

Annex 11

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

CASE No. EXP/384/ICANN/1

THE INTERNATIONAL UNION OF ARCHITECTS

(FRANCE)

vs/

SPRING FROSTBITE, LLC

(USA)

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

EXPERT DETERMINATION

issued in the

New gTDL Dispute Resolution Procedure

administered by the International Centre for Expertise (Centre) of the International Chamber
of Commerce (ICC)

EXP/384/ICANN/I

between

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Expert

appointed by the Chairman of the Standing Committee on 12 June 2013, pursuant to Art. 3 (3)
of Appendix I to the ICC Expertise Rules

TABLE OF CONTENTS

I.	DEFINED TERMS	5
II.	INTRODUCTORY PART	8
A.	The Parties.....	8
B.	The Expert.....	9
C.	The applicable rules and place of the proceedings.....	9
III.	SUMMARY OF THE PROCEEDINGS.....	10
IV.	SUMMARY OF THE PARTIES' POSITIONS	14
A.	The Objector's Position.....	14
B.	The Applicant's Position.....	16
V.	THE EXPERT'S REASONING AND DETERMINATION	19
A.	"The community invoked by the objector is a clearly delineated community"	22
1.	Introduction.....	22
2.	On the definition of the terms "architect" and "structural architect"	24
3.	A delineated community – the UIA's standing to object.....	27
B.	"Community opposition to the application is substantial".....	30
C.	"There is a strong association between the community invoked and the applied-for gTLD string"	32
D.	"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."	34
1.	Background and Policy Consideration.....	37
2.	On the term "architect"	43
3.	Promotion of Consumer Choice and Competition/ Consumer Protection/ the Fundamental Right to Free Speech: Compatible or Incompatible goals?....	46
4.	Only second level domains indicate source?	52
5.	The US Patent Trademark Office's Trademark Manual of Examining Procedure	52
6.	Internet users and consumers expect correct information.....	53
7.	The figurative sense of "architect"	55
8.	Assertion of trademark-like rights by the UIA / relevance or irrelevance of the UIA's failure to object to trademarks including the term "architect" in connection with non-structural architectural services.....	55
9.	The right of free expression	57

10.	The string “.archi” applied for by the UIA	58
VI.	DISPOSITIVE SECTION.....	59

I. DEFINED TERMS

Applicant	Spring Frostbite, LLC (also referred to as SFB)
Application	Spring Frostbite, LLC application for gTLD “.ARCHITECT” (application ID 1-13427920)
Centre	the International Centre for Expertise of the International Chamber of Commerce (ICC)
Exhibit A-[number]	Exhibit submitted by Applicant ¹
Exhibit O-[number]	Exhibit submitted by Objector
Expert	Hon.-Prof. Dr. Andreas Reiner appointed on 12 June 2013 by the Chairman of the Standing Committee of the Centre as the Expert in these Expert Determination proceedings
GAC	ICANN’s Governmental Advisory Committee
GAC Communiqué	ICANN Governmental Advisory Committee’s Communiqué dated 11 April 2013
Guidebook	ICANN’s gTLD Applicant Guidebook (version of 04.06.2012)
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
New gTLD	New generic Top-Level Domain

¹ The Parties did not number their Exhibits in sequential order, nor did they identify their exhibits by using letter prefixes before the exhibit number. However, for ease of reference in this Expert Determination: a) Exhibits are referred to by assigning them sequential numbering (please see paras 6, 11, 15, 20, 22, 23 and Footnotes No. 3, 4, 5, 6, 7, 8) and b) an Exhibit submitted by Applicant is referred to as Exhibit A-[number] (A for Applicant) and an Exhibit submitted by Objector is referred to as Exhibit O-[number] (O for Objector).

Objection	Community objection filed by the International Union of Architects (UIA) to Spring Frostbite LLC's (SFB's) application for gTLD “.ARCHITECT” (application ID 1-13427920)
Objector	the International Union of Architects (also referred to as UIA)
Procedural Instruction No. 1	Procedural Instruction No. 1 issued by the Expert on 9 July 2013
Procedural Instruction No. 2	Procedural Instruction No. 2 issued by the Expert on 18 July 2013 ²
Parties	Objector (UIA) and Applicant (SFB)
Procedure	Attachment to Module 3 of the gTLD Applicant Guidebook - New gTLD Dispute Resolution Procedure
Response	Response dated 15 May 2013 and submitted by Spring Frostbite, LLC (SFB) to the Objection of the International Union of Architects (UIA) regarding application for gTLD “.ARCHITECT” (application ID 1-13427920)
Rules	Rules for Expertise of the International Centre for Expertise of the International Chamber of Commerce
Supplemental Submission	UIA's Supplemental Submission dated 26 June 2013 and admitted by Procedural Instruction No. 1
SFB	Spring Frostbite, LLC (also referred to as Applicant)
UIA	the International Union of Architects (also referred to as Objector)

² Documents referred to in item 2 of Procedural Instruction No. 2 will be referred to as Exhibits 2.1 to 2.6 to Procedural Instruction No. 2.

UIA Accord

the UIA Accord on Recommended International Standards of Professionalism in Architectural Practice submitted by the UIA as Exhibit O-4

II. INTRODUCTORY PART

A. The Parties

1. The Parties to these Expert Determination proceedings are

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“Applicant” or “SFB”

2. The Objector and the Applicant are jointly referred to as “**the Parties**”.

B. The Expert

3. On 12 June 2013 the Chairman of the Standing Committee of the Centre appointed

Hon.-Prof. Dr. Andreas Reiner
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and office@arb-arp.at

as the Expert pursuant to Art. 3 (3) of Appendix I to the Rules.

C. The applicable rules and place of the proceedings

4. The rules applicable to the present Expert Determination proceedings are
 - the ICANN’s gTLD Applicant Guidebook, version of 04.06.2012 (“Guidebook”) and in particular the new gTLD Dispute Resolution Procedure attached to the Module 3 of the Guidebook (“Procedure”) and

- the Rules for Expertise of the ICC (“Rules”), supplemented by the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Procedure and Appendix III – Schedule of Expertise Costs for Proceedings under the New gTLD Dispute Resolution Procedure.
5. According to Art. 4 (d) of the Procedure the place of these Expert Determination Proceedings is the location of the Centre as the Dispute Resolution Service Provider for Community Objections (Art. 4 (b) (iv) of the Procedure), i.e. Paris, France.

III. SUMMARY OF THE PROCEEDINGS

6. On 12 March 2013, the Centre received the Objection filed by the UIA pursuant to the Procedure and the Rules. Together with its Objection the UIA submitted Exhibits O-1 to O-16³ according to the list of Annexes on page 16 of the Objection.
7. By letter, dated 13 March 2013, the Centre acknowledged receipt of the UIA’s Objection and announced that it “*will now conduct its administrative review of the Objection for the purpose of verifying compliance of the Objection with the Procedure and the Rules*” and that it would revert to the Objector in due course.
8. On 28 March 2013, the Centre informed the Objector, following the administrative review of the Objection, that
- the Objection is in compliance with the Procedure and with the Rules,
 - the Objection has been registered for processing,
 - the required information regarding these proceedings will be published on the Centre’s website in due course and
 - the Applicant will be invited to file a response following ICANN’s Dispute Announcement.
9. On 12 April 2013, ICANN published its Dispute Announcement pursuant to Art. 10 (a) of the Procedure.

³ Initially marked by the Objector as Annexes 1 to 16 (regarding numbering of Exhibits please see Footnote 1).

10. On 15 April 2013, the Centre invited the Applicant to file a response to the Objection within 30 days.
11. The Applicant's Response is dated 15 May 2013. Due to technical difficulties encountered by the Applicant when submitting the Response to the Centre on 15 May 2013, the Centre informed the Applicant that it was permitted to re-submit its Response on or before 17 May 2013. The Response was received by the Centre on 17 May 2013 and the Centre confirmed that the Response was filed within the deadline set by the Centre. The Response included Exhibits A-1 to A-5.⁴
12. On 4 June 2013, the Centre informed the Expert that the Centre considered to appoint the Expert as the sole member of the Panel in the present proceedings.
13. On 10 June 2013, the Expert submitted his "*Declaration of Acceptance and Availability, Statement of Impartiality and Independence*" and his CV.
14. On 17 June 2013, the Centre informed the Parties that the Chairman of the Standing Committee had appointed the Expert on 12 June 2013, pursuant to Art. 3 (3) of Appendix I to the Rules and invited the Parties to make the necessary advance payments.
15. On 27 June 2013, the Objector submitted a Supplemental Submission including Exhibits O-17 to O-20⁵.
16. On 28 June 2013, Counsel for the Applicant wrote to the Centre formally objecting to the admission and any consideration of the Objector's Supplemental Submission by the Panel. In the alternative the Applicant requested that it be given 14 days to file a reply.
17. The same day the Centre "*remind[ed] the parties that at this stage no further submissions are due from the parties*" and announced that "*[t]he Expert Panel, once appointed, will contact the parties after the file has been transferred to it, to*

⁴ Initially marked by the Applicant as Annexes 1 to 5.

⁵ Initially marked by the Objector as Annexes 1 to 4.

discuss the further conduct of the proceedings as well as additional submissions from the parties.”

18. On Friday 5 July 2013, the Centre acknowledged receipt of the advance payments made by the Parties and transferred all the documents thus far received to the Expert.
19. On Tuesday 9 July 2013, the Expert issued his Procedural Instruction No. 1
 - admitting UIA’s Supplemental Submission
 - inviting SFB to submit its rebuttal submission within one week and
 - indicating that, in the event that it was particularly difficult or burdensome for SFB to comply with the time limit of one week, SFP would be permitted to file a reasoned request for a short time extension and
 - reserving possible further instructions.
20. On Tuesday 16 July 2013, SFB submitted its Response to Objector’s Supplemental Submission including Exhibits A-6 to A-8.⁶
21. On Thursday 18 July 2013, the Expert issued Procedural Instruction No. 2
 - acknowledging receipt of SFB’s submission of 16 July 2013
 - giving the Parties the opportunity under Art. 17 and 18 of the Procedure to submit their observations regarding the documents which [listed in point 2 of the Procedural Instruction] the Expert came across while analysing the Parties’ submissions by Thursday 25 July 2013, without prejudice to the question whether and, if yes, to what extent those documents may be relevant to the Expert Determination
 - inviting the Parties under Art. 18 of the Procedure to submit written evidence and short comments (if any) in relation to certain statements indicated in Exhibit O-14.

⁶ Initially marked by the Applicant as Annexes A to C.

22. On Wednesday 24 July 2013, UIA submitted Objector's Response to Procedural Instruction No. 2 together with Exhibits O-21 to O-25.⁷
23. On Thursday 25 July 2013, SFB submitted Applicant's Response to Procedural Instruction No. 2 together with Exhibits A-9 to A-10.⁸
24. The language of the proceedings, including all submissions of the Parties, was and is English (Art. 5 (a) of the Procedure). However, Objector submitted Exhibit O-21 and O-24 and Applicant submitted Exhibit A-10 in French. Pursuant to Art. 5 (b) of the Procedure and taking into account that
- both of the Parties had submitted (an) exhibit(s) in French
 - neither of the Parties had any objections regarding the language of the other's exhibits
 - one of the Expert's working languages is French
- the Expert considered that no translation of Exhibits O-21, O-24 and A-10 into English is required.
25. All communications by the Parties, the Expert and the Centre were submitted electronically (Art. 6 (a) of the Procedure).
26. According to Art. 21 (a) of the Procedure
- “[t]he DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed.”*
27. The 45 days time limit is complied with if the Expert Determination is submitted to the Centre for scrutiny within this time limit. The date of the “*constitution of*

⁷ Initially marked by the Objector as Appendixes 1 to 5.

⁸ Initially marked by the Applicant as Annexes A-9 to A-10.

the Panel” was 5 July 2013.⁹ The Expert Determination was submitted to the Centre on 9 August 2013, i.e. prior to the expiry of the 45 days time limit on 19 August 2013.

IV. SUMMARY OF THE PARTIES’ POSITIONS

A. The Objector’s Position

28. The UIA objects to SFB’s Application for new gTLD “.ARCHITECT” (application ID 1-1342-7920)¹⁰ under ICANN’s new gTLD program. The UIA’s Objection is a Community Objection as defined under Art. 3.2.1 of Module 3 of the Guidebook, i.e. the UIA maintains that 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.¹¹
29. The Objector submits that it has standing to object to the gTLD “.ARCHITECT” and that factual and legal grounds justify the Objection.
30. As to its standing to object, the UIA maintains that:
 - it is a globally recognised institution with a clear identity¹², founded in 1948 and currently representing professional organizations of architects from 131 nations and - through these professional organizations - over 1 300 000 architects globally¹³
 - participation in most activities of the UIA as well as leadership requires membership to the UIA or to a national association of the UIA as regulated by its Articles¹⁴
 - the UIA’s aims are clearly defined.¹⁵ It performs regular activities such as international competitions for architecture and urbanism, programmes for a

⁹ See the Centre’s letter of the same date.

¹⁰ Objection, p. 2-3.

¹¹ Objection, p. 3.

¹² Exhibits O-2, O-3.

¹³ Objection, p. 4; Exhibit O-1.

¹⁴ Objection, p. 5; Exhibit O-3.

¹⁵ Objection, p. 5; Exhibits O-3, O-4.

better architecture and UIA World Congresses for the benefit of the associated community¹⁶

- the formal boundaries of the community are defined at two levels: required membership of a national architecture organization to the UIA and required membership of qualified licensed architects to their national architecture organizations.

31. The Objector submits that there is a substantial opposition to the Application by the community of architects (as defined by the Objector).¹⁷ The opposition is based on the UIA's understanding of the term "architect". UIA submits that the term "*architect*" has the meaning as defined in UIA Accord¹⁸

"Architect Definition

The designation 'architect' is generally reserved by law or custom to a person who is professionally and academically qualified and generally registered/licensed/certified to practice architecture in the jurisdiction in which he or she practices and is responsible for advocating the fair and sustainable development, welfare, and the cultural expression of society's habitat in terms of space, forms, and historical context."¹⁹

and, therefore, "so-called 'architects', or 'categories of architects', as listed in the Objected Application" (i.e. landscaping architects, naval architects and those that support them - for example, architecture technology providers, construction managers, drafters, civil engineers, architecture historians, academics, and others, etc.) do not qualify and cannot "be confused with an 'architect' (in one single word)".²⁰

32. The UIA submits that the use of the domain name ".ARCHITECT" by any individual or organization without the express commitment by such individual or organization that it is a recognized member of a national association, itself a

¹⁶ Objection, p. 6-7.

¹⁷ Objection, p. 6; Exhibits O-3, O-4.

¹⁸ Objection, p. 9.

¹⁹ Exhibit O-4.

²⁰ Objection, p. 9.

member of the UIA, and that it therefore abides by the UIA Accord, entails major risks and detriments,²¹ including

- blurring, in terms of public awareness, of what an “*architect*” is
- false sense of official approval and endorsement
- loss of revenue of qualified licensed architects
- significant increase of the costs of obtaining insurance on the part of qualified licensed architects
- significant risk to the population at large in that via the Application to which the Objection is being raised, members of the public may unintentional hire unauthorized architects for architectural services restricted to qualified licensed architects, etc.²²

33. UIA submits that the position of ICANN’s Governmental Advisory Committee expressed in its Communiqué (GAC Communiqué) of 11 April 2013²³ also evidences that the string “.ARCHITECT” is linked to a regulated sector, architects form a community that has a right to object to the Application and that operating this string as an open and unrestricted string may harm both the community and the consumers.

B. The Applicant’s Position

34. SFB submits that the UIA does not have standing to object to the Application for new gTLD “.ARCHITECT” and that there are no grounds to satisfy the submitted Community Objection.

35. As to the UIA’s standing SFB maintains that

- UIA defines the community too narrowly and fails to take into account all other types of architects it does not represent, such as landscape, software or system architects and architect-related enthusiasts. UIA does not have standing to object on behalf of a community that is “*strongly associated*

²¹ Objection, p. 9.

²² For the full list of claimed detriments see UIA’s Objection dated 5 March 2013, p. 12-13; the concrete economic damage that would result from the Applicant’s operation of the objected Application is defined at p. 14-15.

²³ Supplemental Submission; Exhibit O-20.

with the applied-for gTLD string in the application” because there are multiple entities and groups that associate with the term architect and the UIA is but one segment of the community it claims to represent²⁴

- UIA does not adequately represent the community of “structural architects” as not all organizations that serve structural architects and not all licensed structural architects (e.g. only 80,000 of at least 102,000 in the United States) are members of the UIA²⁵
- the 64-year existence of the UIA is relatively short compared to that of the architectural profession.²⁶

36. SFB submits that UIA has not met the high burden of proving substantial opposition by a significant portion of the architect community, since

- the UIA does not represent a delineated community²⁷
- the term “*architect*” should be defined broadly²⁸ and not narrowly as the UIA does
- the UIA “*has no right to usurp a generic term to use only in connection with its own membership*”²⁹
- the true motivation of the Objection is to prevent competition for the “.*archi*” gTLD which UIA has applied for.³⁰

37. According to SFB, there is no material detriment to the rights or legitimate interests of a significant portion of the community to which the gTLD “.*ARCHITECT*” is targeted. Rather SFB’s “*operation of an open gTLD would have the opposite effect and benefit the vast majority of global consumers who identify with a myriad of different architectural “communities,” permitting them to use the .architect gTLD to promote their businesses, hobbies, and interests,*

²⁴ Response, p. 6.

