

resolution process, the Expert finds that the Applicant's challenge to the independence of the IO must therefore be upheld."[13]

It must be noted that this was the only case in which an Expert Panel came to such a conclusion. In all other cases where my independence and impartiality were questioned, the Expert Panels rejected the argument:

- In Case EXP/411/ICANN/28, the Expert Panel found that "there is no basis whatever for any allegations of bad faith or overreaching on the part of the Independent Objector in relation to this novel procedure."[14] In that case, the panel noted: "The phrasing of [Article 21 (d) of New gTLD Dispute Resolution Procedure] suggests that a panel's role is limited to determining which is the prevailing party, and that a panel does not have any discretion to determine the quantum of the refund to be paid. If this Panel had such discretion, it would have reduced the refund to be paid to the Applicant to take account of the Applicant's unjustified attack on the good faith of the Independent Objector."

- In the Community Objection, Case EXP/405/ICANN/22, the Expert Panel stated that "the direct or indirect association of the Objector with the healthcare community, past or present, does not, without further substantiation, justify a plea of bias either. There is no evidence before the Panel that suggests that the Objector is biased or that there is a justifiable doubt as to that and this plea is dismissed."[15]

- Similarly, in Case EXP/412/ICANN/29, the Panel "is satisfied that the IO is acting in the best interest of the public who use the Internet and has filed this objection in the public interest" and therefore found that the Applicant's challenge to my independence and impartiality was "manifestly unfounded."[16]

It should also be underlined that, in the past, I never had to deal with issues in relation to the Internet and gTLDs, which I also consider to be a mainly commercial matter in which governments are very little involved. They are indeed only subject to certain particular rights that need to be preserved and rights of States, when it comes to the Internet and the Internet's addressing system, are addressed by the GAC, one of the ICANN's organ

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[13] Determination cited note 3.

[14] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/healthcare-lpi-silver-glen-llc/ .

[15] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/healthcare-cty-silver-glen-llc/ .

[16] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/hospital-lpi-ruby-pike-llc/

specifically designed to deal with issues in which governments' interests are involved. Its role is distinct from the IO's mission which is to act solely in the best interests of the public who use the Internet.

Section 3.1 of the AGB states that "ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues." For this purpose they have specific means to ensure that their interests are preserved, including the early warning procedure and the GAC advice (In this regard the AGB states that "the process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic"). When reviewing applications and in particular for my review on the Community ground, I paid a particular attention to the GAC early warnings. Indeed, it is explicitly stated in section 3.5.4 of the AGB that the objector "must prove substantial opposition within the community it has identified" and that factors he should refer to include "the representative nature of entities expressing opposition (and) level of recognized stature or weight among sources of opposition". It was therefore more than appropriate for me to review these GAC early warnings, even though I was by no means obliged to file an objection on this basis. I had no other kind of relationship with the GAC (or any of its members), from which I was thus also independent.

Finally and most importantly, it is certainly not for ICANN to take any position on the issue of independence or to remedy any alleged concerns in any way. Indeed, rather to strengthen the necessary independence of the IO, any such step would put great doubt, in the eyes of all those involved, on the independence of the IO and jeopardize all steps taken. Furthermore, it is stated in the AGB that "neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest". If the issue of independence mainly refers to applicants, it also encompasses the IO's independence vis-à-vis ICANN as explicitly stated in the AGB. Once ICANN has appointed the IO and – as one may assume – has dealt with the integrity of the IO to be appointed, the issue is no more in the hands of ICANN. It would be a great infringement on the IO's independence if ICANN were to take any further step on this matter. After the end of my mandate for the first round, it is with great

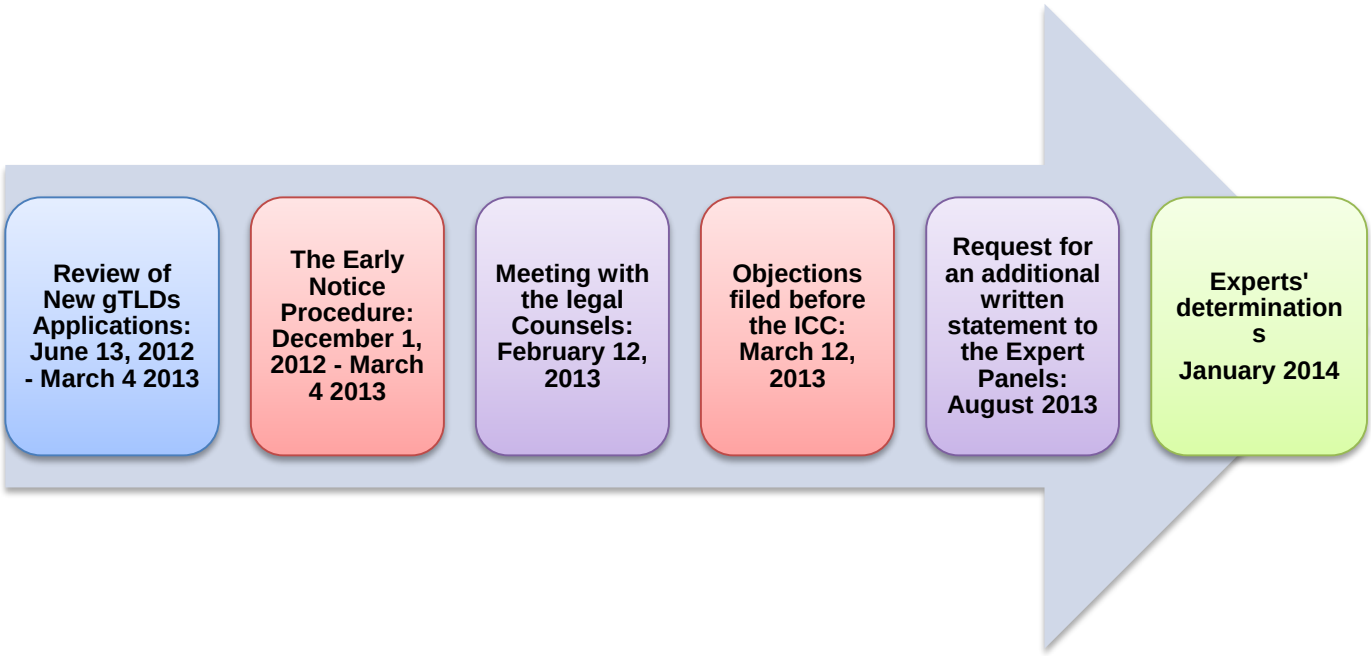
regret that I received the information that the BGC had welcomed a reconsideration request from an applicant which resulted in the annulment of an expert determination to which I was the prevailing party. This is a very unfortunate precedent, particularly harmful for the whole program, the dispute resolution process, its perception by the public and above all, a regrettable decision for the essential principle of legal certainty. It is also a serious threat on the independence of the IO for the future rounds

Therefore, for future rounds, I consider that it would be inappropriate and contrary to the AGB rules for ICANN to interfere on this issue as it has very wisely avoided to do during the first round. A decision from ICANN on this issue could be interpreted as a refusal to one or several IO's objections or an attempt to exert undue pressure on the IO. **I then suggest that ICANN should envisage to expressly state in the rules applicable in the future that if the independence and integrity of the IO is challenged, the issue should be decided by the Experts Panels in the cases in which it is raised. Moreover, the public posting on ICANN's website of a declaration of independence and impartiality by the IO should be envisaged.**

Now, the question of the consequences to be drawn if and when a challenge against the independence and/or the integrity of the IO is accepted – or when the IO himself feels conflicted – is a difficult one. **ICANN should maybe provide for the appointment of an alternate IO. Another solution would be the provision of a list of substitutes, to which the IO, or the Expert Panel could refer to in case they deem it necessary.**

Overview of the Different Phases in the Independent Objector's Functions

Key dates for the IO's activities



The IO's assignment can be divided into four different phases:

1. During the first phase, the IO reviewed new gTLD applications and determined whether an objection to those applications was, at that time, warranted because they were contrary to the public interest. This "First Evaluation" period encompassed the series of reviews performed on all gTLD applications to ensure that they met the established criteria.

2. Following his first review of applications and on his own initiative, he established the "Early Notice Procedure" in line with the mediation/negotiation strongly encouraged by ICANN.

3. During the third phase, he hired a team of lawyers. After close consultation with him and between themselves, the lawyers completed the research and drafted objections before filing these with the ICC.

4. As for the final and fourth phase, the objection proceedings themselves, the IO closely followed all Independent Objector-initiated objection proceedings, requested a second round in all cases and responded to inquiries from the Expert Panels.

Phase 1

1.1 Establishment of the IO's global strategy and working plan.

This phase included:

- His approach to the IO's mandate;
- How will the IO meet ICANN's expectations for this position;
- His working plan and upcoming activities;
- The IO's understanding of key terms such as "generally accepted legal norms of morality and public order that are recognized under international principles of law"; "substantial opposition"; "community" and any other relevant terms;
- The creation of a website in order to inform the public of the IO's activities.