²⁵ Response, p. 6; SFB’s Response to Objector’s Supplemental Submission, p. 1.

²⁶ Response, p. 6.

²⁷ Response, p. 7-8.

²⁸ Response, p. 8, Exhibit A-1.

²⁹ Response, p. 7-8.

³⁰ Response, p. 9.

*which in turn furthers the goals of ICANN and the new gTLD program, namely, to promote consumer choice and competition.”*³¹

38. SFB submits that the UIA’s concerns regarding consumers associating all websites using the “.ARCHITECT” gTLD with licensed structural architects are unfounded, because “*there is a general presumption that second level domains, not top level domains, indicate the source in the mind of consumers.*”³² The UIA’s alleged detriment regarding consumers’ association relate to trademark-like rights which the UIA does not have.³³
39. SFB argues that it will operate the “.ARCHITECT” gTLD with far stronger abuse protections than currently exist and will shut down any infringing website (if the registrant is conducting an illegal activity). “*[A]rchitects work in conjunction with contractors, builders, clients, government agencies to build structures. All of these individuals stand between architects and the completion of a building. Thus, if an unlicensed architect attempts to pose as an architect, the involvement of all of these individuals will mitigate any possible harm to consumers.*”³⁴
40. According to SFB the UIA fails to provide any evidence as to the actual harm which would be incurred due to the use of the gTLD for which SFB has applied.³⁵
41. SFB submits that Early Warnings of the Governments of Australia and France are not relevant as they have been superseded by the GAC Communiqué.³⁶ It submits that the GAC Communiqué does not support the UIA’s Community Objection as it is separate from the objection process and GAC did not advise that SFB Application should be rejected or that SFB should not be permitted to operate the “.ARCHITECT” gTLD.³⁷

³¹ Response, p. 9; SFB’s Response to Procedural Instruction No. 2, p. 2.

³² Response, p. 9.

³³ Response, p. 10.

³⁴ Response, p. 10.

³⁵ Response, p. 10-11.

³⁶ SFB’s Response to Procedural Instruction No. 2, p. 2.

³⁷ SFB’s Response to Objector’s Supplemental Submission, p. 2-3.

V. THE EXPERT'S REASONING AND DETERMINATION

42. The subject matter of this Expert Determination is the Community Objection raised by the International Union of Architects (“UIA” or “Objector”) to the new gTLD application for the string “.ARCHITECT” (the “Application”) filed by Spring Frostbite, LLC (“Applicant” or “SFB”).

43. A Community Objection is one of the four possible objections pursuant to the Procedure. It is further defined in Art. 3.2.1 of Module 3 of the Guidebook.³⁸ Art. 3.2.1 (“*Grounds for Objection*”) provides the following summary definition of 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.”

44. As to the “*rationales for the [...] objection grounds*” the Guidebook refers to the “*discuss[ion] in the Final Report of the ICANN policy development process for new gTLDs.*”³⁹

45. The Final Report contains a “*SUMMARY - - PRINCIPLES, RECOMMANDATIONS & IMPLEMENTATION GUIDELINES*”.⁴⁰

46. These Principles which, as the Final Report indicates, were developed by reference to “*ICANN’s Mission and Core Values*”⁴¹ include

a) the following Principles:

“A: New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.

[...]

³⁸ The other three grounds for or types of objection are “*String Confusion Objection*”, “*Legal Rights Objection*” and “*Limited Public Interest Objection*”.

³⁹ Module 3 of the Guidebook, Art. 3.2.1, p. 3-4.

⁴⁰ Exhibit O-18.

⁴¹ Exhibit O-18, point 3 of the Summary.

C: *The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.*”

b) the following Recommendations:

“1: ICANN must implement a process that allows the introduction of new top-level domains.

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

[...]

20: An applicant will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted.”

and, referring to Recommendation 20, the following “*Implementation Guidelines*”:

“The task of the panel is the determination of substantial opposition.

a) **substantial** – *in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment*

b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.

c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.

d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) **implicitly targeting** – 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.

f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

[...]

g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) **detriment** – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of

detriment to the rights or legitimate interests of the community or to users more widely.”

47. In compliance with Recommendation 20 and the related Implementation Guidelines, the Guidebook states in Art. 3.5.4 (“*Community Objection*”) of Module 3 that for an objection to be successful the Objector must satisfy the following four tests:

- a) *“The community invoked by the objector is a clearly delineated community; and*
- b) *Community opposition to the application is substantial; and*
- c) *There is a strong association between the community invoked and the applied-for gTLD string; and*
- d) *The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. Each of these tests is described in further detail below.”*

48. I will now address those four requirements, one by one.

A. “The community invoked by the objector is a clearly delineated community”

1. Introduction

49. The Guidebook in Art. 3.5.4 of Module 3 expands on this first requirement as follows:

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

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

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

50. Art. 3.2.2 (“*Standing to Object*”) of Module 3 of the Guidebook states that a Community Objection can be submitted by an “*Established institution associated with a clearly delineated community*”. Art. 3.2.2.4 elaborates on that requirement as follows:

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

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

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

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

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

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

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

2. On the definition of the terms “architect” and “structural architect”

51. The Applicant argues in essence that

- a) *“structural architects” are just “one subset of an “architecture community”*
- b) *this “architecture community” covers also “all other types of architects” and “architect-related enthusiasts”⁴² and*
- c) *the Objector misappropriates the term “architect” for its members which are “structural architects”.*

⁴² See Response, p. 5, 8 as well as the Applicant’s Response to Procedural Instruction No. 2, p. 1.

52. The Objector disagrees with the Applicant's understanding of the term "*architect*" and argues that even without adding the adjective "*structural*", this term defines what the Applicant calls "*structural architect*".
53. Neither the Articles nor the Bylaws⁴³ of the UIA define the term "*architect*", but it is beyond doubt that the UIA understands the term "*architect*" as it is defined in the UIA Accord⁴⁴:

“Architect Definition

*The designation 'architect' is generally reserved by law or custom to a person who is professionally and academically qualified and generally registered/licensed/certified to practice architecture in the jurisdiction in which he or she practices and is responsible for advocating the fair and sustainable development, welfare, and the cultural expression of society's habitat in terms of space, forms, and historical context.”*⁴⁵

i.e. what the Applicant calls "*structural architect*".⁴⁶

54. In line with its understanding of the term "*architect*", the UIA Accord⁴⁷ defines the "*practice of architecture*" as follows:

“The practice of architecture consists of the provision of professional services in connection with town planning and the design, construction, enlargement, conservation, restoration, or alteration of a building or group of buildings.

These professional services include, but are not limited to, planning and land-use planning, urban design, provision of preliminary studies, designs, models, drawings, specifications and technical documentation, coordination of technical documentation prepared by others (consulting engineers, urban planners, landscape architects and other specialist consultants) as appropriate and without limitation, construction economics, contract administration, monitoring of

⁴³ Exhibit O-3, p. 15.

⁴⁴ Objection, p. 9.

⁴⁵ Exhibit O-4.

⁴⁶ See, for instance Response, pp. 4, 5.

⁴⁷ Exhibit O-4.

construction (referred to as “supervision” in some countries), and project management.”

55. Under the heading “*architect-background*” the UIA Accord states that

“Architects are part of the public and private sectors involved in a larger property development, building, and construction economic sector peopled by those commissioning, conserving, designing, building, furnishing, financing, regulating, and operating our built environment to meet the needs of society.”

and that

“[t]he designation “architect” is generally reserved by law or custom to a person who is professionally and academically qualified and generally registered/licensed/certified to practice architecture in the jurisdiction in which he or she practices and is responsible for advocating the fair and sustainable development, welfare, and the cultural expression of society’s habitat in terms of space, forms, and historical context.”

56. The “*fundamental requirements for registration/licencing/certification as an architect*” are defined by the UIA Accord to be

“the knowledge, skills, and abilities listed below that must be mastered through recognized education and training, and demonstrable knowledge, capability, and experience in order to be considered professionally qualified to practice architecture.”

57. The difference of opinion between the Parties on the meaning of the term “*architect*” relates in reality not to the issue whether the UIA as the Objector has standing to object, but to the substantive issue raised by the present proceedings, i.e. whether

“[t]he application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

58. This is test No. 4 of the four tests for Community Objections defined in Art. 3.5.4 of Module 3 of the Guidebook.⁴⁸ Whether test No. 4 is satisfied or not will be discussed in point D below.

3. A delineated community – the UIA’s standing to object

59. For the present purpose of determining whether the “*community invoked*” by the UIA “*is a clearly delineated community*”, i.e. whether the UIA has standing to object, it is sufficient to note that the UIA invokes the community of the “*architects*” as understood by the UIA and which the Applicant calls “*structural architects*”.

60. I will determine the objective meaning of the term “*architect*”, on which the Parties disagree, in point D below. In the meantime, I will use the term “*(structural) architect*”.

61. The community of (structural) architects is clearly delineated. It is the community of the (structural) architects of the entire world.⁴⁹

62. Even if one was to assume, for the purpose of the examination of UIA’s standing to object, that the term “*architect*” has the meaning advocated by SFB, i.e. that it includes landscape architects, naval architects, system architects etc., the “*structural architects*” (as understood by SFB) would still qualify as a “*clearly delineated community*” within a larger community of “*architects*” (as understood by SFB).

63. The Objector has submitted, uncontested by the Applicant, that the estimated number of (structural) architects worldwide is approximately 1.5 million. It is inconceivable to deny that group of professionals the qualification of “*a clearly delineated community*” even if they are or were, as argued by SFB, part of another, somewhat larger “*community*” of “*architects*” (including landscape architects, naval architects etc.).

⁴⁸ See para. 47 above.

⁴⁹ See Art. 1.1 and 2.2 of the Articles of the UIA, Exhibit O-3.

64. The UIA's standing to object cannot be called into question either by the fact that not all of the world's (structural) architects are members of those national professional organizations which are, in turn, members of the UIA, which is a federation of national professional organizations of (structural) architects. Nor can the UIA's standing to object be called into question by the fact that international competitions that the UIA organizes as well as the UIA world congresses are limited to direct or indirect members of the UIA.⁵⁰ The first test for community objections does not require a match between "*the objector*" and "*the community invoked*". In other terms, the UIA as Objector, covering through its member-organizations approximately 1.2 to 1.3 million (structural) architects⁵¹, can invoke the community of all (structural) architects of the world⁵² (including (structural) architects that are not members of national professional organizations which are in turn members of the UIA).
65. The UIA is also manifestly an "*established institution associated with [the] clearly delineated community*", whether this community is defined as the community of "*(structural) architects*" or as a larger community of "*architects including landscape architects, naval architects etc.*".
66. The "*level of global recognition*"⁵³ of the UIA is considerable, as is demonstrated by the number of (structural) architects the UIA represents directly or indirectly.⁵⁴ Its level of global recognition is also illustrated by the list of World Congresses it has organized every two or three years since its foundation.⁵⁵
67. The UIA has been in existence since 1948.⁵⁶ There is public historical evidence of its existence.⁵⁷
68. In addition to the "*length of time the institution has been in existence*" and the "*public historical evidence of its existence*", the other factors that Art. 3.2.2.4 of

⁵⁰ This is argued by the Applicant in its Response, p. 6. It is therefore equally irrelevant whether, as SFB seems to admit, the "*UNESCO-UIA competitions*" were also open to non-UIA members (see Response, p. 6).

⁵¹ See Exhibit O-7 and O-1.

⁵² Approximately 1.5 million, of which approximately 83% are (indirect) members of the UIA.

⁵³ Module 3 of the Guidebook, Art. 3.2.2.4, p. 3-8.

⁵⁴ Exhibits A-1 and A-7.

⁵⁵ Exhibit O-5.

⁵⁶ See the preamble to the UIA's Articles and Bylaws, Exhibit O-3, p. 5.

⁵⁷ See Exhibit O-3 - UIA's Articles and Bylaws and its registration as a foreign association in France in 1958 following the transfer of its seat from Lausanne, Switzerland to Paris, France.

Module 3 of the Guidebook mentions in the context of analysing an objector's standing are equally satisfied, i.e.

- *“the presence of mechanisms for participation in activities, membership, and leadership”* and
- *“the institutional purpose related to the benefit of the associated community”*:

see the UIA's Articles and Bylaws⁵⁸; the UIA Accord⁵⁹ and the research *“Architectural Practice around the World”* carried out under the auspices of the Professional Practice Commission of the UIA and on behalf of the UIA's Spanish section.⁶⁰

- *“the performance of regular activities that benefit the associated community”*:

see the list of the UIA world congresses and their themes⁶¹

and

- *“the level of formal boundaries around the community”*:

see the UIA-Accord on Recommended International Standards of Professionalism in Architectural Practice and the limitation to persons who are *“professionally and academically qualified and generally registered/licenced/certified to practice architecture in the jurisdiction in which he or she practices ...”*⁶²

To conclude:

69. The UIA clearly has standing to object. The Guidebook instructs me to *“perform a balancing of the factors”* which I have addressed above and explicitly states that *“[i]t is not expected that an objector must demonstrate satisfaction of each and*

⁵⁸ Exhibit O-3.

⁵⁹ Exhibit O-4.

⁶⁰ Exhibit O-6.

⁶¹ Exhibit O-5.

⁶² Exhibit O-4, p. 15.

every factor considered in order to satisfy the standing requirements".⁶³ I do not have to do any balancing. The UIA satisfies each and every of the relevant factors.

B. "Community opposition to the application is substantial"

70. The UIA's objection to SFB's Application is "*substantial*", considering the fact that the UIA covers, through its member-associations, more than 1.2 million (structural) architects around the world, out of an estimated total of 1.5 million.⁶⁴
71. Even if the relevant "*community*" includes/included, as argued by SFB, landscape architects, naval architects etc., the objection filed by the UIA would still fulfil the requirement of "*substantial*" opposition. "*Substantial opposition*" does not mean opposition by 100% of the members of the relevant community.
72. SFB argues that "*[a]ccepting the UIA's evidence of its own membership opposition as a 'substantial opposition' would render this factor effectively meaningless, because it would allow virtually any organization in the world to submit a community objection simply by having its membership object.*"⁶⁵
73. In reality, SFB's position would make it de facto impossible to satisfy the test of "*substantial opposition*". It would mean that more than 83% of a concerned community (this is approximately the percentage of the UIA's (indirect) members compared to the total worldwide number of (structural) architects) would have to object in order to comply with the "*substantial opposition*" requirement.
74. The numbers for the United States which SFB mentions explicitly, i.e. "*only 80,000 [UIA members] of at least 102,000 [(structural) architects] in the United States*",⁶⁶ are very close to the ratio worldwide and show an "*opposition*" that is far more "*substantial*" than is required under the Guidebook, whatever the relevant minimum standard for "*substantial opposition*" may be.

⁶³ Module 3 of the Guidebook, Art. 3.2.2.4, p. 3-8.

⁶⁴ Exhibits O-1 and O-7.

⁶⁵ Objection, p. 8.

⁶⁶ Objection, p. 6.

75. The non-exhaustive list of factors which panels “*could balance ... to determine whether there is substantial opposition*” includes

- “[n]umber of expressions of opposition relative to the composition of the community;
- [t]he representative nature of entities expressing opposition;
- [l]evel of recognized stature of weight among sources of opposition;
- [d]istribution or diversity among sources of expressing of opposition”
and
- “[h]istorical defense of the community in other contexts”⁶⁷

76. Given the size of the UIA,⁶⁸ its history,⁶⁹ its position,⁷⁰ its nature as a worldwide organization with members on all continents and with worldwide activities,⁷¹ as well as the activities of its member-associations,⁷² all the above factors listed in Art. 3.5.4 of Module 3 of the Guidebook clearly speak in favour of and confirm the qualification of the UIA’s opposition as “*substantial*”.

77. Art. 3.5.4 of Module 3 of the Guidebook also mentions, as another factor to be considered in determining whether there is substantial opposition, “[c]osts incurred by [the] objector in expressing opposition, including other channels the objector may have used to convey opposition.”

78. I have not been shown “*other channels [which] the objector may have used to convey opposition*”, but it is obvious that the UIA has incurred costs linked to the following of the new gTLD process and for the preparation of the present Objection.⁷³

To conclude:

79. there is no doubt that the UIA’s objection is “*substantial*”.

⁶⁷ Module 3 of the Guidebook, Art. 3.5.4, p. 3-23.

⁶⁸ Exhibits O-1 and O-7.

⁶⁹ Objection, p. 4 and Exhibit O-2.

⁷⁰ Exhibit O-3.

⁷¹ Exhibits O-4 to O-6.

⁷² See Exhibits O-9 to O-12.

⁷³ See point 2.6 of the Objection.

C. “There is a strong association between the community invoked and the applied-for gTLD string”

80. The Guidebook mentions in Art. 3.5.4 of Module 3 that in order to determine whether this third test is complied with, the factors that panel “*could balance [...] include but are not limited to:*

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

81. In order to demonstrate the “*strong association*” the UIA refers to the UIA Accord⁷⁴ and the definition of the term “*architect*” it contains. “*Landscaping architects*”, “*naval architects*” or “*software architects*” are not, in the UIA’s view, “*architects*” (in one single word).⁷⁵ According to the UIA not only professionals, but also the general public “*clearly and unequivocally associate [...] an “architect” (in one word) with an individual qualified to constructing habitat.*”⁷⁶

82. SFB contests the existence of “*a strong association between the community invoked and the applied-for gTLD string*” and argues that the UIA “*does not present any evidence that the public only perceives an architect to be an individual constructing a habitat.*”⁷⁷ UIA’s definition of the term “*architect*” is too narrow and ignores that the term “*architect*” includes not only “*a person who designs buildings and advises in their construction*”, but also “*a person who designs and guides a plan or undertaking*”, such as “*the architect of American foreign policy*”.⁷⁸

⁷⁴ Exhibit O-4.

⁷⁵ Point 2.7 of the Objection.

⁷⁶ Point 2.8 of the Objection.

⁷⁷ Point 4 of the Response.

⁷⁸ Point 4 of the Response and Exhibit A-1H.

83. SFB further argues that “[t]he UIA’s membership of structural architects have no legal right to monopolise the term ‘architect’ for themselves to the exclusion of all other architects”.
84. SFB also refers to “more than 3,500 U.S. trademark applications” filed that include the word “architect” in connection with non-structural architectural services, to which the UIA has not objected.⁷⁹
85. Finally, SFB states that “the UIA, through its surrogate Starting Dot, has applied for .archi as a community based application” and that the UIA’s true motivation to object to “.ARCHITECT” is “to prevent competition with its applied-for .archi gTLD”.⁸⁰
86. Both the arguments submitted by the UIA and the arguments submitted by SFB in relation to the third test (“strong association”) relate in reality primarily to test No. 4 (“likelihood of material detriment”) and in part to test No. 1 (“the community invoked is a clearly delineated community”), but not to test n° 3.⁸¹
87. The “strong association” between the community invoked by the UIA as Objector and the gTLD string “.ARCHITECT” applied for by SFB as Applicant is quite obvious.
88. The community invoked by the UIA is the community of the (structural) architects. There is manifestly a strong association with the gTLD string “.ARCHITECT”, whether the group of (structural) architects is identical with the group of “architects” or whether they are a relevant part of the group of “architects” (as understood by SFB, i.e. including landscape architects, naval architects etc.).

To conclude:

89. The UIA’s Objection also passes the third test successfully.

⁷⁹ Point 4 of the Response.

⁸⁰ Point 4. of the Response.

⁸¹ As to the list of the four tests see para. 47.

- D. “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.”**

Introduction

90. Applicants were invited to “[d]escribe “in their applications” the mission/purpose of [their] proposed gTLD”.⁸² Under this heading SFB made the following statement:

“THE .ARCHITECT TLD

This TLD is attractive and useful to end-users as it better facilitates search, self-expression, information sharing and the provision of legitimate goods and services. Along with the other TLDs in the Donuts family, this TLD will provide Internet users with opportunities for online identities and expression that do not currently exist. In doing so, the TLD will introduce significant consumer choice and competition to the Internet namespace – the very purpose of ICANN’s new TLD program.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users. Making this TLD available to a broad audience of registrants is consistent with the competition goals of the New TLD expansion program, and consistent with ICANN’s objective of maximizing Internet participation. Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness in the registration policies for this TLD. In order to avoid harm to legitimate registrants, Donuts will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that represents a generic form of activity and expression.

The .ARCHITECT TLD is especially inclusive. It will be attractive to registrants with a connection to architects, the building architecture or landscape architecture professions, as well as those with interest in or connections to the design of complex systems or products (e.g., a software architect or policy architect). This is a broad, diverse and international group that may include structural architects in various countries and jurisdictions, landscape architects,

⁸² Exhibit O-8, Point 18 (a) of the Application.

structural engineers, naval architects, and those that support them (for example, architecture, technology providers, construction managers, drafters, civil engineers, architecture historians, academics and others). The TLD will also be embraced by information technology designers, software architects and others that carry the “architect” title. The TLD also could become a platform for showcasing architectural accomplishments, sharing relevant information and data, and discussing various architecture-related issues, or simply for discussion of architecture among design and technology enthusiasts. The TLD should be operated in the best interest of registrants in all jurisdictions who approach the TLD from a variety of perspectives.”⁸³

91. According to SFB their “*operation of an open gTLD would ... benefit the vast majority of global consumers who identify with a myriad of different architectural “communities”, permitting them to use the .architect gTLD to promote their businesses, hobbies and interests, which in turn furthers the goals of ICANN and the new gTLD program, namely, to promote consumer choice and competition. The UIA’s alleged detriment is based on an assertion of trademark-like rights it simply does not have*”⁸⁴

92. The UIA takes the position that precisely this “*open registry policy*” creates a number of material detriments to the architecture community.⁸⁵

93. Concerning the test No. 4 the Guidebook sets out the following:

*“**Detriment** – The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.”⁸⁶*

94. This text is important in several respects.

⁸³ Exhibit O-8, extract from point 18 (a) of the Application.

⁸⁴ Response, p. 9.

⁸⁵ Objection, p. 11.

⁸⁶ Module 3 of the Guidebook, Art. 3.5.4, p. 3-24.

95. The objector does not have to prove actual material detriment. It is sufficient that the objector proves that the application creates “a likelihood of material detriment”. [emphasis added]
96. The application must create a likelihood of material detriment “to the rights or legitimate interests” [emphasis added]. The term “legitimate interests” is manifestly broader than the term “rights”. Rights are legal entitlements, based on contract and/or on the law. “Legitimate interests” can be of (only) “commercial/economic” nature.
97. Furthermore, the rights or legitimate interests need not be those of the whole community. It is sufficient that the application creates a likelihood of material detriment to the rights or legitimate interests “of a significant portion of the community” [emphasis added].
98. Finally, the string needs not be “explicitly” targeted to the community, a significant portion of which must be potentially affected. “Implicit” targeting of a significant portion of the community is sufficient.
99. Factors that I am invited by the Guidebook to use in making the determination “*include but are not limited to:*”
- *Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string;*
 - *Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;*
 - *Interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string;*

- *Dependence of the community represented by the objector on the DNS for its core activities;*
- *Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and*
- *Level of certainty that alleged detrimental outcomes would occur.*⁸⁷

1. Background and Policy Consideration

100. Before addressing the Parties' arguments and the issues that are relevant under test No. 4, it seems appropriate to recall briefly the background of and the policy considerations behind the introduction of new generic top-level domains.

101. The Final Report of the ICANN Generic Names Supporting Organization ("GNSO") dated 8 August 2007⁸⁸ recalls under the heading "*Background*"

"1. The Internet Corporation for Assigned Names and Numbers (ICANN) is responsible for the overall coordination of "the global Internet's system of unique identifiers" and ensuring the "stable and secure operation of the Internet's unique identifier systems". In particular, ICANN coordinates the "allocation and assignment of the three sets of unique identifiers for the internet". These are "domain names", Internet Protocol (IP) addresses and autonomous system (AS) numbers and Protocol port and parameter numbers

2 ...

3 ...

4. The finalisation of the policy for the introduction of new top – level domains" is, according to the Final Report, "part of a long series of events that have dramatically changed the nature of the Internet... The ICANN Staff Implementation Team, consisting of policy, operational and legal staff

⁸⁷ Module 3 of the Guidebook, Art. 3.5.4, p. 3-24.

⁸⁸ Exhibit O-18.

members, has worked closely with the Committee on all aspects of the policy development process.

...

7. *A key driver of change has been the introduction of competition in the registration of domain names through ICANN Accredited Registrars.*

...

13. *the Committee has opted to enable potential applicants to self-select strings that are either the most appropriate for their customers or potentially the most marketable.”*

102. Among the “*five key drivers for the introduction of new top-level domains*” identified by the Committee, the Final Report mentions:

“(iii) Expanding the domain name space to accommodate the introduction of both new ASCII and internationalised domain name (IDN) top-level domains will give end users more choice about the nature of their presence on the internet. In addition, users will be able to use domain names in their language of choice.

- (iv) There is demand for additional top-level domains as a business opportunity. The GNSO Committee expects that this business opportunity will stimulate competition at the registry service level which is consistent with ICANN’s Core Value 6”*

103. ICANN’s Bylaws⁸⁹ mention in Art. I (“*Mission and Core Values*”) the following “*core values*”:

“I...

5. *Where feasible and appropriate, depending on the market mechanisms to promote and sustain a competitive environment.*

⁸⁹ Exhibit 2.2 to the Procedural Instruction No. 2, Art. I.

6. *Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.”*

104. The last paragraph of the section on ICANN’s “*Core Values*” states that

“these core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgement to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values”.

105. ICANN is a non-government, non-profit organization. ICANN’s Bylaws,⁹⁰ however, establish a “Governmental Advisory Committee” (GAC) which shall *“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.”*⁹¹

106. At its recent meeting in Beijing in April 2013 GAC Communiqué was issued,⁹² point IV of which (“*GAC Advice to the ICANN Board*”) states:

- “1. *New gTLDs*
 - a. *GAC Objections to Specific Applications*
 - i. *The GAC Advises the ICANN Board that:*
...

⁹⁰ Exhibit 2.2 to the Procedural Instruction No. 2.

⁹¹ Exhibit 2.2 to the Procedural Instruction No. 2, Art. XI, Section 2.

⁹² Exhibit O-19.

b. Safeguard Advice for New gTLDs

To reinforce existing processes for raising and addressing concerns the GAC is providing safeguard advice to apply to broad categories of strings (see Annex I)."

107. Annex I, entitled "Safeguards on New gTLDs", states that

"The GAC considers that Safeguards should apply to broad categories of strings. For clarity, this means any application for a relevant string in the current or future rounds, in all languages applied for."

108. The GAC advised that six safeguards should apply to all new gTLDs and be subject to contractual oversight. The second safeguard reads as follows:

*"2. **Mitigating abusive activity** – Registry operators will ensure that terms of use for registrants include prohibitions against the distribution of malware, operation of botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law."*

109. In addition, the GAC advised the ICANN Board that

"Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm."

110. With regard to this category of strings in which the GAC included explicitly the string ".ARCHITECT" as a string linked to "professional services", the GAC advised the ICANN Board that "the following safeguards should apply":

"1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures."

2. *Registry operators will require at the time of registration to notify registrants of this requirement.*
3. *Registry operators will require that registrants who collect and maintain sensitive health and financial data implement reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law and recognized industry standards.*
4. *Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.*
5. *Registrants must be required by the registry operators to notify to them a single point of contact which must be kept up-to-date, for the notification of complaints or reports of registration abuse, as well as the contact details of the relevant regulatory, or industry self-regulatory, bodies in their main place of business.”*

111. Furthermore, the GAC advised the Board:

“In addition, some of the above strings may require further targeted safeguards, to address specific risks, and to bring registry policies in line with arrangements in place offline. In particular, a limited subset of the above strings are associated with market sectors which have clear and/or regulated entry requirements (such as: financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) in multiple jurisdictions, and the additional safeguards below should apply to some of the strings in those sectors:

6. *At the time of registration, the registry operator must verify and validate the registrants’ authorisation, charters, licenses and/or other related credentials for participation in that sector.*
7. *In case of doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents.*
8. *The registry operator must conduct periodic post-registration checks to ensure registrants’ validity and compliance with the above requirements in order to ensure they continue to conform to appropriate regulations and licensing*

requirements and generally conduct their activities in the interests of the consumers they serve."⁹³

112. Prior to the GAC Communiqué the government of Australia had submitted an "GAC Early Warning – Submittal Architect-AU-7920" where with regard to the string ".ARCHITECT" under the heading "Consumer protection" it is stated that

*"The string (.architect) is linked to a regulated market sector, and Spring Frostbite, LLC does not appear to have proposed sufficient mechanisms to minimise potential consumer harm."*⁹⁴

113. The Government of France had also submitted a "GAC Early Warning – Submittal Architect-FR-7920"

"The proposed gTLD relates to an activity which is subject to certain legislation because of their statutory duties and responsibilities. The French government thinks that the use of this new string should be restricted to persons complying with the legal requirements to carry out the professional activities of an "architect"."⁹⁵

114. As "Reason/Rationale for the Warning" the French Government indicated:

"The French government believes that services provided through websites using such gTLD should only be provided by architects.

The user having access to services through such websites will reasonably think that the service is provided by a person which regularly carried out its professional activities under the professional title of "architect". The user should not be misled by the domain name using this string. On the contrary, the user should be assured that the service made available is complying with duties and responsibilities of architects.

⁹³ SFB's Comment on GAC Advice on new gTLDs will be dealt with in the context of the specific discussion and analysis of the Parties' positions and arguments.

⁹⁴ Exhibit 2.4 to the Procedural Instruction No. 2.

⁹⁵ Exhibit 2.5 to the Procedural Instruction No. 2.

This warning urges the applicant to limit the access of the new registration of domain names using this string only to architects: the services available within websites using this extension shall exclusively be provided by a person which regularly carried out its professional activities under the professional title of an “architect”.”

115. SFB replied to both the Government of Australia and the Government of France. These replies will be dealt with further below in the context of the specific discussion and analysis of the Parties’ positions and arguments.

2. On the term “architect”

116. For the purpose of reaching a conclusion on the issue between the Parties I have to determine the meaning of the term “*architect*” and whether this term includes “*landscape architects*”, “*naval architects*” etc.

117. From a purely abstract point of view it would appear to be justified – prima facie – to argue that “*landscape architects*”, “*naval architects*”, “*system architects*” are “*architects*”, just like “*apple trees*”, “*pear trees*”, and “*olive trees*” are “*trees*”.

118. Language, however, is not an exact science following principles of mathematical science or logic.

119. The term “*tree*” is clearly a generic term that covers all types of trees. Unlike the term “*tree*”, the term “*architect*”, however, is not a generic term that covers “*landscape architects*”, or “*naval architects*” etc. The term “*architect*” has a very specific and limited meaning. SFB’s Exhibit A-1-H defines “*Architect*” as “*a person who designs buildings and advises in their construction*”. The same definition is found, although in somewhat different words, in the free encyclopaedia Wikipedia referred to by the UIA.⁹⁶ Wikipedia defines an “*architect*” as “*a person trained and licenced to plan, design, and oversee the construction of buildings.*”

⁹⁶ Submitted by the UIA as Exhibit O-20.

120. According to both the definition of Merriam-Webster and the definition of Wikipedia, the term “*architect*” means what SFB calls “*structural architect*”.⁹⁷ The term “*structural architect*” which SFB presents as a sub-group of “*architects*” however, does not exist as a common term. One understands what it means but the adding of the adjective “*structural*” is in my view tautological given the meaning of the term “*architect*”.⁹⁸
121. Finally, I wish to add that SFB has also submitted extracts from Wikipedia concerning the terms “*landscape architect*”, “*naval architect*”, “*software architect*” and “*systems architect*”.⁹⁹ None of those terms or professions is defined as a sub-term of “*architect*” or a sub-group of “*architects*”. A landscape architect is defined as “*a person involved in the planning, design and sometimes direction of a landscape, garden or distinct space.*” The “*naval architect*” is defined as “*an engineer who is responsible for the design, construction and/or repair of ships, boats etc.*” A “*software architect*” is defined as “*a computer programmer who makes high-level design choices and dictates technical standards, including software coding standards, tools and platforms*”. The “*systems architect*” is defined as someone who “*establishes the basic structure of the computer system, defining the essential core design features and elements that provide the framework for all that follows ...*”. None of the definitions says “*a landscape/naval/software/systems architect is an architect, that ...*”.
122. The Wikipedia Encyclopedia on “*systems architect*” uses, in the text, the term “*architect*” for “*system architect*”. But the term “*architect*” is used as a shortcut for “*systems architect*”, not in the sense of a generic term that would include (structural) architects, landscape architects etc. Under the heading “*References*” Wikipedia explicitly states, avoiding any possible confusion, that

⁹⁷ This meaning of the term “*architect*” is also confirmed in those documents that SFB submitted as evidence for „*Structural Architect Organizations unaffiliated with UIA*“ (Exhibits A-2-A to A-2-D). The National Council of Architectural Registration Boards, for instance, states under the heading “*Becoming an Architect*” - “*Architects are licenced professionals trained in the art and science of the design and construction of buildings and structures that primarily provide shelter. Additionally, architects may be involved with designing the total built environment – from how a building integrates with its surrounding landscape to architectural or construction details that involve the interior of the building to designing and creating furniture to be used in a specific space.*” (Exhibit A-2-A).

⁹⁸ I wish to add that none of the documents (Exhibits A-2-A to A-2-D) submitted by SFB as evidence for Structural Architect Organizations unaffiliated with UIA uses the term “*structural architect*”, but simply the term “*architect*”, as used and understood by the UIA. The last document is particularly interesting because it says under the heading “*related professions*” [of “*architects*”] - “*Architects often work with engineers, urban planners, interior designers, landscape architects, and a variety of other professionals.*”

⁹⁹ Exhibit A-6.