1.2 Review of New gTLD Applications in order to determine whether objection should be filed against any applied-for gTLD on the grounds of Limited Public Interest or Community Objection and in the public interest. It included:

- The development of a method for reviewing the applications and sorting them into categories (e.g. "applications commented"; "applications potentially controversial"; "applications seemingly not controversial").
- The review of categorized applications with a particular focus on their following components of the public portion of these applications:
  - New gTLD applied-for strings itself;
  - Purpose of the proposed gTLD;
  - How the applicant expects that the proposed gTLD will benefit registrants, Internet users and others;
  - The "Community-based designation" section;
  - The "Geographic names" and "Protection of Geographic names" sections.
- The classification of applications depending upon which ground an objection could be filed (Limited Public Interest or Community Ground);
- The extended review of applications in light of the following grounds for a Limited Public Interest Objection:
  - General principles of international law for morality and public order, including but not limited to:
    - Incitement to or promotion of violent lawless action;

- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children;
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

- The extended review of applications in light of the following four Community Objection tests:
  - There is a strong association between the applied-for gTLD string and a community;
  - The community invoked is a clearly delineated community;
  - Community opposition to the application is substantial;
  - 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.
- The review and consideration of public comments to assess whether an objection was warranted;

Phase 2

2.1 Establishment of the Initial Notice Procedure

2.2 Drafting of a first opinion, the Initial Notice, on selected controversial applications to describe the contentious issues based on the relevant ground and containing in particular:

- The reasons why the IO considered that, after his first evaluation of the application, an objection was warranted on either the community or limited public interest grounds.

2.3 Submission of the Initial Notice to the Applicant for its consideration, comments and feedback.

2.4 Final review of applications in light of the comments and feedback sent by Applicants in order to determine if an objection is still warranted. When the IO considered that an objection was not warranted anymore, the full text of the initial notice was posted on the IO's website. It contained in particular the specific reasons why the IO decided not to file an objection after his exchange of views with the applicant.

Phase 3

3.1 Hiring a team of legal Counsel specialized in international law to prepare and file objections.

3.2 Drafting of the objection according to the requirements of the attachment to module 3 of the New gTLD Guidebook and containing, *inter alia*:

- A statement of the ground upon which the objection is being filed;
- An explanation of the validity of the objection and why the objection should be upheld;
- Copies of any documents that the IO considered to be relevant for the objection.

3.3 Lodging the objections before the International Centre for Expertise of the International Chamber of Commerce.

Phase 4

4.1 Management of objections submitted to the International Centre for Expertise of the International Chamber of Commerce and participation in dispute proceedings:

- Direct the prosecution of the objections;
- Respond to any inquiries from the dispute resolution panels.

4.2 Request to the Expert Panels for a second round in all cases.

4.3 Supervision of the drafting of the authorized additional written submissions.

4.4 Reception of the Expert Panels' Recommendations.

4.5 Dealing with requests for reconsiderations.

The IO's commitment to transparency

On taking office, I emphasized the crucial importance of transparency for the functions of the Independent Objector. As I was solely acting in the best interest of the public who uses the global Internet, I deemed it imperative that this public should be aware of all my activities, providing that they are not confidential. This was notably the case of the proceedings before the ICC International Centre for Expertise.

In light of my deep commitment to transparency and on my own initiative, my assistant has designed and set up under my supervision a website which was launched on 2 October 2012.

http://www.independent-objector-newgtlds.org/english-version/home/

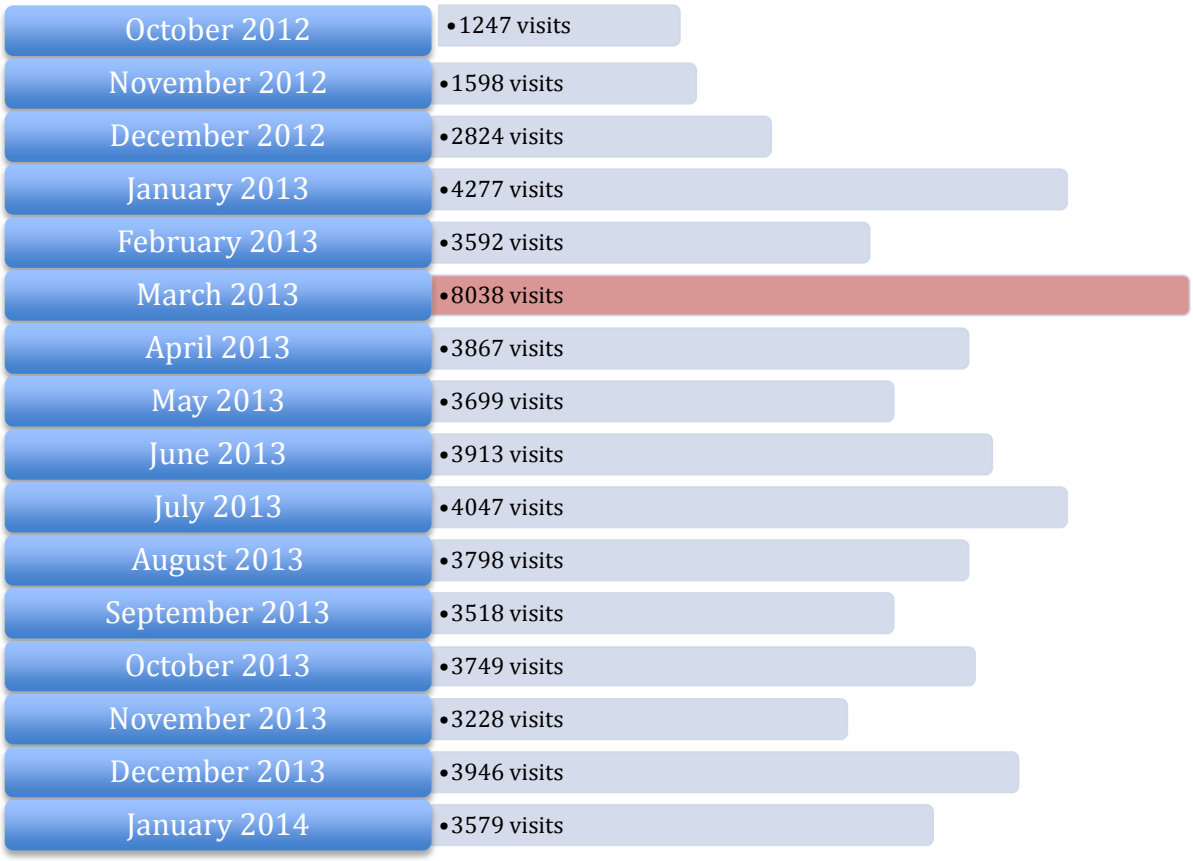
Since it was launched, the website has had more than 65,000 visits (approximately 128,000 pages visited). Every day, there are around 120 visits on this website, which I update when possible and relevant. On 14 March 2013, the deadline for filing objections, there were 1,400 visits on the website.

As for the website content, visitors have access to several information, including:

- A presentation of the Independent Objector and his role;
- A direct access to the Applicant Guidebook;
- A description of the Limited Public Interest ground for Objection;
- A description of the Community ground for Objection;
- An explanation of the dispute resolution process;
- A webpage entirely dedicated to the IO's Objections;
- My comments on controversial applications against which I finally decided not to file an objection (including .Adult, .Africa, .Army, .Catholic, .Church, .Gay, .GCC, .Hot, .Islam, .LGBT, .Persiangulf, .Porn, .Sex, .Sexy, .Vodka, .WTF);
- My general comment on the difficult issue of Closed Generic gTLDs;
- News and updates on my activities;
- A contact form which visitors can use to directly reach me.

Now that the first round has come to an end, the question arises as to whether the website should be removed from the Internet or if it should be kept accessible to the public. I believe that for now, and until the second round of the New gTLD Program, **ICANN should keep the IO's website which is still widely consulted by Internet users.** Access to this website will also be of great benefit for the launch of any further round since it gathers all information concerning the IO and new applicants may have a particular interest in having access to those information when designing their applications.

Overview of the visits on the website



Presentation of the Legal Team

Héloïse Bajer-Pellet (French) is an attorney at law, member of the Paris Bar, France. She has worked at an International level, before the International Court of Justice and other international courts or arbitral tribunals, as well as before Administrative international tribunals or domestic courts.

Ms Héloïse Bajer

Daniel Müller (German) holds a PhD in Public Law from the Université Paris Ouest Nanterre La Defense. He works as a Consultant in Public International Law. As counsel and advocate, he represented several States before the International Court of Justice and before Arbitral Tribunals.

Dr Daniel Müller

Phon van den Biesen (Dutch) is Attorney at Law in Amsterdam, the Netherlands. He is a litigator and acts before the Dutch Courts, as well as before the Courts of the European Union. Also, on occasion he appears before the International Court of Justice; he represented Bosnia and Herzegovina as its Deputy Agent in its genocide case against Serbia.

Mr Phon Van Den Biesen

Samuel Wordsworth QC (British) is a barrister at Essex Court Chambers, London, and a Visiting Professor at King's College London. He has represented many States before the International Court of Justice and other international courts and tribunals, as well as before European and domestic courts.

Mr Samuel Wordsworth, QC

THE DISPUTE RESOLUTION PROCESS

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

A formal objection can be filed only on four enumerated grounds - *String Confusion Objection, Legal Rights Objection, Limited Public Interest Objection and Community Objection* - and it initiates a dispute resolution proceeding. The IO is limited to filing Limited Public Interest Objections and Community Objections.