*“[t]he term “architect” is a **professional title** protected by law and restricted, in most of the world’s jurisdiction, to those who are trained in the planning, design and supervision of the construction of **buildings**. In these jurisdictions, anyone who is not a licenced architect is prohibited from using this title in any way. In the State of New York, and in other U.S. states, the unauthorized use of the title “architect” is a crime and is subject to criminal proceedings.”*¹⁰⁰

123. I also note in this context that organizations or associations of landscape architects or of naval architects are not sub-sections of some “*architect*”-associations, federations or unions, but independent organizations, associations or federations, such as “*The Global IT Architect Association*”,¹⁰¹ the “*International Federation of Landscape Architects*”¹⁰² and the “*American Society of Golf Course Architects*”¹⁰³ and “*The Society of Naval Architects and Marine Engineers*”.¹⁰⁴

124. The term “*architect*” is also used in a figurative sense. Merriam-Webster¹⁰⁵ mentions as a second definition of “*architect*”: “*a person who designs and guides a plan or undertaking < The architect of American foreign policy >*”. I will come back to this second, figurative sense of the term “*architect*”. For the time being it is sufficient to note that neither Merriam-Webster nor Wikipedia mention landscape architects or naval architects etc. as “*architects*”.

125. Wikipedia mentions that “*[t]he terms **architect** and **architecture** are also used in the disciplines of landscape architecture, naval architecture and often information technology (for example a network architect or a software architect).*” This is absolutely true. The terms “*landscape architects*”, and “*naval architects*”, or “*software architects*” do exist, but they are not a sub-term of “*architect*”. They are simply different terms.¹⁰⁶ Neither Merriam-Webster nor

¹⁰⁰ Exhibit A-6 on “*Systems architect*”, p. 5.

¹⁰¹ Exhibit A-1-B.

¹⁰² Exhibit A-1-C and A-1-D; see also Exhibit A-1-E - the “*Landscape Institute*” or “*Royal Chartered institute for landscape architecture*”.

¹⁰³ Exhibit A-1-F.

¹⁰⁴ Exhibit A-1-G.

¹⁰⁵ Exhibit A-1-H.

¹⁰⁶ It is interesting to note, in this context, that Merriam-Webster mentions “*landscape architect*” and “*marine architect*” as separate terms and not as a sub-group of a larger group of “*architects*”.

Wikipedia use the term “*structural architect*” to define what UIA understands and what I also understand to mean “*architect*”.

3. Promotion of Consumer Choice and Competition/ Consumer Protection/ the Fundamental Right to Free Speech: Compatible or Incompatible goals?

126. It is often the case in life in general, and in the law in particular, that the public and decision makers at all relevant levels find themselves confronted with goals and policies which are or which appear to be conflicting or incompatible. The present dispute is a perfect illustration of that type of situation.

127. One of the aims of the introduction of new generic top-level domain names is clearly the promotion of consumer choice and competition.¹⁰⁷

128. Promoting competition, however, is not an *absolute*, unlimited goal. This is reflected in ICANN’s Core Value No. 6:

“Introducing and promoting competition in the registration of domain names where practical and beneficial in the public interest.” [emphasis added]

129. Similarly, free speech is not an absolute, unlimited right. Competition as well as free speech are subject to limitations in the public interest, which include limitations imposed for reasons of consumer protection.

130. The community of architects is an important community, not only because of their number and because of their own economic interests, but because architects are important to society. As indicated in Wikipedia “[p]rofessionally an architect’s decisions affect public safety...”.¹⁰⁸

131. This public interest is confirmed in a document submitted by SFB issued by the National Council of Architectural Registration Boards, an institution unaffiliated with UIA.¹⁰⁹ This document states:

¹⁰⁷ For example see Exhibit O-18, p. 3.

¹⁰⁸ Exhibit O-20.

¹⁰⁹ Exhibit A2-C.

"I. REGULATION OF THE PROFESSIONS

*Since the early days of the Republic, it has been a recognized and accepted function of state governments to regulate activities which affect the public health, safety, or welfare. One aspect of this role has been the regulation of the professions, whose members are properly considered to have special responsibilities to the public as well as to the individuals receiving services. The essential rationale and standard for such regulation was set forth by the U.S. Supreme Court in *Dent v. West Virginia*, 129 U.S. 114, 122 (1889), when the Court wrote:*

...

The goals of the architectural registration law have been threefold:

- 1. To ensure at least a minimum level of competence;*
- 2. To ensure appropriate standards of conduct [and continuing professional development]; and*
- 3. To discourage unlicensed practice.*

II. WHO BENEFITS FROM THE REGULATION OF ARCHITECTS?

The activities of the Board benefit two categories of people.

First, regulation protects the consumers of architectural services. The necessity of ensuring that those who hire architects are not victimized by incompetent or dishonest architects is self-evident.

Second, regulation protects the public at large.

The primary responsibility of an architect is, of course, to design buildings so that they are safe, durable, and satisfy reasonable environmental standards.

...

It should be emphasized that the results of faulty design may injure the users of the building as well as the person who engaged the architect.

There are other less obvious reasons that the regulation of architecture benefits the public. An architect's actions shape the social and physical environment. The design and siting of a building and its relationship to its surroundings will affect the safety, comfort, and convenience of passers-by and users of neighboring buildings. The siting and design together will determine to a considerable degree what demands the building will make on public services, such as power, water, sewerage, and fire protection. In

many locations, the design will determine, for good or ill, the immediate impact of the building on physical characteristics of the environment; the building may change the water table, the soil support of surrounding buildings, the availability of open space, and the pattern of wind current, to cite a few examples.

The architect's decisions may well also have subtle long-range effects, particularly where very large projects are involved.

...

132. Beyond concerns of public safety, habitat for human beings is of essential importance in society, at the human-social level, at the economic level and at the environmental level (including at the level of energy-policy, energy saving etc.).
133. It is unsurprising that, as indicated by Wikipedia, *“an architect must undergo a specialized training consisting of advanced education and a practicum (or internship) for practical experience to earn a licence to practice architecture”* and that *“[i]n most developed countries, only qualified persons with appropriate licensure, certification, or registration with a relevant body, often governmental, may legally practice architecture”* and that *“[t]he use of terms and titles, including derivatives such as architectural designer, and the representation of one-self as an architect is restricted to licenced individuals by law.”*
134. These public interests are reflected in the UIA Articles and Bylaws¹¹⁰ and in the UIA Accord.¹¹¹ This UIA Accord emphasises the *“social and ecological imperatives”* linked to the practice of architecture,¹¹² the architect’s *“responsib[ility] for advocating the fair and sustainable development, welfare, and the cultural expression of society’s habitat in terms of space, forms, and historical context”*¹¹³ and the aim of *“meet[ing] the needs of society.”*¹¹⁴

¹¹⁰ Exhibit O-3.

¹¹¹ Exhibit O-4.

¹¹² Exhibit O-4, p. 15 under *“Practice of Architecture - Background”*.

¹¹³ Exhibit O-4, p. 15 under *“Architect - Definition”*.

¹¹⁴ Exhibit O-4, p. 15 under *“Architect - Background”*.

135. The UIA consequently takes the position that these public interest concerns are violated by the Applicant's intended "*open registry policy*" with regard to the applied-for domain name ".*ARCHITECT*".
136. SFB clearly announced in its Application that it does not intend to limit the use of the domain name ".*ARCHITECT*" to (licensed) architects but rather intends to open its use to "*landscape architects*", "*naval architects*", etc. and more generally to any and all "*professionals whose work supports and advances the work of architects*",¹¹⁵ as well as to "*architecture enthusiasts*".¹¹⁶
137. Given the specific nature of the new generic top-level domain name ".*ARCHITECT*" and the specific meaning of the term "*architect*",¹¹⁷ it would be incompatible with the above referenced public interests linked to the work of architects and with the related consumer protection concerns, to allow the domain name ".*ARCHITECT*" to be used by anyone other than "*architects*" who, by definition, need to be licensed, even if the type of license and the requirements for such licenses may not be exactly the same in each and every country or jurisdiction.
138. The UIA has demonstrated the risk of persons who do not fulfil the necessary requirements and who are not licensed, but who claim to be (licensed) architects.
139. Exhibit O-9 shows several examples of complaints/enforcement actions related to the misuse of the term "*architect*".¹¹⁸
140. These concerns are confirmed by other evidence submitted by the Objector.¹¹⁹ They were confirmed by the GAC Early Warning of the Australian

¹¹⁵ Response, p. 9.

¹¹⁶ SFB admits that (structural) architects "*are licenced according to specific governmental standards, unlike landscape architects, software architects, system architects, naval architects, and golf course architects*", see Response, p. 7.

¹¹⁷ SFB has submitted evidence on "*Architecture Critics and Non-UIA Publications*", i.e. to "*Architectural Digest*" (Exhibit A-3-A), to "*architectural record*" (Exhibit A-3-B) and to the "*Chicago Architecture Foundation Facts*" (Exhibit A-3-C). SFB, however, has not filed an application for "*architecture*" or "*architectural*" but for ".*ARCHITECT*".

¹¹⁸ From the US State of Ohio, from the US States of Texas, Washington, New York, Florida and others and from India.

¹¹⁹ See Exhibit O-10 – a brochure of the UK Architects Registration Board; Exhibit O-11 – a publication by the Architectural Institute of British Columbia on the "*Right to Title*" and Exhibit O-12 – a publication of the NSW

Government¹²⁰ and the French Government,¹²¹ as well as by the GAC Communiqué.¹²²

141. Consumers should be entitled to assume that anybody using the generic top-level domain name “.ARCHITECT” is a licensed architect. I do not see how any other use of the generic top-level domain name “.ARCHITECT” could “*promote consumer choice and competition.*”
142. SFB also argued that upholding the UIA’s objection would have “*an inhibiting effect on new gTLDs’ ability to fairly compete*” since “*no such restrictions now exist or are demanded of most existing gTLDs or ccTLDs*”.
143. I find this argument to be very general, too general in order to allow me to address it. I can say, however, that my role is not to express a view on other top-level domain names than “.ARCHITECT”.
144. It is, however, certainly not required, as suggested by the UIA,¹²³ that those who use the domain name “.ARCHITECT” be members of the UIA or of any association or organization affiliated with the UIA. The UIA cannot “*monopolize*” the term “*architect*” for its (direct or indirect) members.
145. In the context of the “*abuse*” discussion, SFB has referred to its “*Public Interest Commitments*”¹²⁴ in which SFB states under the heading “*Anti-Abuse Policy*”:

“Registry Operator will monitor the gTLD for abusive behaviour and address it as soon as possible if detected.”

146. It its “*comments on GAC Advise on New gTLDs*”¹²⁵ SFB took the position that

Architects Registration Board, Sydney, concerning the Architects Act 2003 and the “*illegal use of the title “architect”*”.

¹²⁰ Exhibit 2.4 of the Procedural Instruction No. 2.

¹²¹ Exhibit 2.5 of the Procedural Instruction No. 2.

¹²² Exhibit O-19.

¹²³ Objection, p. 9, see also para. 32 above.

¹²⁴ Exhibit A-8.

¹²⁵ Exhibit 2.6. of Procedural Instruction No. 2.

“Registrants must operate within the law ... It is very unlikely, for example, that registry operators know anything substantive about organic farming. ...”

“Placing limitations on gTLDs before they’re launched, solely in anticipation of a possible type of abuse, will stifle innovation.”

147. The use of the top-level domain name “.ARCHITECT” by non-licensed architects is in itself an abuse. This top-level domain refers to a regulated professional service. Therefore all safeguards must be adopted to prevent its use by a non-licensed person. Otherwise the door would be open for abuse, examples of which were shown by the UIA.¹²⁶ Why one would have to wait until after the actual use of that top-level domain name to find out that the user is not a “*licensed architect*”. SFB itself stated “...it would be grounds for domain name deletion if an unlicensed structural architect tried to confuse consumers by using a.Architect registration to present himself as licensed”.¹²⁷ Why should one wait for all those who “*stand between architects and the completion of a building*”, such as “*builders, ... and government agencies*” in order to “*mitigate any possible harm to consumers*” in case “*an unlicensed architect attempts to pose as an architect*”?¹²⁸

148. SFB argued that an “*identity based control*”, i.e. an *ex ante*-limitation would be *ineffective and difficult to enforce*. To illustrate this position SFB referred to the example that a certified public accountant “*could use his or her credential to register multiple names in .CPA and then licenses their use to any person of his or her choosing, credentialed or not*”.¹²⁹ The likelihood of such an abuse by a licensed CPA or, in our case, by a licensed architect appears to be very limited, in any case far too limited in order to support SFB’s position.

¹²⁶ Exhibit O-9.

¹²⁷ Exhibit O-14 – SFB’s Reply to the Government of France.

¹²⁸ Response, p. 10: “*There are additional safeguards to prevent substantial harm to consumers. As the UIA notes on page 14 of its Objection, structural architects work in conjunction with contractors, builders, clients, and government agencies to build structures. All of these individuals stand between architects and the completion of a building. Thus, if an unlicensed architect attempts to pose as an architect, the involvement of all of these individuals will mitigate any possible harm to consumers. The existence of these safeguards are what prevents consumers from suffering harm as a result of believing that an unlicensed architect is actually licensed.*”

¹²⁹ Exhibit O-13 – SFB’s Reply to the Government of Australia, p. 8.

4. Only second level domains indicate source?

149. The Applicant has submitted that “*there is a general presumption that [only] second level domains not top-level domains, indicate source in the mind of consumers.*” In this context the Applicant referred me to *Interstellar Starship Serv. Ltd. v. Expix, Inc.*¹³⁰

150. The important passage in this Interstellar case is:

“The district court correctly recognized that a word used as a second-level domain name in a web-site address can present a cause of action for trade mark infringement.”

151. The Interstellar case deals with trademark infringement issues under US law and is, therefore, inapposite to the present matter. In addition, neither the district court nor the court of appeals expressed the view that “*only*” a “*second-level domain name*” “*indicate[s] source in the mind of consumers*”. In addition, the relevant generic top-level domain name in the Interstellar case was “.com”. Such very general top-level domain names cannot, in terms of their effects, be compared to or subsumed under such very specific generic top-level domain names as “*ARCHITECT*”.¹³¹

5. The US Patent Trademark Office’s Trademark Manual of Examining Procedure

152. The Applicant’s reference to the US Patent Trademark Office’s Trademark Manual of Examining Procedure (Section 1215.02 (d)) is equally unhelpful to the Applicant’s position. The relevant passage in this Trademark Manual of Examining Procedure reads as follows:

“If a mark is composed solely of a TLD for “domain name registry services” (e.g., the services of registering .com domain names), registration should be

¹³⁰ Response, p. 9, Footnote 24 (184 F. 3d 1107, 1110 (9th Cir. 1999)).

¹³¹ It is therefore not relevant that, as argued by SFB in its Reply to the Government of France, Exhibit O-14 “*in the .COM namespace alone, ..., there are over 12,000 of the word “architect” and that “there is little evidence that these have generated abuse.”*

refused under Trademark Act §§1, 3, and 45, 15 U.S.C. §§1051, 1053 and 1127, on the ground that the TLD would not be perceived as a mark.”

153. Whether a domain name can be registered as a trademark is irrelevant in the present context. In addition, that Trademark Manual of Examining Procedure was last updated in June 2007, i.e. prior to the Final Report published by the ICANN Generic Names Supporting Organization in August 2007.¹³² In 2007 the list of top-level domains was quite limited and did not contain specific top-level domains such as “.ARCHITECT”.

6. Internet users and consumers expect correct information

154. Finally, the public interest and consumer protection concerns cannot be overcome by the argument “*that consumers visiting websites registered under the .architect gTLD will receive additional information about the services offered based on the content of the website itself.*”¹³³ Consumers are entitled to get the information and the service that they reasonably expect.

155. The top-level domain name “.ARCHITECT” raises the legitimate expectation that the related website is the website of a licensed architect (or a group of licensed architects). Correct information is essential to consumers visiting websites.

156. The Applicant has drawn my attention to a passage in *Toyota Motor Sales, U.S.A., Inc. v. Tabari*¹³⁴ quoted in *Network Automation, Inc. v. Advanced Systems Concepts, Inc.*¹³⁵ That passage reads as follows:

“[I]n the age of FIOS, cable modems, DSL and T1 lines, reasonable, prudent and experienced internet consumers are accustomed to such exploration by trial and error. They skip from site to site, ready to hit the back button whenever they’re not satisfied with a site’s contents. They fully expect to find some sites that aren’t what they imagine based on a glance at the domain name or search engine summary. Outside the special case of ... domains that actively claim affiliation

¹³² Exhibit O-18.

¹³³ Response, p. 10.

¹³⁴ Response, p. 10, Footnote 26 - 610 F. 3d 1171, 1179 (9th Cir. 2010).

¹³⁵ Response, p. 10, Footnote 26 - 638 F. 3d 1137, 1152-53 (9th Cir. 2011).

with the trademark holder, consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page- if then."