In filing an application for a gTLD, the applicant accepts the applicability of this gTLD dispute resolution process. Similarly, the Independent Objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate Dispute Resolution Service Provider (DRSP) for each objection ground. The International Centre of Expertise of the International Chamber of Commerce is the DRSP which administers disputes brought pursuant to Limited Public Interest and Community Objections.

The Initial Notice Procedure

Prior to the objection' process and on my own initiative, I established the "Initial Notice Procedure" in order to give applicants the opportunity to react to my concerns following my first assessment of applications. In the context of this procedure, a detailed note, including the reasons why I considered that an objection against their applications might have been warranted, was sent to all concerned applicants in order to give them the opportunity to react to my first assessment. 34 Initial Notices were sent to applicants for the following gTLDs strings:

- .Africa (2 applications)
- .Amazon (3 applications)

- .Army
- .Charity (2 applications)
- .Church (2 applications)
- .GCC
- .Health (4 applications)
- .Healthcare
- .Hospital
- .Hotel (7 applications)
- .Hoteles
- .Hotels
- .Indians
- .Islam
- .Med (4 applications)
- .Medical
- .Patagonia

As explained on my website, "the Initial Notice may also aim at finding an amicable settlement of the dispute arising between the applicant and the IO. Indeed, as encouraged but not required by ICANN, both parties are given the choice to participate in mediation or negotiation processes. The Initial Notice had opened up an opportunity for amicably and effectively settling the pending issues in full respect of the interests the IO must protect."[17] It should be noted that my *prima facie* inclination was to give priority to direct negotiations over mediation.

All applicants contacted during this phase of the procedure responded to my remarks. It is only after careful review of their comments and feedback that I conducted a second assessment of their application.

All applicants benefited from this procedure. For some applicants and as a result of the Initial Notice Procedure, I considered that they appropriately addressed my first concerns. In these particular cases, I made my final decisions public and posted all relevant facts on my website. Therefore, the public was informed of the reasons why I first considered that

[17] http://www.independent-objector-newgtlds.org/home/the-dispute-resolution-process/the-objection-process-and-the-independent-objector/.

an objection was warranted and why, after an exchange of view and a second review, I have decided not to lodge an objection.

This process was welcomed by applicants and has proved its effectiveness for several applications:

- As for ".Africa", I was of the opinion that the African Union was an established institution representing and associated with a significant part of the targeted community. The African Union Commission was already fully aware of the controversial issues and was better placed than myself to file an objection, if it deemed it appropriate.[18] I met the same issue with the application for ".GCC" and came to the conclusion that the Gulf Cooperation Council itself was in a better position to file this objection.[19]

- I decided not to file an objection against ".Army" since the guarantees presented by the Applicant ensured respect for the rights and best interests of the public who uses the global Internet. Moreover, I noted that if a particular State considered that its own rights and interests were threatened, it was entitled to issue a GAC advice or to file its own objection.[20]

- Following my final assessment of the application for ".Islam", I decided not to file an objection since the Applicant properly addressed my concerns and committed to sufficient guarantees.[21]

For other applicants, it is only after this second assessment and a meeting with my legal team that I decided to file objections on 12 March 2013.

Furthermore, the AGB also encourages the parties to a dispute to enter into mediation or negotiation after the filing of the objection.

We successfully continued negotiations with the Applicant for ".Indians". As for this application, I finally considered that an objection was not warranted anymore. Accordingly, I have withdrawn my community objection since the Applicant satisfactorily

[18] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/africa-general-comment/ .
[19] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/gcc-general-comment/ .
[20] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/army-general-comment/
[21] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/islam-general-comment/ .

addressed my concerns raised during this initial notice procedure.[22] I did so only after that changes to the application were validated by ICANN.

One Applicant requested the commencement of a mediation procedure under the auspices of the Amicable Dispute Resolution Centre of the International Chamber of Commerce. I considered that the functions of the Independent Objector have been specifically designed to address particular needs and that my concerns were not appropriately addressed at the propitious time of the Initial Notice Procedure and since I had difficulties in foreseeing how and why the Applicant could give at this time the assurances and guarantees that it was not able to give during the previous phase. Moreover, I was of the opinion that the IO was not in a position to "negotiate" over the admissibility or not of an application, as might be the case with respect to String Confusing Objections or Legal Rights Objections. The IO is only called to represent the interest of the users of the Internet; he cannot negotiate and bargain with these interests.

Therefore, given the fundamental importance of the interests defended by the Independent Objector and particularly in view of the specificities of my functions, I decided that, at this point of the proceedings, it was not appropriate for me to enter into a mediation procedure, which could only have as an effect to delay the final decision. In case of an objection filed by the IO, in the sole interests of the public who uses the global internet, I am of the opinion that, although the Parties – included the IO – should use all the possibilities to obtain an amicable solution, once the objection lodged by the IO, it is only for the Expert Panel to consider the matter in view of all elements brought to its attention and to provide a clear and public resolution to the dispute.

The Initial Notice Procedure is not provided for in the Guidebook. However, I think it is an important innovation and given its success with the Applicants – all have reacted to my request – I would think that **it would be appropriate to formally consecrate it in the Guidebook in view of the future rounds of the New gTLD Program**. **It is indeed a good alternative to the mediation and negotiation strongly encouraged by ICANN, which better corresponds to the specificities of the IO's mission and mandate.**

[22] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/ .

Objections Filed by the Independent Objector

On 12 March 2013, I have lodged 24 objections against gTLDs applications before the International Chamber of Commerce (ICC). This number was brought down to 19 following the withdrawal of three applications by the applicants themselves[23] and the withdrawal of two of my objections. As explained earlier, I have withdrawn my Community Objection against ".Hospital" since another objection was filed on the same ground by a different objector.[24] I have also withdrawn my Community Objection against ".Indians" since the applicant addressed all my concerns raised during the Initial Notice Procedure through the modification of its application.[25] This, again, shows the usefulness of this process which I established on my own initiative.

The following list of objections has been filed and examined by Expert Panels appointed by the ICC International Centre for Expertise and in light of the New gTLD Dispute Resolution Procedure from ICANN, the ICANN gTLD Applicant Guidebook, the ICC Rules for Expertise, the Appendix III to the ICC Rules for Expertise and the ICC Practice Note on the Administration of Cases.

	gTDL string	Applicant	Application ID	Objection Ground	Case Reference	Objection Status
1.	.amazon	Amazon EU S.à r.l.	1-1315-58086	Community Objection	EXP/398/ICANN/15	Dismissed
2.	.アマゾン [Amazon - Japanese]	Amazon EU S.à r.l.	1-1318-83995	Community Objection	EXP/396/ICANN/13	Dismissed
3.	.亚马逊 [Amazon - Chinese]	Amazon EU S.à r.l.	1-1318-5591	Community Objection	EXP/397/ICANN/14	Dismissed
4.	.charity	Corn Lake, LLC	1-1384-49318	Community Objection	EXP/395/ICANN/12	Upheld
5.	.charity	Spring Registry Limited	1-1241-87032	Community Objection	EXP/400/ICANN/17	Dismissed
6.	. 慈善 [Charity]	Excellent First Limited	1-961-6109	Community Objection	EXP/399/ICANN/16	Dismissed
7.	.health	Afilias	1-868-3442	Limited Public	EXP/409/ICANN/	Dismissed

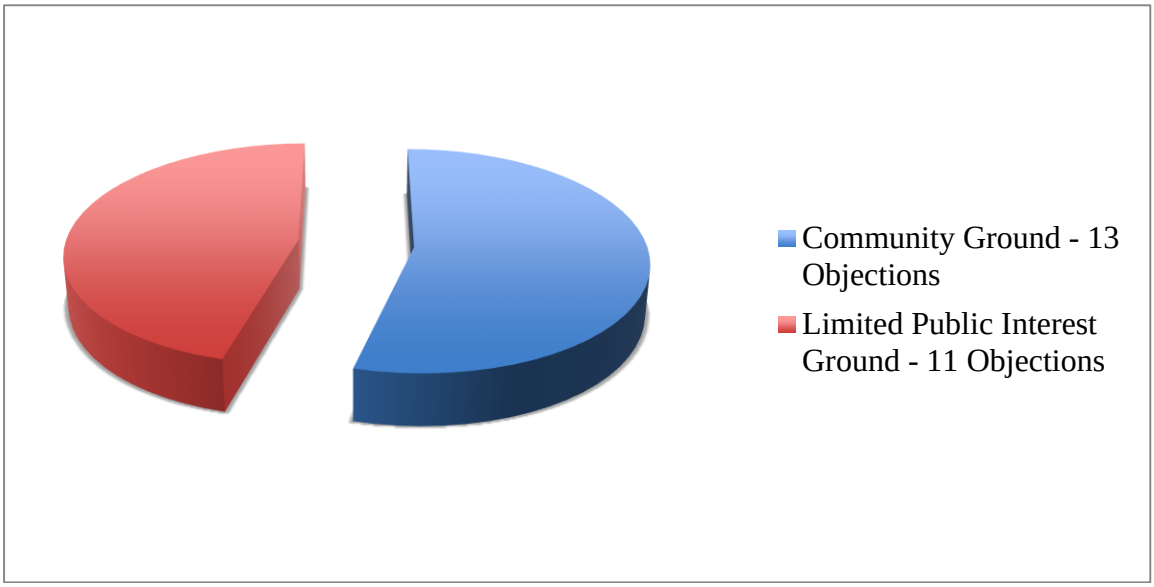
[23] Dot Health Limited, DocCheck AG and Patagonia

[24] See :http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/hospital-cty-withdrawn-objection/ .