157. I do not think these two cases, which are both trademark cases and are as such anyway not or at least not directly applicable here, support the Applicant's position.
158. The Toyota v. Tabari decision had to address the question whether the domain names of a distributor of Lexus cars "*buy-a-lexus.com*" and "*buyorleasealexus.com*" "*suggests [...] sponsorship or endorsement by the trademark holder*", thereby infringing Toyota's Lexus trademark. I fully agree with the court's answer that the use of those domain names did not infringe the Lexus trademark, but simply used the trademark to refer to the trademarked good itself which the distributor was entitled to sell. I also agree that the use of the string "*lexus*" in those domain names was not "*likely to cause confusion as to the source of the [distributor's] website*".¹³⁶
159. The extract from the court's decision quoted above relates to the assumption that an internet user will enter the search term "*lexus*" and to the question whether that internet user/customer would assume that the sites that pop up are sites (of companies) affiliated with the trademark holder.
160. There is nothing shocking about the fact that the search engine results would include the website of a legitimate, rightful distributor of Lexus cars. If the internet user or consumer wanted to get to a Toyota website, but arrived at the Tabari lexus-distribution website, the internet user/consumer will of course "*hit the back button*".¹³⁷ The situation that I have to address in my Expert Determination is completely different, however.
161. More likely than not, somebody who searches "*architect*" expects to get to the website of licenced architects, but is not interested in landscape architects, naval architects or system architects. The internet user/consumer would simply lose valuable time by having to go through a totally unnecessary "*exploration by trial*

¹³⁶ Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F. 3d 1171, 1179 (9th Cir. 2010).

¹³⁷ Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F. 3d 1171, 1179 (9th Cir. 2010).

and error”,¹³⁸ which would be time consuming, annoying, if not indeed irritating. This would neither be in the interest of the internet user/consumer nor in the true interest of the internet system as a whole.

7. The figurative sense of “architect”

162. I am aware, as indicated above¹³⁹, that the term “*architect*” is also sometimes used in a figurative sense (“*the architect of the foreign policy of country X*”¹⁴⁰). However, this very limited use of the term “*architect*” does not affect my Expert Determination. I cannot imagine that anybody searching on the internet for the foreign policy of country X and more specifically searching who is or may have been the “*architect*” of that country’s foreign policy would search under the term “*architect*” or would expect an answer to that question under a website with the top-level domain name “.ARCHITECT”.

163. SFB has argued, in support of its “*Open Registry Policy*” that a specialist for the repair or the maintenance of rugs may hold himself out as a “*rug-doctor*”¹⁴¹. I do not say that this would be an illicit use of the term “*doctor*”, but I am equally of the opinion that somebody who is looking for “*doctors*” would not expect – nor would he want - to be referred to a “*rug-doctor*”¹⁴², a “*car-doctor*”, etc. Quite to the contrary, such internet users/consumers would be presumably quite annoyed and feel that the internet system is not as efficient and as helpful as it should be and that it is causing them to lose valuable time.

8. Assertion of trademark-like rights by the UIA / relevance or irrelevance of the UIA’s failure to object to trademarks including the term “architect” in connection with non-structural architectural services

164. SFB argues that “[t]he UIA’s alleged detriment is based on an assertion of trademark-like rights it simply does not have.”¹⁴³

¹³⁸ Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F. 3d 1171, 1179 (9th Cir. 2010).

¹³⁹ See para 124 above.

¹⁴⁰ See Exhibit A-I-H.

¹⁴¹ Exhibit O-13.

¹⁴² Applicant’s Reply to the Government of Australia, Exhibit O-13, p. 8.

¹⁴³ Response, p. 9.

165. I have not seen any reliance by the UIA on trademark rights. In addition, I have already said in para 144 above that the UIA cannot request that the use of the gTLD “.ARCHITECT” be limited to UIA members.
166. SFB also states that “*the UIA has not objected to the more than 3,500 U.S. trademark applications that had been filed that include the word “architect” in connection with non-structural architectural services*”.¹⁴⁴
167. In this context SFB has submitted the results of various searches in the Trademark Electronic Search System¹⁴⁵ as well as one specific trademark “*Portal Architects*”.¹⁴⁶
168. These records show a number of trademarks including the term “*architect*” or “*architects*”.
169. I obviously cannot go through 3,500 trademark applications. But I don’t think this is necessary either.¹⁴⁷ The question of whether or not the UIA has objected to any trademark applications including the word “*architect*” in connection with “*non-structural architectural services*” does not affect the UIA’s Objection to the top-level domain name “.ARCHITECT”.
170. SFB has provided details only for one trademark, i.e. for the trademark “PortalArchitects”¹⁴⁸, but the reference to this trademark does not support SFB’s position in the present Expert proceedings.
171. As the reproduction from SFB’s Exhibit A-4-B shows,

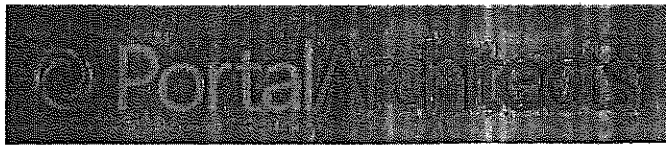
¹⁴⁴ Response, p. 9.

¹⁴⁵ Exhibit A-4-A.

¹⁴⁶ Exhibit A-4-B.

¹⁴⁷ Just for the sake of record I note that a) among the 3,379 records found under the search „*architect*” many of the trademarks are indicated to be “*dead*”, b) many trademarks do not include the term “*architect*” or “*architects*” and c) that I do not have to express a view as to whether the term “*architect*” as such, i.e. without any additional words, without the use of any stylised letters or elements and without the use of any colours, could be protected as a trademark for services of an architect.

¹⁴⁸ Exhibit A-4-B.



this trademark is not a pure “word” trademark, but includes the colours red, black and white which “are claimed as a feature of the mark”. Furthermore, this trademark “consists of a red stylized swirl design next to the word “PORTAL ARCHITECTS”. “PORTAL” is displayed in stylized red letters and “ARCHITECTS” is displayed in stylized white letters.

172. The trademark is registered for “downloadable software for improving the productivity of portals”.

173. In light of the above, I consider the trademark evidence presented by SFB as unpersuasive.

9. The right of free expression

174. SFB has relied on the fundamental right of free expression. This right is, of course, a fundamental right but it is not an “absolute” right. The right of free expression is subject to a number of limitations based on conflicting rights or interests.

175. SFB also relied on the reference made to “freedom of expression” in the report on the world conference on international telecommunications¹⁴⁹ and to the Internet being “un bien commun, qui devrait rester libre et ouvert”.¹⁵⁰ But these texts do not suggest to give priority to the right of free expression over other public interests, including consumer interests. They referred to the discussion whether or not the technical operation (and control) of the Internet should be transferred via the International Telecommunications Union to the States.¹⁵¹

¹⁴⁹ Exhibit A-9.

¹⁵⁰ Exhibit A-10.

¹⁵¹ See the discussion at the World Conference on International Communication (“WCIT”) in Dubai in December 2012 and related Exhibits O-21 and O-25.

10. The string “.archi” applied for by the UIA

176. SFB has also submitted on various occasions¹⁵² that the UIA has objected to SFB’s Application “.ARCHITECT” because the UIA itself has filed an application for the top-level domain name “.archi” through an affiliated entity. On that view, the UIA simply wants to protect its own application for a domain name and to avoid competition by the domain name “.ARCHITECT” for which SFB has applied.

177. The application “.archi” may have influenced/contributed to the UIA’s decision to file an objection to “.ARCHITECT”. But even assuming that this was/is the case, this does not affect the strength of the UIA’s Objection. Moreover, I am not called upon to deal with the “.archi” application.

To conclude:

178. Returning now to the various factors which the Guidebook invites me to take into account in my Determination, I have reached the following conclusions:

- The operation of the generic top-level domain “.ARCHITECT” as suggested by the Applicant in its Application would lead to considerable damage to the reputation of the community of architects. Internet users would necessarily assume that those who use the domain name “.ARCHITECT” are licensed architects. There is a considerable risk that internet users would be misled and this would, in term, cause harm to the reputation of the community of architects.
- For the reasons set out above I also conclude that if the Applicant acted as per its stated intention, it would not be acting in accordance with the interests of the community of architects or of internet users more widely. Given the importance of the work of architects it would be insufficient, in my view, to address possible abuse by non-licenced architects *ex post*. I see

¹⁵² Response, p. 9; Response to Objector’s Supplemental Submission, p. 1 and Response to Procedural Instruction No. 2, p. 2.

no reason why any non-licensed architect should have access to the domain name “.ARCHITECT” in the first place.

- Opening the domain name “.ARCHITECT” to others than licensed architects, including for instance “*landscape architects*”, “*naval architects*”, “*system architects*”, would create an interference with the core activities of the community of architects.
- Given the specificity and the precise meaning of the term “*architect*”, the opening of the top-level domain name “.ARCHITECT” to “*architecture*”-related businesses or activities, such as, for instance, the supply of special software to architects or the supply of special photocopying machines or printers or of paper and pens for architects, would both interfere with the core activities of the community of architects and would run counter to the interests of the broader community of internet users.
- The community of architects is clearly dependent on the DNS for its core activities, as nearly any community is nowadays.
- The evidence submitted by the Objector on the illegal use of the title “*architect*”¹⁵³ as well as the early warnings by the Governments of Australia and France as well as the GAC Communiqué¹⁵⁴ show the relevant nature and extent of concrete or economic damage to the community. They also confirm, to a relevant level of certainty, that the alleged detrimental outcomes would occur.

VI. DISPOSITIVE SECTION

In light of the current version of the Application and according to Art. 21 (d) of the Procedure I hereby render, for all the above reasons, the following

¹⁵³ See Exhibits O-9 to O-12.

¹⁵⁴ Exhibit O-19.

EXPERT DETERMINATION

1. The International Union of Architects prevails and I, therefore, state that their Objection is successful.
2. The Centre is invited to refund to the International Union of Architects their Advance Payment of Costs pursuant to Art. 14 (e) of the Procedure.

Place of the Expert Determination proceedings: Paris, France

Date: 3 September 2013



Andreas Reiner

Expert

Annex 12

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

CASE No. EXP/389/ICANN/6

INTERNATIONAL BANKING FEDERATION

(UK)

vs/

DOTSECURE INC.

(UAE)

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

Expert Determination
In the Matter of the Community Objection by International Banking Federation to the “.bank”
Application by Dotsecure Inc.

as of November 26, 2013

Mark Kantor
Sole Panel Member and Expert
110 Maryland Avenue, N.E.
Suite 311B
Washington, D.C., U.S.A. 20002

ICC EXP/389/ICANN/6

International Banking Federation (UK) vs/ Dotsecure Inc. (United Arab Emirates)

TABLE OF CONTENTS

I.	Introduction
II.	Applicable Standards
III.	Standing and Merits
A.	Standing
i.	Analogy to ICANN
ii.	Established Organization
iii.	Clearly Delineated Global Banking Community
iv.	Ongoing Relationship
v.	Substantial Opposition
vi.	ABA Sponsorship of fTLD Registry Services
vii.	Conclusions as to Standing
B.	Merits Objection and Response
i.	IBFed’s Position
ii.	Dotsecure’s Position
iii.	Analysis
a.	Substantial Opposition
b.	Strong Association
c.	Material Detriment
d.	Conclusion as to Merits of Objection
IV.	Decision

This Expert Determination is made in connection with the Community Objection (collectively with annexes thereto, the “Objection”) made by International Banking Federation (“IBFed” or the “Objector”) to the Application (the “Application”) made by Dotsecure Inc. and publicly available in November 2012 (“Dotsecure” or the “Applicant”) for the generic top-level domain (“gTLD”) “.bank”. For the reasons set forth below, the Panel determines that the Objection should be upheld and the Application denied.

I. Introduction

1. Dotsecure, a company located at F/19, BC1, Ras Al Khaimah FTZ, P.O. Box #16113, United Arab Emirates, has applied for the new gTLD “.bank”. Dotsecure is a member of the corporate family of Directi Inc. (“Directi”), a company located in Mumbai, India, a subsidiary of Radix FCZ (“Radix”) and an affiliate of Public Domain Registry (“PDR”). The contact for Dotsecure in these proceedings is Mr. Brijesh Harish Joshi.
2. IBFed is an association with members having its principal office at Pinners Hall, 105-108 Broad Street, London, EC2n 1EX, England, United Kingdom. The contact for IBFed in these proceedings is Ms. Sally Scutt, Managing Director.
3. The establishment of new gTLDs requires the operation of a domain registry and a demonstration of technical and financial capacity for such operations and the management of registrar relationships. On 13 March 2013, IBFed filed with the International Centre for Expertise (the “Centre”) of the International Chamber of Commerce (“ICC”) its Objection to the Dotsecure application for “.bank”. The Objection was made as a community objection under the Attachment to Module 3 of the gTLD Applicant Guidebook (the “Guidebook”), New gTLD Dispute Resolution Procedure (the “Procedure”) for resolution in accordance with the Rules for Expertise (the “Rules”) of the ICC supplemented by the ICC Practice Note on the Administration of Cases (the “ICC Practice Note”) and Appendix III thereto.
4. Pursuant to Article 1(d) of the Procedure, the Applicant by applying for the gTLD “.bank”, and the Objector by filing the Objection, have each accepted the applicable principles in the Procedure and the Rules.
5. Article 3(d) of the Procedure specifies that community objections shall be administered by the Centre.
6. Terms used in this Expert Determination and not otherwise defined herein shall have the respective defined meanings given to them in the Procedure and the Rules, as the case may be.
7. Pursuant to the Procedure, these findings “will be considered an Expert Determination and advice that ICANN [the Internet Corporation for Assigned Names and Numbers] will accept within the dispute resolution process.” Guidebook, Paragraph 3.4.6.
8. Neither the Applicant nor the Objector has objected to the application of the Procedure or the Rules to make this Expert Determination.

9. The Centre conducted the administrative review of the Objection called for under Article 9 of the Procedure. By letter dated 28 March 2013, the Centre informed IBFed and Dotsecure “that the Objection is in compliance with Articles 5-8 of the Procedure and with the Rules. Accordingly the Objection has been registered for processing (Article 9(b) of the Procedures).”

10. On 14 May 2013, Dotsecure filed its Response to the Objection (collectively with annexes thereto, the “Response”).

11. By letter dated 14 June 2013, the Centre advised Dotsecure and IBFed that, pursuant to Article 13 of the Procedure, Article 9(5)(d) of the Rules and Article 3(3) of Appendix I to the Rules, the Chairman of the Standing Committee had appointed the undersigned, Mark Kantor, on 12 June 2013 as the Expert in this matter and the sole member of the Panel.

12. By letter dated 3 July 2013, the Centre advised Dotsecure and IBFed that all advance payments had been received. Therefore, estimated Costs have been paid in full. Accordingly, “the Centre confirm[ed] the full constitution of the Expert Panel” and transferred the file to the undersigned Expert in accordance with the Procedure and the Rules, together with any relevant correspondence between the Centre and the parties in this matter.

13. Pursuant to the Procedure, a draft Expert Determination must be submitted to the Centre within 45 days following the Constitution of the Expert Panel, subject to extensions granted by the Centre upon a reasoned request. Procedure Article 21 (A). No such extension was requested.

14. On 3 July 2013 as well, the Panel confirmed receipt by email of the materials forwarded by the Centre. The Panel further inquired of the Applicant and Objector pursuant to Articles 17 and 19 of the Procedure whether any party was seeking permission to make Additional Written Submissions or have a hearing held in this matter.

15. By email dated 4 July 2013, Dotsecure noted that IBFed had submitted an Additional Written Submission to the ICC on 3 July 2013 replying to Dotsecure’s Response. Dotsecure requested the opportunity to make an Additional Written Submission itself addressing the points made by IBFed in the Objector’s July 3 Additional Written Submission. With respect to a hearing, Dotsecure stated that it “did not believe that it would serve to change or enhance any of the facts presented in our Response.” If, however, the Panel believed a hearing would be required, then “Dotsecure would comply with the requirements thereof.”

16. On 4 July 2013, the Panel requested the parties to confer with respect to Dotsecure’s request to make an Additional Written Submission. The Panel requested as well a short Response from IBFed to that request and the question of the hearing.

17. Following extensions due to the Fourth of July holiday weekend in the United States, IBFed advised on 9 July 2013 that it had nothing further to add at the time. Accordingly, the Panel responded on the same day authorizing Dotsecure to reply to the IBFed 3 July 2013 Additional Written Submission on the following terms:

The reply (i) should not exceed the same three pages in length of the IBFed July 3 letter, (ii) should address only matters covered in the July 3 letter not previously argued in earlier Dotsecure submissions, and (iii) should not repeat arguments previously made by Dotsecure in earlier submissions in this proceeding.

18. The Panel informed the parties at the same time (July 9) to make no further submissions in this matter unless the Panel so requested and that, in light of the views of the parties, the Panel would not hold a hearing this proceeding.

19. By letter dated 9 July 2013, Dotsecure made its Additional Written Submission in substantial conformity with the foregoing. That letter concluded the submissions in this proceeding.

20. All submissions in the Procedure were made, and the Procedure was conducted, in English. All communications by the parties and the Expert were submitted electronically. The place of these proceedings is the location of the Centre in Paris, France. See Procedure Articles 5(a),6(a) and 4(d).

21. Neither party has challenged the undersigned as Expert or raised any question as to the fulfillment by the undersigned of my duties as Expert or the qualifications, the impartiality or independence of the undersigned as Expert.

II. Applicable Standards

22. IBFed's Objection to Dotsecure's Application was filed as a community objection. A community objection, according to the Procedure and the Guidebook, refers to an objection that "there is substantial opposition to the application from a significant portion of the community to which the string [here, ".bank"] may be explicitly or implicitly targeted." Procedure, Article 2(e)(iv).

23. Article 20 of the Procedure sets out the standards to be applied by an Expert Panel with respect to each category of objections, including a community objection. Article 20 states as follows:

Article 20. Standards

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

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

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

24. ICANN has set out standards in the Guidebook for determining whether or not the Objector has standing to make a community objection.

3.2.2.4 Community objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-

for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

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

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

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

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

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

25. In addition, ICANN has set out standards in the Guidebook for the Panel to determine whether or not a community objection will be successful.

3.5.4 Community objection

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

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

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

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

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

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

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by the objector in expressing opposition, including other channels the objector may have used to convey opposition.

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

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

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

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

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

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

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail. The objector must meet all four tests in the standard for the objection to prevail.

26. The Guidebook refers back to the ICANN Final Report Regarding the Introduction of New Generic Top-Level Domains, dated 8 August 2007 (the "Final Report"). The Final Report set out a table of Implementation Guidelines with views regarding the determination by the Panel of *inter alia* "community," "substantial opposition" and "material detriment" in connection with a community objection.

IG P* The following process, definitions and guidelines refer to Recommendation 20.

Process

Opposition must be objection based.

Determination will be made by a dispute resolution panel constituted for the purpose.

The objector must provide verifiable evidence that it is an established institution of the community (perhaps like the RSTEP pool of panelists from which a small panel would be constituted for each objection).

Guidelines

The task of the panel is the determination of substantial opposition.

- a) **substantial** – in determining substantial the panel will assess the following: signification portion, community, explicitly targeting, implicitly targeting, established institution, formal existence, detriment
- b) **significant portion** – in determining significant portion the panel will assess the balance between the level of objection submitted by one or more established institutions and the level of support provided in the application from one or more established institutions. The panel will assess significance proportionate to the explicit or implicit targeting.
- c) **community** – community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted.

d) **explicitly targeting** – explicitly targeting means there is a description of the intended use of the TLD in the application.

e) **implicitly targeting** – 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.

f) **established institution** – an institution that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted to an institution that has been in existence for fewer than 5 years.

Exceptional circumstances include but are not limited to a re-organization, merger or an inherently younger community.

The following ICANN organizations are defined as established institutions: GAC, ALAC, GNSO, ccNSO, ASO.

g) **formal existence** – formal existence may be demonstrated by appropriate public registration, public historical evidence, validation by a government, intergovernmental organization, international treaty organization or similar.

h) **detriment** – the objector must provide sufficient evidence to allow the panel to determine that there would be a likelihood of detriment to the rights or legitimate interests of the community or to users more widely.

27. The parties have referred in their respective submissions to the statements by the European Commission and the U.S. Federal Deposit Insurance Corporation (FDIC), among others, with specific respect to the sensitivity of the “.bank” gTLD. IBFed has relied on those statements to support its Objection, while Dotsecure has argued that reliance is misplaced.

28. The comments by supranational and national authorities do not constitute standards for purposes of ruling on community objections and are not binding on the Panel. Those comments do, however, assist the Panel in understanding the nature of community objections, determining how to assess “whether there is substantial opposition,” determining how to assess the strength of “the association between the applied-for gTLD string and the community,” and identifying factual elements relevant in assessing “the likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.”

29. In late November 2012, the Director of the Directorate-General for Communications Networks, Content and Technology of the European Commission wrote to ICANN and to the

applicants for 58 sensitive names, including the two applicants for “.bank.” In that letter, the Director noted that those applications "could raise issues of compatibility with the existing legislation ... and/or with policy positions and objectives of the European Union."

30. Further, the Director noted that “[g]enerally speaking, all new gTLD applications should properly take into account the “GAC Principles regarding new gTLDs” of 2007, as well as the more specific concerns expressed by a number of GAC members, *inter alia* in the Communiqué of the GAC of 17 October 2012.” (footnotes omitted)

31. The Director stated the Commission’s desire to open a dialogue with each applicant.

32. That letter illustrates the heightened sensitivity for European policy-makers and regulators with respect to how the “.bank” string must be managed.

33. In December 2008, the FDIC stated directly to ICANN its prudential regulatory concerns that a “.bank” gTLD might potentially create additional risks of financial fraud, consumer confusion and misdirected trust in the .bank gTLD. Moreover, according to the FDIC, creation of a .bank gTLD could require the financial services industry to incur additional intellectual property protection expenses during the ongoing time of economic stress.

34. The FDIC therefore recommended *inter alia* that (i) financial sector gTLDs be subject to community-established governance rules, including measures established by financial sector regulators and (ii) applicants should demonstrate their intent and ability to comply with these governance rules in the application process.

35. The governance requirements, according to the FDIC, should include, at a minimum: (a) financial capability to carry out its governance requirement; (b) a process for ensuring intellectual property rights such as trade names; and (c) a requirement for registrant due diligence.

36. In addition, the FDIC recommended that the process and rules for objecting to any financial sector gTLD applications include the ability to object on the grounds of insufficient governance as proposed by the application as well as a process for financial regulatory objection.

37. The FDIC further recommended an additional process to permit financial sector gTLD ownership to be revocable or transferable at any time in the future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements.

38. In operative part of its December 2008 letter, the FDIC comments emphasized the central role of industry and regulatory body endorsements in connection with a financial services gTLD such as “.bank”.

Regulatory Concerns

Through its deposit insurer and regulatory roles, the FDIC is a community leader for the US financial sector on the Internet and is at the forefront of issues related to consumer confidence in the banking systems, including Internet banking. While the FDIC has historically encouraged industry-led technical innovations,

and prefers an industry-led effort to establish standards and guidance for the safe and sound implementation of those innovative technologies, we are very concerned that new gTLDs could potentially create new rounds of financial fraud, consumer confusion, misdirected trust in a gTLD, and could force trade name protection costs onto the financial industry during a period of economic stress. As such, we encourage ICANN to include industry representatives such as financial trade associations (e.g., American Bankers Association, Financial Services Roundtable, Independent Community Bankers, etc.) in its deliberations regarding the value of financial sector specific gTLDs.

The FDIC is also concerned that financial sector gTLDs could potentially impact consumer trust and confidence in Internet banking, and the banking system in general, if such gTLDs are misused. Financial sector gTLDs such as ".bank" could intuitively, and mistakenly, imply industry (including regulatory) endorsement to the public. The draft application processes does not provide sufficient requirement that such industry endorsement exists. Without sufficient industry endorsement, and an integrated governance requirement for financial sector gTLDs, we believe that a financial sector gTLD could be detrimental to consumers and undermine established confidence in Internet banking.

Recommendations

With respect to the proposed gTLD Guidebook, the FDIC believes more consideration should be given to the regulated environment of the financial sector and the potential impact that a financial sector gTLD could have on the financial industry and consumers. To remedy these concerns, the FDIC recommends a separate and distinct application process for financial sector gTLDs. Specifically, we offer the following suggestions for a financial sector gTLD process:

- 1) The draft Guidebook permits gTLD applications as either "open" applications or "community-based" applications. The FDIC recommends that a financial sector gTLD be implemented from a top down approach to ensure that no unsponsored gTLDs are issued, and that if issued, such gTLDs are managed within an industry and regulatory framework. Furthermore, the FDIC recommends that the financial sector gTLDs process not permit "open applications" and that any applications include explicit endorsement of the financial industry community including regulatory bodies.
- 2) The FDIC recommends that financial sector gTLDs be subject to community-established governance rules, including various laws, regulations, guidance and policy established by the financial sector regulators. Additionally, applicants should demonstrate their intent and ability to comply with these governance rules in the application process. The governance requirement should include, at a minimum:
 - a. Financial capability to carry out its governance requirements
 - b. A process for ensuring intellectual property rights such as trade names
 - c. A requirement for registrant due diligence
- 3) The draft Guidebook provides a process for objecting to applications. The FDIC recommends that the process and rules for objecting to any financial sector gTLD applications include the ability to object on the grounds of insufficient governance as proposed by the application as well as a process for financial regulatory objection.
- 4) The FDIC recommends an additional process to permit financial sector gTLD ownership to be revocable or transferable at any time in the future when the represented community or regulatory body determines and shows that the sponsored gTLD has not satisfied its governance requirements.

39. ICANN did not wholesale adopt these FDIC recommendations into the final version of the Guidebook. The policy concerns stated by the FDIC remain relevant, however, to the determination of "substantial opposition," "strong association" and "material detriment."

40. In November 2009, the Canadian Office of the Superintendent of Financial Institutions in Canada (“OSFI”) informed ICANN as to possible problems under the Canadian Bank Act that would be faced by applicants for a “.bank” gTLD. According to OSFI, all persons and entities are prohibited by the Bank Act and regulations thereunder from using in Canada the word “bank” to indicate or describe a financial service other than banks regulated by OSFI. Accordingly, OSFI advised ICANN that any entity found using a “.bank” gTLD in violation of the Bank Act would be required to abandon the domain name regardless of associated costs or expenses incurred.

41. Senior Director Evanoff of OSFI wrote to ICANN in the following terms.

By means of this letter OSFI would like to inform you of the importance of this initiative to OSFI and that there are issues that any prospective applicant for a “.bank” gTLD will need to consider. In particular, as a general rule, Canada’s *Bank Act* prohibits any person, other than a bank that is regulated by OSFI, to use the word “bank” to indicate or describe a financial services business in Canada. The objective of this provision is to protect the Canadian public from incorrectly assuming they are dealing with a Canadian bank that is subject to the *Bank Act* and OSFI’s regulatory oversight. At the same time the provision contributes to the public’s confidence in Canada’s financial system by protecting the integrity of the word “bank” as a word that is generally reserved for entities that are regulated and supervised as a bank in Canada.

As such, and consistent with OSFI’s role to promote and administer a safe and sound regulatory framework, a person that OSFI find to be in contravention of the prohibition above would be asked to relinquish the “.bank” gTLD irrespective of associated cost or inconvenience for that person. We note that a contravention of the prohibition would constitute a criminal offense.

42. This comment from the Canadian regulatory authorities underscores the difficulties a holder of the “.bank” gTLD would face if it were not embedded inside the banking community. Those difficulties would in turn affect the availability and reliability of service for users of the top-level domain, difficulties that would be compounded if the holder of the gTLD was not familiar with bank regulatory compliance requirements in all global financial centers and elsewhere.

43. In making this Expert Determination, the Panel has applied the foregoing ICANN standards and taken account of the principles underlying the substantive concerns expressed by national regulatory authorities to the extent the Panel considered them applicable and appropriate. Procedure, Article 20.

III. Standing and Merits

44. In this Section of the Expert Determination, the Panel summarizes the positions of the parties as set out in the Objection, the Response and related correspondence. This summary is made for the convenience of the reader and does not purport to be exhaustive. The Panel has carefully reviewed the Objection (including all annexes), the Response (including all annexes), the Additional Written Submissions, other correspondence from the parties, the Procedure, the Rules, the Guidebook and any other rules or principles that I have determined to be applicable. The absence in this Expert Determination of any specific reference to any particular information, document or provision is not to be taken as an indication that the Panel has failed in any way to consider fully the submissions of the parties or the standards, principles and rules applicable under the Procedure.

A. Standing

45. Dotsecure asserts that IBFed does not have standing to pursue a community objection. Pursuant to Article 20 of the Procedure, IBFed has the burden of proving it has standing to assert a community objection. IBFed must prove, among other matters, that it is an “established institution,” that there is a “clearly delineated community” corresponding to the “global banking community” and that IBFed has an “ongoing relationship” with such a community. Recognizing that it has the burden of proof, IBFed initially set forth its position regarding standing in its Objection. IBFed detailed in the Objection its background, the identity of its members, and its interaction with national and international bank regulatory authorities on behalf of its members.

The IBFed was formed in March 2004 to represent the combined views of a group of national banking associations. IBFed’s membership list is available on its website and includes the following: American Bankers Association, Australian Bankers’ Association, Canadian Bankers Association, European Banking Federation, Japanese Bankers Association, China Banking Association, Febraban, Indian Banks Association, Korea Federation of Banks, Association of Russian Banks, and the Banking Association of South Africa. The IBFed’s members collectively represent more than 18,000 banks with 275,000 branches, including around 700 of the world’s top 1000 banks which alone manage worldwide assets of over \$31 trillion. This worldwide reach enables the IBFed to function as the key international forum for considering legislative, regulatory and other issues of interest to the global banking industry. See Annex A for the list of IBFed objectives from its Memorandum and Articles of Association.

Guided by these objectives, the IBFed’s advocacy on behalf of the global banking community has created strong relationships with inter-governmental organisations (e.g., G20, the Basel Committee on Banking Supervision, the Financial Stability Board, the International Accounting Standards Board, the International Organisation of Securities Commissions, and the Financial Action Task Force on Money Laundering). By way of example, the IBFed works closely with the inter-governmental Financial Action Task Force to promote national and international policies to combat money laundering and to prevent the financing of terrorism. The reform agenda extends across the entire regulatory landscape and encompasses all the main international standard setters and involves the regulatory and supervisory authorities of all the G20 countries.

The primary mechanism the IBFed utilizes in the advocacy efforts is a series of working groups including, but not limited to, Consumer Affairs, Financial Crime, Financial Markets and Value Transfer Networks that can be accessed on its website.

46. In support of its argument that IBFed has an ongoing relationship with a clearly delineated global banking community, IBFed also pointed to a number of annexes to the Objection as further demonstrations that IBFed satisfies the standing requirements to pursue a community objection. Those annexes include *inter alia* statements of support for IBFed’s formal opposition by the community against Dotsecure’s application (Annex D) and statements of opposition filed against Dotsecure’s application submitted to ICANN’s public forum (Annex E).

47. Dotsecure argues in its Response that IBFed has failed to sustain that proof, as follows.

48. With respect to IBFed’s assertion that it is an “established institution,” Dotsecure responds that IBFed is an “association of associations” that has only one full-time employee, an individual who is associated as well with the British Bankers Association (BBA). IBFed’s financial statements for Fiscal Year 2011 state that the Federation “relies on staff seconded by BBA” to carry out its work. Moreover, IBFed utilizes BBA premises rather than holding its own premises.

49. Dotsecure further argues that IBFed does not have an “ongoing relationship” with a “clearly delineated” community known as the “global banking community.” Dotsecure principally argues that no such community can be found and that the purported community is not “clearly delineated.” By reference to dictionary definitions and references to Guidebook Module 4 (p. 4-11), Dotsecure asserts that the purported community lacks coherence and the purported members lack awareness of the community. Websites of the world’s largest banks, and Google searches generally, do not show the phrase “banking community.” Rather, banking websites and public perceptions, reports Dotsecure, refer to a “banking industry,” a “banking sector” or similar phrases. Similar phrases, but not the phrase “banking community,” are found in IBFed letters to regulatory authorities. Nor do the IBFed charter documents employ the phrase “banking community.”

50. Moreover, says Dotsecure, regulation and supervision in many countries of the world contain “variations” in bank definitions and in the nature of the regulatory regime.

51. Additionally, Dotsecure argues that IBFed misstates in its submissions the impact of the history of the GAC and ICANN, including the Beijing communiqué. For Dotsecure, that correspondence and the New gTLD Program Committee’s (“NGPC”) positions may be relevant for scoring a community priority, but are “not relevant to this Objection at all.”

52. Dotsecure further claims that, even if IBFed is an “established institution,” IBFed has not provided evidence of a direct relationship with the 36,000+ organizations that carry on banking worldwide sufficient to satisfy the requirement of an “ongoing relationship” with the community. All of IBFed’s relationships are with other representative associations, its members.

53. Dotsecure also objects to the persuasiveness of IBFed’s showing of “substantial opposition” by members of the community, by counting the number of opposition letters and comparing that number to the total number of banks in the world.

54. Dotsecure additionally argues that IBFed has failed to show a “strong association” between the community and the string “.bank.” In that regard, Dotsecure notes that the word “bank” has several other meanings and connotations, such as the bank in a poker game or a piggybank. Even a cursory review of the Oxford English Dictionary demonstrates that most words in the English language have multiple meanings. The proposed requirement that a “strong association” between a community and a term such as “bank” can exist only if there is just one possible meaning of that term is unrealistic. That approach is not required by the Guidebook, nor are the GAC-ICANN exchanges and the NGPC comments to the contrary.