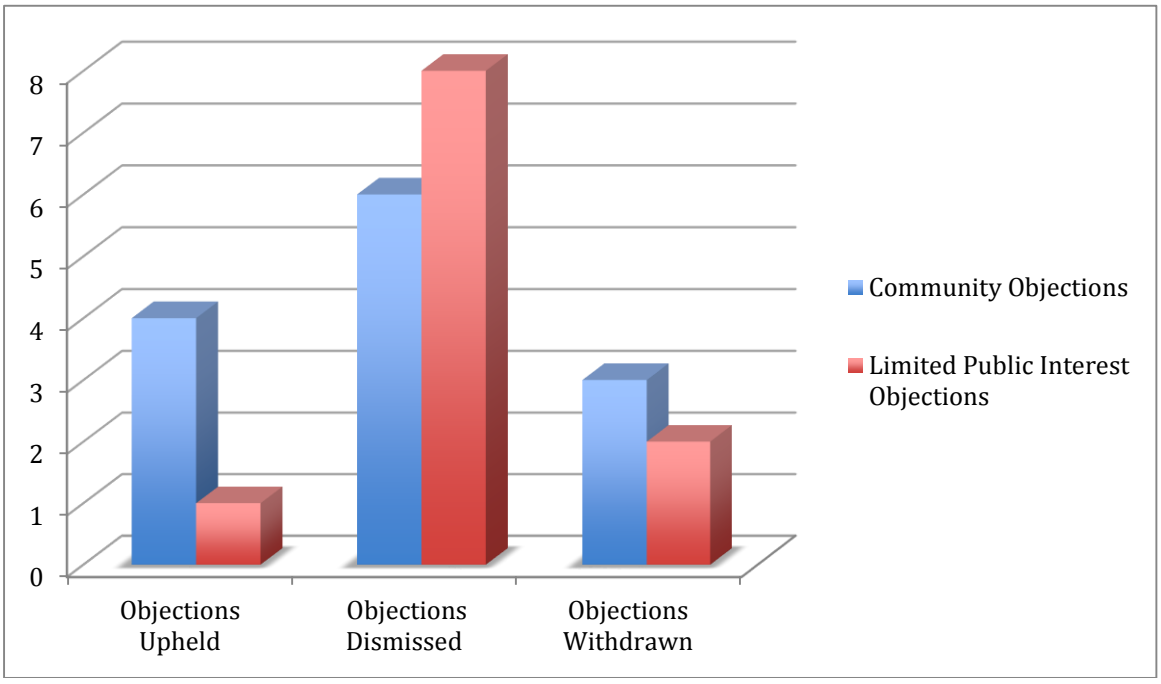
[25] Op. Cit. note 22

		Limited		Interest	26	
8.	.health	dot Health Limited	1-1178-3236	Limited Public Interest	EXP/418/ICANN/ 35	Withdrawn
9.	.health	DotHealth, LLC	1-1684-6394	Limited Public Interest	EXP/416/ICANN/ 33	Dismissed
10.	.health	Goose Fest, LLC	1-1489-82287	Limited Public Interest	EXP/417/ICANN/ 34	Dismissed
11.	.healthcare	Silver Glen, LLC	1-1492-32589	Limited Public Interest	EXP/411/ICANN/ 28	Dismissed
12.	.healthcare	Silver Glen, LLC	1-1492-32589	Community objections	EXP/405/ICANN/ 22	Dismissed
13.	.hospital	Ruby Pike, LLC	1-1505-15195	Limited Public Interest	EXP/412/ICANN/ 29	Upheld
14.	.hospital	Ruby Pike, LLC	1-1505-15195	Community objections	EXP/406/ICANN/ 23	Withdrawn
15.	.indians	Reliance Industries Limited	1-1308-78414	Community Objection	EXP/401/ICANN/ 18	Withdrawn
16.	.med	Charleston Road Registry Inc.	1-1139-2965	Limited Public Interest	EXP/415/ICANN/ 32	Dismissed
17.	.med	Charleston Road Registry Inc.	1-1139-2965	Community objections	EXP/404/ICANN/ 21	Upheld
18.	.med	DocCheck AG	1-1320-21500	Limited Public Interest	EXP/408/ICANN/ 25	Withdrawn
19.	.med	HEXAP SAS	1-1192-28569	Limited Public Interest	EXP/410/ICANN/ 27	Dismissed
20.	.med	Medistry LLC	1-907-38758	Limited Public Interest	EXP/414/ICANN/ 31	Dismissed
21.	.med	Medistry LLC	1-907-38758	Community objections	EXP/403/ICANN/ 20	Upheld
22.	.medical	Steel Hill, LLC	1-1561-23663	Limited Public Interest	EXP/413/ICANN/ 30	Dismissed
23.	.medical	Steel Hill, LLC	1-1561-23663	Community objections	EXP/407/ICANN/ 24	Upheld
24.	.patagonia	Patagonia, Inc.	1-1084-78254	Community Objection	EXP/402/ICANN/ 19	Withdrawn

Objections' Grounds



Objections' Status



Second Rounds in the Objection Proceedings

In all the cases I was involved in, I have requested the Panels to authorize a second round and the submission of an additional written statement.

Pursuant to Article 17 (a) of the Attachment to Module 3 of the Applicant Guidebook, New gTLD Dispute Resolution Procedure (hereinafter the Procedure), "the Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions". I was pleased to note that my requests were granted in all cases.

Reading applicants' responses, it appeared in all cases that they were not content merely to address the concerns expressed in my objections, but they also sought to introduce new elements to the cases, on which I considered it was crucial to express my views.

It was notably the case when applicants referred to an alleged bias. On the substance and as I have previously explained, the Expert Panel has the full authority to decide in its expertise that an objection does not meet the requirements as set out in the Guidebook. Notably, if the Expert Panel is convinced that I am acting "on behalf of any particular persons or entities" and not, as I am directed to do, "solely in the best interests of the public who use the global Internet" (Applicant Guidebook, Article 3.2.5 (1)), it may draw the consequences from its findings on any allegations of partiality or bias. Since I was of the view that the claims concerning my alleged bias were groundless, I deemed it necessary to request the Expert Panel to authorize me to submit additional written statements in order to provide me with the opportunity to present my position on this important and new issue.

More importantly, all Applicants raised issues concerning the interpretation of the New gTLDs dispute resolution procedure and of the framework that has been established by ICANN in connection with the Limited Public Interest and Community Objections grounds. When I disagreed with the applicants' positions and, since I had special responsibility towards the global community of Internet users, I thought it was in the best interest of the public and of the proceedings that I could express my views with regard to those key issues in order to assist the Experts' Panels in the fulfilment of their task.

Finally, between the deadline for objections and the authorization of second rounds, the new gTLD process progressed, leading to new facts or important elements for the proceedings such as the Public Interest Commitments or the GAC Advices. When

applications were concerned, it was crucial to address those new issues which had a marked influence in Experts' Determinations.

Obviously, this is an entirely new and unprecedented procedure involving standards established in the Applicant Guidebook which needed to be clarified, interpreted and applied for the first time. In this exercise, the parties to the cases had a major role to play according to Article 13 (2) of the ICC Expertise Rules, which stipulates that "in agreeing to the application of these Rules the parties undertake to provide the expert with all facilities in order to implement the expert's mission".

This was also an opportunity to draw from the fundamental principles of an adversarial process and the right to respond (*audiatur et altera pars*), as largely enshrined in international law. The Guidebook also embodies these elementary principles. According to Article 4 of the Procedure, the Expert Panel shall "ensure that the parties are treated with equality, and that each party is given a reasonable opportunity to present its position".

It is important to note that the purpose of the proposed additional statement was not to return to issues already addressed by both parties but to discuss new issues that had arisen from the applicants' responses.

The question of an appeal

It should also be noted that the New gTLD Dispute Resolution Procedure, as thoroughly detailed in Module 3 of the Applicant Guidebook (AGB), makes no specific provisions for an appeal process. As stated in Section 3.4.6 of the AGB, "the findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process". This seems to imply that ICANN reserves its right not to follow the experts determination – a rather unfortunate situation which paves the way for allegations of arbitrary decisions. However, it does not specify the proceedings to be followed and there is no mention of an appeals proceedings.

However, I note that some applicants have used the reconsideration request process as a substitute for an appeal process, and I am dismayed that one request was accepted by the Board Governance Committee (BGC).[26] In that occasion, I was contacted by the BGC which asked me a number of questions on my initial objection but did not offer me any

[26] https://www.icann.org/en/system/files/files/acceptance-medistry-22mar14-en.pdf

possibility to comment on the request for reconsideration which constitutes an obvious breach of the fundamental principle of an adversarial process. This is all the more surprising in view of the fact that, as for the IO's objections, two other similar requests were rejected[27].

Not without hesitation, I have, very reluctantly, decided to answer those questions as a matter of courtesy. However, I consider that it is regrettable that the Board has accepted to introduce an appeals proceeding under the guise of the reconsideration process, which is totally unrelated to the New gTLD Dispute Resolution Procedure, and is not mentioned in the Applicant Guidebook. According to ICANN website, this procedure is intended for "any person or entity that has been materially affected by any ICANN staff action or inaction".

Neither the ICC, nor the Expert Panels nor indeed the Independent Objector are staff members of ICANN. Moreover I note that, in response to a reconsideration request submitted by another Applicant, the BGC has issued a recommendation in which it clearly affirmed that "while parties to a dispute resolution proceeding may not always be satisfied with the determinations of the DRSP panels, the Reconsideration process *is not intended* to reexamine the established dispute resolution process".[28] I do regret that the BGC did not follow this wise reasoning for all similar requests.

As already explained, it is therefore with the utmost hesitation and reluctance that I have answered the questions asked by the BGC, which I also perceived as a pressure exerted by ICANN upon me and as a possible infringement to the IO's independence for the future: it is not provided for in its mandate – nor is it in conformity with the very spirit of his or her functions – that he or she would be called to justify his or her decisions to object (or not to object) *ex post* before an ICANN body. I see these proceedings as a very regrettable precedent.

I am not "ideologically" opposed to an appeal process in the framework of the ICANN New gTLDs Dispute Resolution Procedure. However, I believe that such a process should be expressly provided by that Applicant Guidebook and should remain a procedure held

[27] https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf and https://www.icann.org/en/system/files/files/determination-ruby-pike-05feb14-en.pdf
[28] http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-tencent-29oct13-en.pdf, p.9 – italics added.

before arbitrators who, alone should have the last say. If such a process is put in place, both parties (that is the Applicant and the IO) should be placed on the same footing – i.e.: both could be called to lodge an appeal (probably based on limited grounds) and both could make their arguments (not the IO being suspiciously asked question as I was in the case reported above). Moreover and in any case, such a process should by no means take place before the BCG, which has clearly no title and no competence to review an Expert Determination.

The Limited Public Interest Ground for Objection

When assessing whether an objection against an application would be warranted on the Limited Public Interest ground and according to the AGB, the IO examines whether the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under fundamental principles of international law.

The scope of this ground for objection is wide and it is quite clear that it was designed to avoid serious violations of the international public order. Non-exhaustive examples of instruments containing such general principles include:

- The Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social, and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

When it comes to issues of morality, such as sexual or religious issues, it must be noted that every person, society, country, religious tradition or cultural group can have a different perception of what is acceptable and what is not. Moreover, those perceptions evolve and what is acceptable today can be unwelcome tomorrow, and vice versa. Because the definition of what is offensive or not greatly differs over time and amongst different societies, it is difficult for a global consensus to be reached on those matters. Thus, it falls within each State, society, religious or cultural groups to set their positions on those issues, notably through national legislation, and it is not within the scope of the IO's mandate to express views on the legality or appropriateness of such policies.

From a legal perspective, it is undoubtedly possible to identify principles and rules of international law aimed at protecting common values of the international society, such as the prohibition of genocide, slavery, torture or sexual exploitation of children. However, the understanding of international morality is not uniform within the international society. It is difficult to list such principles since those value judgments, even when fundamental, also change over time. When reviewing applications, I made my assessment in light of those value judgments that have been transcribed in international legal norms, and not with regard to specific religious or national moral values. Thus, I considered that the position of certain communities on these issues is not relevant in respect to the IO's possibility to object to an application on the Limited Public Interest ground.

In Case EXP/412/ICANN/29, the Panel gave its own definition of "morality" and "public order". It stated that "morality in the normative sense refers to a code of conduct that applies to all who can understand it and can govern their behaviour by it. Morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral consideration. All of those who use 'morality' normatively also hold that, under plausible specified conditions, all rational persons would endorse that code". It further stated that "public order has the same meaning as the term 'public policy', used especially in Anglo-American legal terminology. Thus, the notion of Public Order is often used interchangeably with the term 'public policy'. Despite this terminological confusion, public order is commonly understood as the pillar of the legal system and social order. The civil law system recognizes public order as long-term constant and one upon which rests, not only, the constitutional and legal order. However, in light of the common law approach this term also represents a much broader legislative category which expresses to a certain

degree the prevailing political view of social priorities. The Expert Panel adopts the broader notion of public order which is close to the category of public interests and goes beyond the interest of individuals. Such a notion is aimed to ensure the safety and welfare of the society."[29]

The AGB adds that grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

I believe that the first three grounds should be removed from this list since I have noted that it can mislead people who tend to think that these three grounds are the only reasons which could trigger a Limited Public Interest Objection. The fourth ground is very general and includes in any case the three other grounds. Thus, **for the sake of clarity, I am of the position that only the fourth ground should be retained in a future version of the AGB**.

Finally, the AGB puts the emphasis on the fact that the panel will conduct its analysis on the basis of the applied-for gTLD string itself. It may, if needed, use as additional context the intended purpose of the TLD as stated in the application. In my considered opinion, the assessment conducted by the panel should not be limited to the wording of the gTLD string itself. Indeed, if taken out of context, it generally does not make any sense for an objection to be filed. Obviously, no applicant will apply to a gTLD that will directly encourage child

[29] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/hospital-lpi-ruby-pike-llc/ .

prostitution or promote genocide or torture. This rule would therefore, by this narrow reading, render the Limited Public Interest ground almost moot.

In Case EXP/413/ICANN/30, the Panel adopted a strict interpretation of the AGB. They considered that "the definition and elaboration of the Limited Public Interest Objection all refer to the consideration of the applied-for gTLD string itself". On this basis, they further argued that "whilst the Panel may, if needed, use as additional context the intended purpose of the gTLD as stated in the application, the starting point must be the applied-for gTLD string itself. It is only necessary, in the Panel's view, to refer to the intended purpose of the gTLD as an additional context if the consideration of the string itself does not allow the Panel to come to a view one way or another. This would be the case, for example, if the word to be used as a string does not have a clear meaning, or if the intended purpose shows beyond doubt that the applied for string is intended to be used for a purpose that is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law. *Therefore, the starting point, the Panel concludes, must be whether the string .medical is contrary to general principles of international law for morality and public order, not whether the internet content potentially available under that string conforms to such principles*" (emphasis added).[30]

I find that decision both debatable from a legal point of view and very unfortunate. Indeed, in my view, any applicant applying for a .Medical TLD should demonstrate awareness of its duty to organize, set up and manage this gTLD in such a way that the right to health (which the Panel furthermore acknowledges to be a fundamental principle of international law) with all of its implications, including the necessity of reliability and trustworthiness, is fully respected and, consequently, should demonstrate that this duty will be effectively and continuously implemented. In addition, the applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfil the right to health.

As for another similar example, I have filed four Limited Public Interest Objections against the gTLD string ".Health". The string in itself is not contrary to generally accepted legal norms of morality and public order that are recognized under fundamental principles of

[30] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/medical-lpi-steel-hill-llc/ .

international law. However, a wide range of international legal instruments sets the framework for the protection and well-being of the people and addresses subjects such as health in its broadest sense. Examples of key international instruments, more or less specific, are the Universal Declaration of Human Rights, and in particular its article 25, the Constitution of the World Health Organization or the Medicrime Convention of the Council of Europe. The Applicants themselves recognized that a public interest was at stake and the stakeholders working for the promotion and protection of the global public health feared that applications for a ".Health" gTLD did not provide the necessary guarantees for a secure and reliable health Internet network. A regrettably rigid reading of the AGB led the Expert Panel in Case EXP/416/ICANN/33 to say that "it is clear that under Section 3.5.3 of the AGB, an LPI objection may be sustained if the string itself – in other words, the terms constituting the applied-for gTLD – is contrary to general principles of international law for morality and public order. But it is just as clear to the Panel that the generic term "health" is not, in and of itself, contrary to such generally accepted legal norms. The IO has primarily conjectured that a .Health gTLD registry, as operated by Dothealth, would not be adequately safeguarded or protective enough of human rights to health, but that changes nothing to the fact that word 'health' is by no means inherently objectionable"[31].

As for my position, I was convinced that the protection of global public health is an issue of public concern and should be promoted. Given the technically ease with which people can access to the Internet, the entity operating the gTLD should offer the necessary safeguards to ensure that the most vulnerable people, including children and people with low health literacy, are able to make effective use of the resources and are not the target of fraudulent commercial activities. In this regard, an improper use of the gTLD could constitute a real threat to public health and the international public order. It is by reference to those motivations that I filed my objections. This reasoning is not solely based on the gTLD itself but inevitably involves closely reviewing the intended purpose of the applications. Therefore, I can only find the Determination of the Expert Panel in Case EXP/416/ICANN/33 very unfortunate since, based on a very limited understanding of the AGB, it led to a speedy conclusion in this matter of a fundamental importance for the public who use the Internet.