55. IBFed has argued that the nature of the national and international regulatory framework supports the position that a “clearly delineated global banking community” exists. Dotsecure seeks to rebut that position by asserting that the multiplicity of regulatory regimes for the banking community shows otherwise. Dotsecure further argues that the regulatory controls on the use of the word “bank” in business activities is no different in substance than the prohibition of the use of the term “Limited” except for certain companies. In this regard, Dotsecure overstates the matter. Bank regulatory agencies and securities regulatory agencies seek to coordinate policy both formally (e.g., the Basle process) and informally (e.g., through central bank cooperation facilitated

by the BIS). Dotsecure’s counter-examples of a “community of listed companies” and regulatory restrictions on the use of the word “Limited” are exaggerations rather than helpful comparisons.

56. Although not directly tied to any particular standing requirement in the Guidebook, Dotsecure draws the attention of the Panel to the role IBFed may have in connection with the “.bank” application by fTLD, a company affiliated with IBFed member the American Bankers Association. Dotsecure asserts this relationship shows a clear conflict of interest. This Panel, however, is not assessing the fTLD application or the motivations of an objector. Rather, the Panel is tasked with objectively reviewing the standing of the objector and the merits of the Objection. Dotsecure’s conflict allegation is not relevant to those tasks.

57. In its 3 July Additional Written Statement replying to Dotsecure’s Response, IBFed argued that:

In its response, Dotsecure seeks to undermine the credibility, standing and relevance of the IBFed. In the global banking community the IBFed’s operations are analogous to ICANN’s operations within the Internet community in that both rely extensively, particularly as it relates to policy development, on a network of volunteer subject matter experts and industry professionals. The IBFed reaffirms that its work in the areas of Consumer Affairs, Financial Crimes, Financial Markets, Financial Reporting, and Prudential Regulation is undertaken by a vast network of professionals from the global banking community. These IBFed working groups are comprised on average of between forty and fifty individuals from across IBFed’s membership. The IBFed will allow its body of work to speak for itself in response to the spurious allegations that it lacks standing to bring this action.

Dotsecure also insinuates that the IBFed’s decision to file the community objection against its application was motivated by the American Bankers Association (ABA), a participant in fTLD Registry Services, LLC (fTLD), a competing applicant for the .bank gTLD. The ABA is but one member of IBFed’s broad, global membership. The decision by IBFed’s Board to file a community objection against Dotsecure was based on a desire to protect the financial community that the association serves. The ABA’s association with fTLD was properly disclosed to the IBFed Board as part of its due diligence prior to voting on the resolution to file the Objection to Dotsecure.

The IBFed stands ready to provide any additional documentation that Mr. Kantor may need to ascertain the true facts for this proceeding. Specifically, the IBFed would respectfully like to highlight the following areas where additional facts may provide clarification for Mr. Kantor’s consideration:

- According to Section 3.2.2.4 of the Applicant Guidebook, standing is determined based upon a panelist’s balancing of the factors as well as other relevant information. This fact would render Dotsecure’s self-serving numerical tabulations irrelevant to the panel.
- ICANN’s Governmental Advisory Committee’s (GAC) continuing advice/guidance to ICANN Board per ICANN’s bylaws is germane with respect to what constitutes a community per Section 3.5.4 of the Applicant Guidebook, see also GAC’s Beijing Communiqué https://gacweb.icann.org/download/attachments/27132037/Beijing%20Communiqué%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2 (“Community Support for Applicants”).
- Rather than interpreting the plain meaning of the guidance set forth in ICANN’s Applicant Guidebook to assess if the global banking community is a clearly delineated community, Dotsecure attempts to dissect the individual words with self-serving definitions. IBFed encourages Mr. Kantor to look to the Applicant Guidebook in how ICANN references the “Internet Community” as well as statements referencing the same by Bhavin Turakhia, founder and CEO of Directi Group, Dotsecure’s parent company.

- Substantial opposition is based upon Mr. Kantor’s weighing of non-exhaustive subjective factors enumerated in the Applicant Guidebook, not a mere numerical compilation in which the representative nature of the commenters, the geographic diversity of the commenters and their historic defense of the community are dismissed.
- Objector must merely prove that there is a “strong association between the applied-for gTLD string and the community represented by the objector” to prove implicit/explicit targeting.

58. In its 9 July 2013 Additional Written Submission in reply, Dotsecure responded to IBFed’s 3 July 2013 submission. The substance of that response as it relates to standing has been summarized above in paragraphs 45-56.

59. After reviewing the positions of the parties as to standing, the Panel has determined that IBFed has the requisite standing to pursue a community objection.

i. Analogy to ICANN

60. As an initial matter, the Panel notes that IBFed has argued in its 3 July 2013 Additional Written Submission that its operations are analogous to the operations of ICANN in the Internet community, particularly as those operations relate to policy development. That argument is unpersuasive – ICANN is fundamentally a different organization, and has different types of members and responsibilities, from a professional and trade association such as IBFed. Nevertheless, the other facts identified in this Section of the Expert Determination point convincingly to the existence of a global banking community and to IBFed’s ongoing relationship with that community.

ii. Established Organization

61. Turning first to the requirement that the Objector be an “established organization,” the Panel is satisfied that IBFed is an established organization for purposes of making a community objection.

62. The ICANN Guidebook points the Applicant and the Panel to several non-exhaustive factors that weigh in the balance, including the level of global recognition of IBFed, the length of time IBFed has existed and the presence of charter documents showing continued existence. IBFed easily satisfies these requirements.

63. The Implementation Guidelines table in the ICANN Final Report states that an “established institution” is “an institution that has been in formal existence for at least 5 years.”

64. IBFed has existed, established working groups, undertaken substantive representative tasks and generated reports and position papers on behalf of its banking community membership since 2004. The Objection sets out undisputed information about these activities of IBFed, which are corroborated by a very large number of exhibits as well as by publicly available on IBFed’s website. There is, of course, also no dispute between the parties that IBFed has charter documents dating back to its initial organization as a legal entity (appended as Annex A to the Objection).

65. Each member of IBFed (other than associate members) is entitled to a representative on the Board of Directors of the Federation. The chief executive officer of the banking trade association in whose premises the Federation's Secretariat is located is an *ex officio* member of the Board as well. Through its membership and through almost a decade of dialogue with regulatory authorities and policy makers, IBFed has been recognized as a representative by both banking institutions and national and international regulators.

66. Dotsecure's argument to the contrary is based on the structure of IBFed as an "association of associations" and its use of seconded staff and member representatives to conduct its work rather than *inter alia* employing a stand-alone staff and its own premises. That argument is not persuasive. The argument, however, would deny any association staffed by its members from status as an established institution, a situation that does not correspond in the Panel's experience to the manner in which many representative trade and industry associations are operated. The Guidebook does not limit representative status only to organizations that have stand-alone staffs and premises, and large budgets.

67. A trade association may rely on seconded staff and member representatives to conduct its work, just as many government bodies and subsidiary companies do. Additionally, the fact that IBFed as an "association of associations" does not prevent it from being an established organization.

68. That latter criticism by Dotsecure also relates to other factors in the standing formula - the existence of a clearly delineated community and whether IBFed has an ongoing relationship with that community. The Panel addresses those elements of standing below.

iii. Clearly Delineated Global Banking Community

69. The Panel is also satisfied that a clearly delineated global banking community exists.

70. The Final Report recommends that "community should be interpreted broadly." Without disputing that interpretive principle, the Panel does not need, in light of the characteristics of the global banking community, to rely upon that tool of interpretation to conclude that the global banking community is clearly delineated and that Dotsecure's Application for the string ".bank" explicitly and implicitly targets members of that community and its clients.

71. The Panel begins by noting that the dispute between the parties with respect to the GAC-ICANN exchange is not dispositive of this issue. Nor is the NGPC response. There is nothing talismanic under the Guidebook with respect to the word "community." Banks and their associations can, and do, convey the same idea by means of other phrases, such as "banking sector" and "banking industry." The concept of a community is functional – it is not a magic term that must be used by community participants as a condition to fulfilling the requirements of a "community" for purposes of a community objection.

72. IBFed points in its Objection to a number of factors that support this conclusion.

- Common regulatory framework and operating principles at a local and global level

- Regulatory restrictions on the use of the word “Bank” at local and national levels
- Various ISO standards related to the banking community
- The existence of international organizations as forums for coordination of regulatory measures for the global banking community, including the Financial Stability Council and the Basel Committee on Banking Supervision
- The longevity and global scope of the banking community

73. Of considerable persuasive import in that regard, governments around the world consider that a global banking community exists. The formal boundaries of the banking community are set by a coordinated national regulatory environment identifying which institutions are entitled to take deposits from the public and may employ the term “bank” in their corporate name. Those parameters conform to most of the institutions who are members of the national trade associations making up the membership of IBFed.

74. Governments seek to coordinate their regulatory measures with respect to banks to assure harmonization of regulation in an interconnected world where deposit-taking, payments systems, extending credit, making loans and other financings, underwriting, other bank products and services, and customers and counterparties cross borders continuously. Bank regulatory agencies worldwide coordinate their regulation of banking institutions that take deposits and make loans through, *inter alia*, the Financial Stability Board and the Basel Committee on Banking Supervision.

75. The size and composition of the global banking community, unsurprisingly, has changed over time. Nevertheless, an extensive community of banks globally has existed at least since bank regulatory authorities were established and began to cooperate to regulate commercial banks more than a century ago and inter-bank deposit and similar markets arose to address the funding needs of banks.

76. Legislatures too treat banking as a clearly delineated community – for example, the United States Senate has a “Banking Committee” that is the principal forum for that body to consider legislation and provide oversight relating to inter alia bank regulatory measures and markets.

77. Most recently, those various public bodies and their members have harmonized capital adequacy requirements for commercial banks in response to the recent financial crisis. The capital adequacy rules for commercial banks are different in many respects from the capital adequacy rules for other financial institutions, thereby demonstrating that the competent government authorities consider deposit-taking banks to be a clearly delineated separate component of the financial system.

78. Other international organizations also specifically address banking as a distinct sector. Illustratively, the Annex on Financial Services to the WTO General Agreement on Trade in

Services (GATS) singles out banking and related financial services as a special sector of financial services distinct from insurance services.

79. Significantly, commercial banking organizations have themselves organized into their own national trade associations to coordinate their responses to public policy and regulatory measures at the national and international levels (many of the most influential of which are members of IBFed and sit on its Board of Directors) and through international associations such as IBFed itself.

80. The existence of inter-bank deposit and funding markets, such as the London inter-bank market, illustrates the existence of a global banking community as a business matter, not just as a regulatory matter. Similarly, the Abu Dhabi Interbank Offered Rate (“ADIBOR”) is the average interest rate at which term deposits are offered between prime banks in the UAE wholesale inter-bank market.

81. Dotsecure argues, in connection with comments by the GAC, that “ICANN does not consider .bank to constitute a community directly.” Dotsecure refers to Annexes 2.1, 2.2 and 2.3 of its Response as support for this argument.

82. Those Annexes merely show, instead, that ICANN views the dispute resolution process as the proper forum to resolve disputes as to the existence and identity of a community.

83. As Dotsecure itself points out in Annex 2.2, the GAC specifically referred to “.bank” in its comments as a string “subject to national regulation” that “should also be considered a “community-based” string” and that “*a priori* characterisation of strings is inherently problematic.”

84. Further, Dotsecure itself stated in Annex 2.3 that” [i]n the final version of the AGB, ICANN identified .bank as a “sensitive string” that might get a GAC Early Warning.” Indeed, ICANN expressly quoted the GAC concern in footnote 1 to Module 1 of the Guidebook, including the reference to “.bank”.

85. ICANN’s responses cannot reasonably be construed as expressing skepticism by ICANN regarding the existence of a clearly delineated global banking community.

86. Moreover, denying the existence of a global banking community in the aftermath of the recent financial crisis is an unpersuasive exercise of linguistic distinctions in the face of commercial and regulatory reality.

iv. Ongoing Relationship

87. IBFed has an “ongoing relationship” with the global banking community. IBFed’s membership of national trade associations demonstrates that ongoing relationship.

88. IBFed's founding members are:

American Bankers Association
Australian Bankers' Association
Canadian Bankers Association
European Banking Federation
Japanese Bankers Association
Banking Association of South Africa

89. IBFed's associate members are:

China Banking Association
Febraban
Indian Banks Association
Korea Federation of Banks
Association of Russian Banks

90. Mr. Wim Mijs, Chief Executive Officer of the Dutch Banking Association and Chairman of the Executive Committee of the European Banking Federation (“EBF”), serves as IBFed chairman. The Managing Director of IBFed, Ms. Sally Scutt, is Deputy Chief Executive of the British Bankers' Association (“BBA”). The Dutch Banking Association and the BBA are yet two more broad-based representative banking voices that thus participate in the work of IBFed.

91. Collectively, according to IBFed, the national associations with membership in IBFed “represent more than 18,000 banks with 275,000 branches, including around 700 of the world's top 1000 banks which alone manage worldwide assets of over \$31 trillion.”

92. The fact that IBFed is an “association of associations,” rather than having individual banks as direct members, in no way undermines the relationship. Each of the national banking associations that is a direct member of IBFed itself has very large numbers of individual banking organizations as members. Those individual banks look to their representative associations to participate in policy and regulatory developments in a coordinated fashion on their behalf.

93. Dotsecure appears to argue that, for IBFed to have an “ongoing relationship,” it must itself be in privity with the 36,000+ banking enterprises in the world. That argument misconceives the nature of the requisite relationship. A representative association may maintain a relationship by means of intermediary associations, as is the case for IBFed. Dotsecure seeks to introduce an artificial requirement that any relationship between an association and the enterprises within a community must be direct, one-on-one and exhaustive before that relationship will be recognized as an “ongoing relationship” for purposes of the Guidebook. That purported requirement cannot be found in the Guidebook. In any event, it is unrealistic – such a limitation, if it existed, would disqualify a very great number of well-respected professional, trade and industry associations from satisfying the “ongoing relationship” Procedure requirement to the detriment of the purpose of the community objection process.

94. IBFed's working group efforts, newsletters, reports, public comments, meetings with policymakers and regulators and the like show, individually and cumulatively, that IBFed's institutional purposes are efforts intended for the benefit of the global banking community.

95. IBFed maintains working groups, staffed by representatives of its member organizations, for a broad range of activities comprising principal business and regulatory concerns of its banking constituents; financial markets, financial reporting, prudential regulation, regulatory reform, value transfer networks, consumer affairs and financial crimes. Here again, reliance on seconded staff and member representatives to undertake the work of coordinating positions across national boundaries and communicating those positions to policy-makers and regulators does not undermine the relationship – rather it reinforces the relationship.

96. Those IBFed working groups, and their substantive responsibilities, demonstrate persuasively that IBFed has an ongoing relationship with a clearly delineated global banking community.

97. Dotsecure’s position also fails to take account of the direct lobbying and policy efforts of IBFed with national and international financial services regulatory bodies. Government regulatory bodies comprise part of the global banking community just like private sector participants.

v. Substantial Opposition

98. Although the Guidebook makes the “substantial opposition” requirement a merits test, Dotsecure has raised the issue with respect to both standing and merits. IBFed has put forth formidable evidence of “substantial opposition” to Dotsecure’s application. Dotsecure’s critique of the opposition relies to a considerable extent on a formalistic counting of opposition letters compared with the total number of banks worldwide in the global banking community. That kind of quantitative measurement ignores the representative nature of IBFed itself as an association, the endorsement of IBFed’s Objection by its members, who themselves are broad representative associations and the function of representative associations as voices for their members and their community. The professional world is simply not organized on the mass membership basis that Dotsecure sees as a requirement for a showing of “substantial opposition.” Rather, many arenas of trade and commerce, including financial services, rely on representative associations for that purpose. The Guidebook does not refuse to recognize that means of organizing voices in a community. Here, the representative nature of IBFed and each of its members, the recognized stature of those organizations and their geographic and cultural diversity weigh heavily in favor of proving “substantial opposition.” Additionally, IBFed has provided letters from organizations and individuals who associate with the Federation, but also with organizations and individuals who are independent.

vi. ABA Sponsorship of fTLD Registry Services

99. Dotsecure points to the participation of the American Bankers Association (“ABA”) on the Board of Directors of IBFed and as co-sponsor in fTLD Registry Services, the competing applicant for the “.bank” gTLD. Dotsecure argues that ABA’s participation is a conflict of interest. After considering Article 20 of the Procedure and Paras. 3.2.2.4 and 3.5.4 of the Guidebook, the Panel determines that allegation relates in substance to the merits claims in the Objection rather than to the question of whether IBFed has the requisite standing to pursue a community objection. The assertion is consequently best addressed in the Section of this Expert Determination covering the merits of the Objection.

vii. Conclusions as to Standing

100. For the reasons described above, the Panel determines that IBFed has standing to pursue this community objection.

B. Merits Objection and Response

101. The Panel now turns to the substantive objections to Dotsecure's Application presented by IBFed. Pursuant to Article 20 of the Procedure, IBFed again has the burden of proving its substantive objections.

i. IBFed's Position

102. In summary, IBFed argues that, if Dotsecure is awarded the right to manage the gTLD ".bank", "there would be a material detriment to the global banking community ... based upon deficiencies in Dotsecure's application, its lack of any apparent connection to or engagement with the community it has targeted and the superiority of fTLD Registry Service's community application for .bank that has been formally endorsed by IBFed and over thirty global banking community members."