[31] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/health-lpi-dothealth-llc/

To the contrary, in Case EXP/409/ICANN/26, the Panel adopted a different reading of the AGB and decided that "an expert panel charged with deciding a limited public interest objection cannot properly assess the compatibility of a proposed string with public order and morality without taking into account the context of its application, including the likely effects of the operation of the string on the internet community". The Panel further concluded that it "does not look merely at the simple wording of the proposed string, but also at its probable use and operation. Without doing so, an expert panel could not possibly come to any determination as to whether the gTLD that has been applied for would impair interests protected by any fundamental norm of international law – and making such a determination is precisely an expert panel's mandate"[32]. I fully agree with this conclusion of the Panel which also highlights the risk of inconsistencies in the various Determinations if the AGB is not clear on that point.

Similarly, in Case EXP/414/ICANN/31, the Expert Panel followed my reasoning and gave a pertinent example: "suppose an enterprise specializing in the production of films intended for adults was applying for '.Kids' string and proposing to operate it as a domain reserved for pornographic materials. It should be obvious that the Limited Public Interest objection was intended to cover such a case. Yet, there would be nothing highly objectionable in the string .Kids considered independently from the context of the intended purpose of the gTLD."[33] In Case EXP/412/ICANN/29, the Panel also noted that "limiting the scope of procedure only to the name of gTLD may render the entire objection procedure pointless."[34]

I therefore suggest that **the AGB should explicitly mention that the Expert Panel will conduct its analysis on the basis of the applied-for gTLD string itself and its intended purpose as stated and described in the application**.

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[32] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/health-lpi-afilias-limited/ .
[33] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-lpi-medistry/ .
[34] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/hospital-lpi-ruby-pike-llc/ .

The Community Ground for Objection

According to the AGB, in the event of a Community Objection, there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The IO and established institutions associated with clearly delineated communities are eligible to file a Community Objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. The goal of the community-objection process is to prevent the misappropriation of a community label by delegation of a gTLD.

As for the IO's competence to object on the Community ground, it has been my clearly explained public policy not to make an objection when a single established institution representing and associated with the community having an interest in an objection can lodge such an objection directly. Thus, I considered that an objection was not warranted for ".Africa" since I was of the opinion that the African Union was an established institution representing and associated with a significant part of the targeted community. Moreover, the African Union Commission was already fully aware of the controversial issues and was better placed than myself to file an objection, if it deemed it appropriate.[35] I met the same issue with the application for ".GCC" and came to the conclusion that the Gulf Cooperation Council itself was in a better position to file an objection.[36] This does not exclude that the IO can deem it nevertheless appropriate to file a Community Objection in exceptional circumstances, in particular if the established institution representing and associated with the community has compelling reasons not to do so, or if several institutions could represent a single community and are in the same interest so that an application could raise issues of priority, or in respect to the modalities of the objection.

According to the Guidebook, a "Community Objection" is warranted when "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted."

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[35] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/africa-general-comment/ .

[36] See http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/gcc-general-comment/ .

In order to evaluate the merits of a "Community Objection" the Expert Panel shall "use appropriate general principles (standards)" as set out in Section 3.5 of the Guidebook, as well as "other relevant rules of international law in connection with the standards."

Article 3.5.4 sets out four tests which need to be met cumulatively for a "Community Objection" to prevail:

- The community invoked by the objector is a clearly delineated community (**Community test**);
- Community opposition to the application is substantial (**Substantial Opposition test**);
- There is a strong association between the community invoked and the applied-for gTLD string (**Targeting test**);
- 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 (**Detriment test**).

These four tests must not necessarily be examined in this order. This is in particular true as far as the role of the IO is concerned. Since the IO does not represent, as such, a particular delineated community and has not to establish, unlike other objectors, "an ongoing relationship with a clearly delineated community" (see Article 3.2.2.4 of the Guidebook), rather than to determine, at the outset, the existence of a "clearly delineated community", I first inquired whether the applied-for gTLD targets a specific community or whether it is likely to be associated by the public using the global Internet to one or several communities. Only in that case, it is indeed necessary to examine whether opposition has been voiced in regard to the application for the gTLD by members of the community or in the interest of the public which use the global Internet, and whether the Application is likely to create detrimental effects to the rights or interests of this or these communities.

This was confirmed by the Expert Panel in Case EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15). The Panel held that "[t]he reason for dealing with this test at the outset in the present case is that, prior to establishing whether there is a strong association between the Strings and a community, the community having the purportedly strong association must be identified."

However, for ease of reference, the four tests set out in the Guidebook, which includes some further guidance and criteria for each of these tests, will be discussed in the order they are presented in the Guidebook. **I am of the view that the Guidebook should further develop, as I do below, the four tests to be conducted in case of a community objection**.

The Community Test

The Guidebook does not provide a clear definition of the term "community". It merely recalls that an objector "must prove that the community expressing opposition can be regarded as a clearly delineated community" (Article 3.5.4) and refers to a non-exhaustive list of factors the Expert Panel could refer to for that purpose, including the recognition at a local/global level, the level of formal boundaries, the length of existence, the global distribution, and the size of the community. Some of these factors are also used as criteria in the different context of Community Priority Evaluation for community-based applications as set out in Section 4.2.3 of the Guidebook.

Generally, the term "community" refers to a group of people living in the same place or having a particular characteristic in common (see http://oxforddictionaries.com/definition/english/community). The distinctive element of a community is therefore the commonality of certain characteristics. The individuals or entities composing a community can share a common territory, region or place of residence, a common language, a common religion, a common activity or sector of activity, or other characteristics, values, interests or goals which distinguish them from others.

The Guidebook does not determine which kind of common characteristics, values or goals are relevant for the issue whether a given group constitutes a community, nor does it put any limits in that regard. The 2007 ICANN Final Report on the Introduction of New Generic Top-Level Domains ('2007 ICANN Final Report'), confirms in Implementation Guideline (IP) P that "community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community."

The most relevant criterion is whether the group of individuals or entities can be clearly delineated with regard to others. The recognition of the community as such among its

members, on the one hand, and by the general public at a global or a local level, on the other hand, depending on its actual distribution, is in that regard a useful factor to be taken into account.

The Guidebook places relevance on the degree of "formal" boundaries delimiting the community from others. This factor needs to be interpreted with regard to the specific situation of each community, and in particular its level of organization and structure. An organized community – i.e., a community which has some entity dedicated to the community and its activities – has usually clearer formal boundaries described in terms of membership or registration.

For example, membership of the medical community can be determined by formal boundaries. First, membership is directly linked to the qualification to exercise a specific healthcare or medical profession. Access to such professions is regulated by public institutions, and in order to access a medical profession and the medical community, one needs to have successfully completed a specific scientific or professional education programme or to get a specifically granted license or authorization. Secondly, members of the medical community usually work in specific sectors of activity, including healthcare and medical services, pharmaceutics, but also the development of medical and similar technologies. Finally, despite the variety of actors it includes, the medical community has developed a highly specific and complex system of technical terms and phrases, hardly understood by the general public. It also proves that a community can be heterogeneous and still clearly delineable.

For the Panel in Case EXP/407/ICANN/24, "a community is 'a social, religious, occupational, or other group sharing common characteristics or interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists'. The focus of this test is on the community expressing opposition, not on the meaning of the word comprising the string. Accordingly this test does not require the string itself to describe or denote a clearly delineated community nor exclusively or nearly so to identify a closely connected group of people or organizations". The Panel further accepts that "a clearly delineated community has developed globally over many centuries, comprising a large group of people and enterprises having in common an involvement in the provision of health care to the general public. That involvement distinguishes the group from the larger society within which it exists, both in its perception of itself and in its recognition by

that larger society. There are formal boundaries around the principal participants in that community since medical practitioners, who spring to the public mind first when considering the group and who comprise a very large sector within it, are required under national laws to have formal qualifications before they may practise. The expression 'medical community' is apt to describe this clearly delineated community."[37]

The situation is different in case of communities which are less structured or organized, like those based on a common place of origin or a common language. I consider that despite their looser organization and structure, such communities are clearly recognized as a community distinct of others, at a local, national, or even global level. Organization and structure, even if they can help to identify a community and its delineation, are not as such relevant distinctive criteria for the existence of a clearly delineated community.

The Panel in Case EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15), recognized that "that some of the factors highlighted by the IO could indicate the existence of an Amazon Community. The economic interests and ties within the Amazon region, and the community that can be considered related to it, are significant. More pertinently, the Amazon Community is characterized by its importance in terms of wealth of culture, archeology, ethnology and environment, as well as by its impact on the environment of the world as a whole. It therefore has its own specificity and interests, and its interests to a certain extent coincide with those of the broader public, in particular as concerns the environment. In general terms it can also be seen to be recognized as a community by outsiders. Moreover, the Amazon Community unquestionably has a very large population and has been in existence for a long time." It raised however also doubt about the existence of a "Community" invoking the fact that the Amazon community is "composed of several different countries and exhibits within itself a considerable diversity in terms of geography, economy, population and bio-diversity. This could rule out the idea of cohesiveness, that arguably lies at the core of the notion of community and might imply something more than a mere commonality of interests."[38] The Panel did not find it necessary to decide upon the issue.

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[37] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/medical-cty-steel-hill-llc/ .

[38] http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/amazon-アマゾン-亚马逊-cty-amazon-eu-sàrl/

The Substantial Opposition Test

According to the Guidebook, a Community Objection is warranted in the event of "substantial opposition within the community" identified by the objector. This test and its scope of application depend largely on the circumstances and of the context of each case. The Guidebook includes several factors which the Expert Panel could use in order to determine if such "substantial opposition" with regard to an application exists. These factors include the number of expressions of opposition relative to the composition of the community, the representative nature of entities expressing opposition, the level of recognized stature or weight among sources of opposition, distribution or diversity among sources of expressions of opposition (regional, subsectors of community, leadership of community, membership of community), historical defence of the community in other contexts, and costs incurred by the objector in expressing opposition, including other channels the objector may have used to convey opposition.

This list of factors is not limitative. It focuses, almost exclusively, on the number of oppositions expressed or the representative nature of those having expressed opposition, i.e., the part of the community represented by those having expressed opposition and its significance with regard to the community in its entirety. These criteria are useful, in particular in the case of well-organized and structured communities. They are more difficult to apply in case of communities which lack organisational structures or clear representation.

As noted by the Expert Panel in Case EXP/404/ICANN/21, "the Guidebook standard of substantial opposition is a broad concept like the other three Guidebook standards and the term 'substantial opposition' is not defined as such. In common language, opposition in its most general sense is defined as 'resistance or dissent, expressed in action or argument' while the word substantial is used for something of considerable importance, size or worth."[39]

Indeed, in my view, a mere numerical criteria was certainly not the intent of the authors of the Guidebook and the Expert Panel is not limited to a mere numerical analysis balancing the number of those having expressed opposition or are deemed to be represented by those

[39] http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-lpi-charleston-road-registry-inc/ .

having expressed opposition, on the one hand, and the overall size of the concerned community, on the other hand. The word "substantial" is not at all limited in that way. If it can certainly refer to an important size or number, it is also used for something of "considerable importance" or "considerable … worth" (http://oxforddictionaries.com/definition/english/substantial). It is therefore not only the number of oppositions which should be taken into account, but also the material content of comments and oppositions expressed by those concerned, and in particular, the importance of the rights and interests at stake. Particularly importance should be paid in that regard to comments made by governments through the GAC.

This reasoning was followed by many Expert Panels. As for example, in Case EXP/407/ICANN/24, the Expert accepted that "for the purpose of this test, the concept of substantial opposition is not confined to consideration of the number of those expressing opposition or on whose behalf opposition is expressed as a proportion of the community as a whole but may include consideration of the nature and importance of that opposition. In this regard, the Expert notes that the factors which the Expert may take into account are expressly not limited to those mentioned in Article 3.5.4. In this case the Expert finds the content of the expressions of opposition to outweigh in importance those quantitative factors."[40]

The fact that the Independent Objector was granted the possibility to file Community Objections confirms the necessarily broad meaning of the term "substantial opposition". Indeed, as I have pointed out, the IO should not file a formal Community Objection if an established institution is better placed to represent the community concerned. The role of the Independent Objector is to defend the public interests and to act on behalf of the public for the defence of rights and interests of communities which lack institutions which could represent the community in the present context. The Guidebook also indicates that "in light of the public interest goal noted above, the IO shall not object to an application unless *at least one comment* in opposition to the application is made in the public sphere." (Article 3.2.5 of the Guidebook). This shows that even a single comment can trigger a Community Objection if it raises issues in relation to rights and interests of a community which can be associated with the applied-for gTLD.

[40] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/medical-cty-steel-hill-llc/ .

In addition, the "substantive opposition" test must also be interpreted in light of other circumstances, like the awareness of a community of ICANN's New gTLD Program, the implication of the community in this Program, and the more or less strong association between the applied-for gTLD string and the community. One should expect a higher degree of reaction of a specific community particularly linked to the Internet or actively using Internet as a community tool, than of a community which is hardly aware of or is simply unable to be connected to the Internet.

The Targeting Test

In order for a Community Objection to succeed, there must be a strong association between the community concerned and the applied-for gTLD string. In other words, the string used is or could be clearly linked to the community the rights and interests of which are at stake. This link can be explicit or implicit.

The link between the applied-for gTLD and the community can be explicit, i.e., voluntarily sought for by the applicant, as established in its application or in other statements made by the applicant.

But even if the applicant has not made a community-based gTLD or has declared in its application that the applied-for gTLD is aimed at a particular community, it is not excluded *per se* that the string cannot be linked implicitly to a community. The 2007 ICANN Final Report 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" (Implementation Guideline P).

The Guidebook also confirms that a relevant factor to be taken into account in order to evaluate the Targeting test is "[a]ssociations by the public". The test is therefore not limited to the assumptions and the intended use proposed in the application, but is primarily concerned with the expectations of the usual Internet user and his or her associations with the string. This was confirmed by Expert Panels.[41] Useful elements for the determination whether an applied-for gTLD string targets a community are the identity of the string and the usual denomination or abbreviation used by and for the community, or

[41] See e.g. .Amazon (para. 67) (note 38), .Med (Medistry), para. 68 (http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/).

if the string clearly describes the community and its members without including elements outside the community.

The Detriment Test

Finally, the Expert Panel has to determine if the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community or to the public more generally.

The Guidebook includes some guidance with regard to the Detriment test, which needs to be addressed with regard to the specific elements and particularities of each application, on the one hand, and the interests and rights of the community to which the applied-for gTLD can be targeted, on the other hand. The material detriment can result from harm to 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. In order to assess the likelihood of such harm or damage, the Expert panel can 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 evidenced in the application, but also the importance of the rights and interests exposed for the community targeted and for the public more generally. The Applicant Guidebook pays particular attention to the issue of whether the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user and community interests. In such a case, it is more than likely that the rights and interests of the community will be detrimentally affected by operation of the gTLD as projected by the applicant.

The Expert Determination in Case EXP/404/ICANN/21 is very useful in defining the concept of "likelihood of material detriment" which is not precisely addressed in ICANN AGB. As noted by the Expert, this concept was "obviously formulated so broadly in order to cover many different constellations which may arise in the context of applications for new gTLDs. The factors listed in connection with it do not define it; they, as the Guidebook says, 'could be used by a panel' in making its determination, and are to be regarded as guidance only, albeit as guidance to be taken into consideration. But they do not limit a panel in balancing other factors of an application for a new gTLD it considers of

relevance in determining whether it has been proven or not that an application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community in question". He further rightly notes that "in common language, likelihood is understood as a state or fact of something's being likely; probability is considered a synonym. Detriment can be defined as a state of being harmed or damage, whereas the adjective 'material' in the given context can be understood to mean significant or important."[42] It is in line with my conception of the dispute resolution procedure which has been put into place in order to assess and remedy in advance any potential negative effects of the operation of a new gTLD. It must also be noted that "while an objector can obviously not be asked to prove actual harm or damage, but must engage in a risk assessment, the requirement of the standard remains to prove 'likelihood of material detriment', which can only mean that an objector must show some probability that harm or damage may occur. The demonstration of improbable potential negative effects of the operation of a new gTLD, on the other hand, must be regarded as not being sufficient".

The issue of Closed Generic gTLDs

As the Independent Objector, I have faced the issue of "closed generic" gTLDs from the very beginning of my review of applications. Notably, several persons and entities reported directly to me their concerns on this issue and urged me to file objections against the concerned applications. I have decided not to do so on this sole ground.[43]

In my view, a "generic term" is an expression associated to goods, service, activities or market sectors, which is widely used by people and commonly understood as referring to

[42] See the Expert Determination, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-charleston-road-registry-inc/ .
[43] See http://www.independent-objector-newgtlds.org/home/the-issue-of-closed-generic-gtlds/

the good, service, activity or market sector in question. It is supposedly not directly associated to a brand or trademark. However, sometimes trademarks or brands become generic terms, such as “Aspirin”.

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

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

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

The IO is only entitled to lodge objections on the Limited Public Interest and Community grounds. For both grounds of objection, he acts in complete independence, and solely in the best interests of the public who use the global Internet.

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

When reviewing the applications, I have paid great attention to the related public comments, some of which addressed the issue of “closed generic” gTLDs. While the present comment aims at explaining the reasons why I consider that the issue of “closed generic” gTLDs does not fall within the scope of my limited functions, it should be noted

that the hereunder remarks are general; each application has been reviewed separately and has specificities which could justify an objection from the IO for other reasons.

However, I acknowledge the importance of the problem. The question of the openness of new gTLDs is crucial, particularly when it comes to terms that could be profitable to a large part of the public, and this is undoubtedly the case concerning gTLDs strings such as ".Search", ".Book", ".Beauty", ".Insurance", ".Blog", ".Shop", ".Music", ".Jewellery", ".App" or ".Cloud", to mention the most commented ones.

In case of a Limited Public Interest Objection, the essential criterion is not to determine whether or not the application is contrary to the multiple potential interests of the public who use the global Internet. It is not the mission of the IO to protect personal or commercial interests of individual Internet users. This particular ground of objection aims at ensuring that no applied-for gTLD string and its intended use are contrary to fundamental norms of public order and morality that are recognized under international law.

For instance, a Limited Public Interest Objection could be triggered in case an application promotes unlawful activities or international crimes, such as child pornography, sale of counterfeit medicines, slavery, torture or genocide; in case it endangers international public order or in case it is obviously against other moral values that have been transcribed in international norms.

In its letter dated 31 January 2013, Microsoft argued that applied-for "generic closed" gTLDs strings "threaten the openness and freedom of the Internet and could have harmful consequences for Internet users worldwide".[44]

On the issue of the openness and freedom of the Internet, which is the main argument used by most opponents to "generic closed" gTLDs on the ground of the protection of the public interest, I acknowledge that there are fundamental principles of international law which should be protected. This is notably the case of the principle of freedom of expression, which is given a broad interpretation in international law as it encompasses the freedom of speech, opinion, expression and access to information. This freedom applies to the Internet

[44] See https://www.icann.org/en/system/files/correspondence/pangborn-to-crocker-et-al-31jan13-en.pdf

as recalled by the United Nations Educational Scientific and Cultural Organization (UNESCO), which "recognizes that the Internet holds enormous potential for development. It provides an unprecedented volume of resources for information and knowledge and opens up new opportunities for expression and participation. UNESCO assumes its responsibility of promoting freedom of expression on Internet and has integrated it to its regular program. The principle of freedom of expression must apply not only to traditional media but also to the Internet and all types of emerging media platforms which will definitely contribute to development, democracy and dialogue."

I also note that the issue of the openness of the Internet was discussed recently at the international level. The United Nations Human Rights Council requested the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, to further explore the issue. However, his reports do not, either directly or indirectly, address the issue of "closed gTLDs", or more generally of the management of the DNS, and refer to "the advantages and challenges of new information and communications technologies, including the Internet and mobile technologies, for the exercise of the right to freedom of opinion and expression, including the right to seek, receive and impart information and the relevance of a wide diversity of sources, as well as access to the information society for all". The Special Rapporteur's reports notably address the issues of restrictions of content on the Internet, the access to the Internet and the necessary infrastructures, and general principles on the right to freedom of opinion and expression and the Internet.[45]

However, while I recognize that certain questions raised by the openness of the Internet should be in line with fundamental principles of public order and morality recognized under international law, I also note that these principles are hardly relevant for the specific issue of "closed generic" gTLDs. Indeed, I have strong doubts that the question of closed gTLDs is related to the problematic of public order: the issue might be linked to commercial interests, it is not directly linked with the freedom of expression.

Therefore, whether applicants can benefit from a new gTLD string for their own use, notwithstanding the general use of the term by the public, does not seem to be an issue that I could invoke to justify an objection on this ground. Therefore, a Limited Public Interest

[45] See http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

Objection would not be warranted for those applications, at least on the ground of the openness of the access to a gTLD.

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

I based my evaluation on the four eliminatory tests, which are set out in the Applicant Guidebook in order to guide the Expert panels for the evaluation of community objections.

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

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

Taking ".book" as an example, the "book industry" and a hypothetical "book community" would encompass a large variety of stakeholders, who do not always share similar primary interests. Thus, it would include authors, publishers, libraries, retailers, readers, etc… In a more inclusive way, we could also include international organizations working, *inter alia*, for the promotion of culture such as the UNESCO. Therefore, these different stakeholders

are difficult to be delineated as a single community since they are of very different nature. Some have the promotion of literature as their primary aim but for many others it is one objective among many others. It is therefore quite doubtful that they represent a clearly delineated community within the meaning of the Applicant Guidebook.

Therefore, I have noted that, in general, for the issue of "closed generic" gTLDs and my possibility to object as the IO on the Community ground, it was unlikely that the applications concerned met the four tests. However, for an assessment on the community ground, each application has been reviewed separately. The present comment only affirms that a Community Objection cannot be lodged on behalf of the public who uses the Internet as a whole, which cannot be considered as a clearly delineated community.

CONCLUSION

Overall, the mandate of the Independent Objector, as designed by ICANN, and the dispute resolution process were successful. I very much welcome the fact that ICANN did not fail to protect the interests of the primary party involved in the new gTLD Program, the public who use the global Internet. While the Internet is in the hand of ICANN, States and significant economic actors, its major user remains the public. Where public international law historically addressed issues of well-defined and secure boundaries, it now has to face new issues in the context of the development of the Internet, where boundaries are precisely inappropriate. A great step forward for information and communication technology, sometimes a vector of democratization or an instrument that facilitates the

promotion of human rights, the Internet is also a tool without borders and clear limits which requires careful monitoring to ensure it remains in service of the people. The mission of the IO, solely acting on behalf of the public who use the Internet, is therefore of a fundamental importance and is key to a positive perception of the Program.

This being said, there are ample improvements to be made in this new and unprecedented dispute resolution process and this first experience should serve to highlight areas for improvements:

- There is a need to clarify the definitions of key terms in the Applicant Guidebook. Law attaches great importance to its wording and so does the parties to the objection proceedings, their lawyers as well as the Expert Panels. To ensure a certain stability and consistency in the proceedings, words used by the Applicant Guidebook should be precisely defined. This applies both to the Procedure itself and to the IO's mandate. By way of example, I have always had difficulties understanding why a "Limited Public Interest Objection" was not a "Public Interest(s) Objection". Indeed, the interests protected by this Program and its procedure are many, varied and anything but limited.

- This need for clarification also applies to the community objection ground which should be defined more precisely as I have sketched in the present report. The main goal of the Applicant Guidebook is to provide with a clear and complete overview of the Program. The Expert Panels' mission will be more consistent and facilitated if the AGB and its Procedure leaves only small room for interpretation.

- Another crucial clarification should be for the AGB to explicitly mention that the Expert Panel will conduct its analysis on the basis of the applied-for gTLD string itself and its intended purpose as stated and described in the application (as finally agreed to by the Applicant in case of changes accepted in the course of the Initial Notice Procedure) since an analysis based on the sole gTLD string does not make any sense.

- In the same vein, the AGB states that the IO can only file an objection against "highly objectionable" applications. If it is not specifically defined, this term will be systematically discussed in future rounds. It should be explicitly stated in the AGB that the IO has a discretionary power in deciding if an application is "highly objectionable" or not, even if it must also be made clear that the IO will have to explain its choices.

- The IO is also limited to filing objections where no objection has been filed against the same string, on the same ground and where there are no extraordinary circumstances. It implies that the IO has to withdraw his objection in case there is another objector to the same gTLD string. The AGB should however follow its reasoning through, develop the concept of "extraordinary circumstances" and explicitly grant the IO access to other objections within reasonable time, prior to making the decision to withdraw his own objections. It is indeed the only way the IO can make sure there are no extraordinary circumstances at hand. Based on the same reasoning, this provision would be even more effective if the IO is granted a different deadline to file his objections. I believe he should have an additional period of 2 months after the publication of the list of objections to finalize his own list of objections.

- ICANN encourages applicants and objectors to enter into mediation or negotiation prior to or during the objection process. As explained in the present report, such alternatives do not always correspond to the IO's mission. I have however created the Initial Notice Procedure, which took place before the objection proceedings. This procedure was a success, welcomed by all applicants. I therefore suggest that ICANN should formalize this new Procedure in the AGB.

- As for the issue of conflict of interests, I suggest that ICANN should envisage to expressly state in the rules applicable in the future that if the independence and integrity of the IO is challenged, the issue should be decided by the Expert Panel in the case in which it is raised. Moreover, the public posting on ICANN's website of a declaration of independence and impartiality by the IO should be envisaged. Also, ICANN should reflect on the possibility to provide for the appointment of an alternate IO. Another solution would be the establishment of a list of substitutes, to which the IO, or the Expert Panel could refer to in case they deem it necessary.

- It is certainly appropriate to reflect on possible appeals following a determination upon an IO's objection, but the reconsideration process as it exists is clearly not a suitable option.

- The question of the maintenance of the IO's website should arise now that his mission for the first round is terminated. I believe that ICANN should decide to keep the

website I created online. Indeed, it has been and is still widely consulted. It is also an important source of information on the IO's functions for future rounds and future applicants, as well as internet users, might have a particular interest in consulting this website.

Being the first Independent Objector for the first round of the New Generic top-Level Domains Progam has been an extraordinary and fascinating experience. Of course a user of the Internet, I had, besides this, no particular relations with the Internet community nor with ICANN itself which certainly made an adventurous bet in appointing me. I have tried my best to understand the underlying logic of the Program and to answer the particular needs justifying the institution of an Independent Objector. I also very much hope that the present Report can be of some help for improving the Program in this respect for the future.

I wish to end with a personal note of gratitude for ICANN and, in particular for Akram Atallah, President of ICANN's Global Domains Division, and Olof V.G. Nordling, Senior Director for GAC Relations, and Amy Stathos, Deputy General Counsel for ICANN, who were successively my main correspondents within the Corporation. I thank them for their perfect (and probably excessive) respect for my independence (except when it came to the reconsideration proceedings). However, I wonder whether this respect was due to a real wish to guarantee my independence or to mere disregard for my work as the IO. I regret to note that, especially at the end of my contract, my interlocutors at ICANN were very little responsive – it took two full months to get a reaction to the present Report and they have declined my offer to discuss it in depth. Nor have they accepted to post it on the ICANN's Website which, of course, considerably limits its diffusion and dissemination among the interested public.

My deep thanks go to Julien Boissise who, when we began, was not much more familiar than I was with the problematic of the Internet and which has undeniably become a great specialist; together, we have tried to properly "invent" this "worldwide unique job position".