103. As part of those asserted "deficiencies," IBFed urges in its Opposition, *inter alia*, as follows:

- a. The ICANN Governmental Advisory Committee (GAC) has repeatedly advocated the need for heightened safeguards in connection with potential "sensitive strings," including an express statement by the GAC that "those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse." (Emphasis added)
- b. Additional governmental concerns regarding the sensitive nature of the .bank string expressed in December 15, 2008 correspondence from the Federal Deposit Insurance Corporation (FDIC) to ICANN. The FDIC urged that no financial sector gTLDs not sponsored by the financial community be issued.
- c. The collective position of IBFed and its member associations (and their member associations and institutions) is that gTLDs that have public interest implications, such as .bank and other financial-oriented gTLDs, must be operated by a trusted member of the community that understands the needs and interests of the community and the consumers served. Dotsecure is neither a member of the banking nor financial services community.
- d. In analysing the opposition to Dotsecure's application, the panel should also consider the extensive support within the banking community for fTLD's community-based application which is in contention with Dotsecure's application. At the time of this objection filing, more than 30 global banking associations and institutions have formally endorsed fTLD's application with new community members continuing to join.
- e. The strong association between the word "bank" and the global banking community. Notwithstanding the strong association between the global banking community and the applied for string (.bank), Dotsecure readily acknowledges that it has no formal ties to the banking community. A review of Dotsecure's application (Question 18) as well as other public comments made by Dotsecure leave no doubt that it intends to target a community that it has no ties to should it be awarded the .bank gTLD and IBFed opposes this.

- f. Dotsecure is part of the Directi family of companies. According to the Anti-Phishing Working Group (APWG) report, “Global Phishing Survey: Trends and Domain Name Use in 1H2012,” Directi accounted for the largest percentage of malicious domain name registrations of any named registrar.
- g. Another concern of the IBFed is the ability of Dotsecure/Radix to provide sufficient resources to ensure the secure and stable operation of the .bank gTLD, in light of Radix’s portfolio of 31 gTLD applications (including for example .CLICK, .SITE, etc.). As IBFed does not have access to Dotsecure’s responses to the financial questions in their application, it is unclear whether Dotsecure is adequately resourced and whether funds are properly segregated for its 31 applications. As Directi has acknowledged in public comments in connection with its .bank application, its primary expertise is as a domain name registration authority.
- h. The ability for Radix to safeguard any “sensitive string” is a paramount concern in light of a current gTLD in which the registry operator had no meaningful and on-going relationship with the community targeted by the gTLD.
- i. Public Domain Registry (PDR) is another Directi entity providing domain name registrations services. Notwithstanding clear legal provisions in its registration agreement that permit the registrar “to delete, suspend, deny, cancel, modify, take ownership of or transfer” of a domain name in a wide range of instances, there have been numerous documented instances in which members of the global banking and financial services sectors have had to expend financial and legal resources to file an ICANN Uniform Domain-Name Dispute-Resolution Policy (UDRP) proceeding to combat abusive domain name registrations sponsored by PDR.
- j. The failure of Directi and its controlled registrars to duly act in accordance with contractual provisions set forth in its registration agreement and proactively address cybersquatting and other abusive registration practices directed at the banking and financial services sector represents a clear and material detriment to the global banking community. Directi’s decision not to act upon these contractual provisions, calls into question its ability to be a proper steward of the .bank gTLD on behalf of the global banking community.
- k. It is appropriate for the ICC panel to factor into its analysis the choice of a more suitable trustee for the .bank gTLD. fTLD, created and governed by members of the global banking community, filed a community application for .bank on behalf of this community.
- l. Permitting Dotsecure the potential to operate the .bank gTLD with no apparent connection to the global banking community would represent a material detriment in connection with the historic self-governance model promoted within the global banking community.
- m. When a registry operator with no established ties with the targeted community operates a gTLD their primary objective is often the maximization of revenue while minimizing costs. The potential for Radix, the parent of Dotsecure, to adopt lesser standards to uniformly deploy across Radix’s entire portfolio of gTLDs would be detrimental to the global banking community.
- n. Because Dotsecure is not a member of the global banking community and its interests appear driven solely by the registration and hosting of domain names, Dotsecure will no doubt place its commercial interests ahead of the community’s interests. This coupled with Directi’s previous track record and business practices creates the likelihood for cybersquatting and a broader loss of institutional reputation within the .bank gTLD.
- o. If fTLD is selected to operate the .bank gTLD, members could voluntarily elect to register and use a domain name or they could in full confidence elect not to defensively register knowing full well there will be no non-compliant/abusive registrations in the .bank name space. However, if Dotsecure is given the right to operate .bank, members of the global banking community will have no option but to defensively register their brands in .bank even if they have no intention of ever using that domain name.

104. In its 3 July Additional Written Submission, IBFed offers further comments, in reaction to Dotsecure's Response as explained below.

- With regard to likelihood of material detriment to the community, IBFed has reviewed Dotsecure's Public Interest Commitments (PIC) statement and stands by its concern regarding a likelihood of material detriment. Moreover, the distinction Dotsecure makes between its treatment of general names (i.e., some apparent form of restrictions) vs. other names (i.e., with no restrictions at all) is quite problematic for the global banking community.
- While the words in Dotsecure's application promise one thing, the actions of its sister companies demonstrate something entirely else. Directi, in an ex parte communication to the ICC dated 9-May-2013, attempts to rebut the statements made about its business practices and what it is legally entitled to do. The IBFed welcomes Mr. Kantor to review the relevant contractual provisions and reach his own conclusions. Moreover, the IBFed would encourage Mr. Kantor to review the actions, associated with a "spam-outbreak", that another Directi company, .PW registry, is currently addressing in connection with its recently re-launched .PW registry, see <http://domaingang.com/domain-news/pw-registry-addresses-recent-explosion-in-spam-emails-from-pw-domains/>.
- While the IBFed does acknowledge some of the "reactive" measures that Dotsecure's sister companies have undertaken in connection with abusive/malicious registrations, the global banking community finds little comfort in this approach. Harm to institutions and consumers usually happens within minutes and/or hours of malicious domain names being purchased and activated and Dotsecure has not proffered a proactive approach to mitigate this activity.

ii. Dotsecure's Position

105. Dotsecure rejects the objections made by IBFed. In summary, Dotsecure argues in its Response:

- IBFed fails to provide evidence that "community opposition to the application is substantial". We show factual evidence to prove that the opposition alleged by it is not substantial, be it in numbers, representation, stature, or expenses.
- IBFed fails to prove a "strong association" between the purported "global banking community" and the string "bank". Of primary importance is that the term "bank" has several other meanings and connotations.
- IBFed fails to show a "likelihood of material detriment" to the purported "global banking community". IBFed has made irrelevant allegations against legal entities separate from Dotsecure in an attempt to smear Dotsecure, and shift the Expert Panel's focus from Dotsecure's application content. We assert that IBFed's obvious self-interest in the fTLD the application has prevented IBFed from assessing Dotsecure's application fairly. IBFed has relied on numerous baseless assumptions and made factually incorrect statements in a desperate attempt to obstruct Dotsecure's application with the end goal of protecting its founding member's (ABA) investment in fTLD.

106. Dotsecure fleshes out these responses along the following lines in the same submission.

IBFed makes an argument that ICANN intended for .bank to be a community string. We submit that the very quote IBFed submitted evidences otherwise. While the GAC has called for an expansion in the definition of "community" as defined in the AGB, that issue has been considered and the ICANN Board decided to NOT define community as recommended in the GAC's brief. Please see Annexure 2.1, 2.2 and 2.3 for a detailed analysis of the GAC and ICANN communications. We summarize the analysis:

- ICANN does not consider .bank to constitute a community directly.

- GAC asked ICANN to consider .bank is a community string in it's GAC scorecard in Fed 2011 (Annexure 2.1).
- On 4 March 2001 ICANN's Board responded saying that they do not agree with the GAC (Annexure 2.2).
- IBFed has neglected to present all the facts in this argument in their conclusions are incomplete and inaccurate (Annexure 2.3).
- GAC clearly considers .bank is a sensitive string. We agree with this.
- GAC spent 10 months analyzing every single new gTLD application from June 2012 to April 2013 and issued 242 Early Warnings on 200 applications. However our application for .bank did not get a GAC Early Warning related to "community" or the sensitive nature of the string. This clearly demonstrates that the safeguards in our application have passed the bar of government representatives from 124 countries.
- Additionally the independent objector also has the ability to file an objection against any application on Limited Public Interest and Community Grounds, but Dotsecure received no such objection.

We also note the following AGB requirement related to Security Policy (Question 30 criteria): "Complete answer demonstrates ... security measures are appropriate for the applied-for gTLD string (For example, applications for strings with unique trust implications, such as financial services-oriented strings, would be expected to provide a commensurate level of security)." We submit that our security measures are appropriate.

107. In its Response, Dotsecure explained each one of these points more fully. Dotsecure began by arguing that it proposed to put in place "a multitude of augmented security measures that not only go above and beyond ICANN's requirements, but also closely match the security measures proposed by fTLD in its application (see Annexure 6.1).

108. Further, on 13 May 2013 Dotsecure filed a PIC statement making its commitments enforceable as provided therein.

109. Dotsecure argues that IBFed's allegations against Directi "have no bearing on Dotsecure's application for .bank as well as this objection." Directi's own response is found at Annexure 6.3.

110. With respect to IBFed's assertions regarding inadequate funding of Dotsecure, the Applicant argues that IBFed "should respect that ICANN's evaluation process incorporates assessing the financial stability of applicants (questions 45 – 50) before delegating a gTLD to them." Dotsecure did not, however, persuasively and substantively address IBFed's financial resources allegations.

111. As to the assertion that Dotsecure has no relationship with the global banking community, "Dotsecure does not deny this, and would like to stress the fact that it has not broken any rules or flouted any ABG requirements by applying for .Bank. In fact, we submit that the lack of an existing relationship with the banking industry makes Dotsecure a more unbiased candidate to run the .Bank registry."

112. Dotsecure has challenged what it regards as the lack of evidence from IBFed to support IBFed's claim that Dotsecure will not properly perform its tasks operating the .bank string.

Dotsecure points to the absence of any ICANN objection as evidence that Dotsecure is competent to operate the .bank registry.

113. Regarding the role of the American Bankers Association in both IBFed and fTLD Registry Services, Dotsecure argued in its 9 July 2013 Additional Written Submission that IBFed, the ABA, the Financial Services Roundtable and cooperating institutions in the financial community are seeking to eliminate competing applications by objections. In support of this position, Dotsecure notes that the Financial Services Roundtable filed a “near-identical objection” against Dotfresh’s application for the string “.insurance”. Moreover, points out Dotsecure, IBFed has not filed objections to applications for several other finance-oriented strings; among them “.finance,” “.financial,” “.insure” and “.mutualfunds,” “all of which would be considered to be part of the “financial community.” Dotsecure asserts this cannot be a coincidence, since the ABA did not apply to operate any of those strings.

iii. Analysis

114. To prevail on its Objection, IBFed must prove to the Panel (a) that “substantial opposition within the community” to the Application exists, (b) the existence of a “strong association between “.bank” and the community,” and (c) that the Application “creates a likelihood of material detriment to the rights or legitimate interests of the community to which “.bank” may be explicitly or implicitly targeted.”

115. In addition, IBFed must also prove that the community expressing opposition can be regarded “as a clearly delineated community.” The Panel has addressed this factor above in connection with reviewing the issue of IBFed’s standing to pursue the community objection. The Panel incorporates the conclusion that a clearly delineated global banking community exists from that standing discussion into this analysis of the merits of the Objection.

116. As explained below, the Panel has determined that IBFed has proven each of these elements and that Dotsecure’s responses are not persuasive.

a. Substantial Opposition

117. As noted above, Dotsecure seems to have raised the requirement of “substantial opposition” in the context of both standing and merits. The comments in paragraph 98 of the Standing section above apply equally to the merits analysis and are incorporated herein by reference. The Guidebook identifies a number of non-exhaustive factors a panel may balance to determine whether substantial opposition to the Application exists within the global banking community, including numbers, representative nature, stature or weight among sources of opposition, historical defense of the community and costs incurred. IBFed’s objection satisfies each of these factors, other than costs incurred.

118. IBFed is itself an “association of associations.” Accordingly, when IBFed speaks, it does so as the “representative body for national and international banking federations from leading financial nations around the world.” See, e.g., Letter from IBFed to Board of Governors of the Federal Reserve System Re: Enhanced Prudential Standards and Early Remediation Requirements

for Foreign Banking Organizations and Foreign Nonbank Financial Companies (30 April 2013)(publicly available on IBFed's website).

119. As noted above, IBFed's member associations include leading banking trade associations from the United States, the European Union, Japan, China, India, Canada, Australia, Korea, Russia and South Africa. IBFed persuasively explains that those national associations, in turn, collect and represent the views of more than 18,000 banks, including about 700 of the world's largest 1000 banks.

120. As IBFed explained in its Objection, the Board of Directors of IBFed, representing the views of its member federations, approved in writing the presentation of the Objection and has supervised IBFed's participation in the comment process with respect to the ICANN gTLD effort. As stated above, each of the full members of the Federation appoints a representative to the Board, and thus the approval by the Board is in fact approval by each of the member national banking associations. The extent of the opposition to the Dotsecure application is expressed by that vote, even without looking further.

121. In addition, representatives of the national associations and their constituent banks have staffed IBFed's participation in that process and the development of the Objection.

122. IBFed's activities with respect to the gTLD process have been reported regularly to its members and, through them, to constituent banks, as well as to national and international bank regulatory authorities. In particular, IBFed has reported to the international banking community and bank regulatory bodies the opposition of its member national associations to the Dotsecure application as expressed by approval of the Objection and the related actions of IBFed. There is no evidence at all that any member bank of any national association, or any national bank regulatory agency, has offered any opposition to the position of IBFed in this regard. Rather, both banks and regulators have supported the national associations and IBFed in their opposition. See, e.g., Annex D to the Objection for support by banking enterprises for the Objection.

123. Those facts, by themselves, are sufficient to show that the Objection reflects substantial opposition to Dotsecure's Application within the global banking community - in numbers relative to the composition of the community, in the representative nature of IBFed's opposition and the opposition of its member associations, and in the recognized stature and weight of IBFed speaking as the voice of leading national associations in the financial centers of the world and their member banks.

124. In addition, IBFed has also annexed to the Objection letters demonstrating that substantial opposition to the Application extends well beyond the member associations of IBFed.

125. Among those statements of opposition are letters from a large United States insurance and financial services company (Nationwide Mutual Insurance Company), one of the world's largest companies, with a prominent financial services division (General Electric Company), a direct banking and payment services provider (Discover Financial Services), a "super-regional" banking corporation in the United States (Regions Financial Corporation), two major United States bank holding companies (SunTrust Banks, Inc. and KeyCorp), the Spanish Banking Association

(Asociación Española de Banca), two leading United Kingdom global banking organizations (the Royal Bank of Scotland Group PLC and Lloyds Banking Group), a Nordic regional banking corporation based in Denmark (Nykredit Bank A/S), a Nordic regional banking corporation based in Sweden (Nordea Bank Danmark A/S), the Norwegian national association for financial institutions (Finance Norway), the Federation of Finnish Financial Services (FFI) and a regional bank holding company in the United States (First Horizon National Corporation).

126. The broad worldwide membership of IBFed’s Board of Directors explained above, as well as its member associations, and the representative positions of IBFed’s chair (member, EBF Executive Committee) and managing director (Deputy Chief Executive, BBA) attest to the broad geographic and business distribution and diversity of this community opposition. That conclusion is reinforced by the additional opposition noted above from specific institutions in Europe and the United States, crucial global financial centers.

127. As contemplated by the ICANN Guidebook factors, IBFed has also undertaken “defense of the global banking community” in a wide variety of subject areas. Since its establishment in 2004, IBFed has represented the global banking community in reviewing, commenting and seeking to shape policy and regulatory measures in numerous areas of continuing importance to the community. IBFed maintains permanent working groups on regulatory reform, prudential regulation, financial reporting, financial markets, financial crime and consumer affairs.

128. IBFed also establishes ad hoc working groups on a case-by-case basis.

129. In connection with these activities, IBFed regularly meets and corresponds with international and national regulators and legislators, international accounting bodies, central banks and monetary authorities on behalf of its membership, as well as submitting formal comments on banking policy and regulatory proposals throughout the world. These various activities outlined in this and the preceding paragraphs illustrate the representative nature of the Federation. The opposition to Dotsecure’s application expressed by IBFed is made in its representative capacity, and with full knowledge and concurrence of its members and the national associations, undertaken after broad and regular consultation.

130. The last factor identified by ICANN for balancing is “costs incurred by the objector in expressing opposition,” including other channels for conveying opposition. IBFed does not offer evidence speaking to this point, although it is apparent that IBFed has spent time and resources in pursuing the Objection. The absence of proof of this factor does not weigh heavily in the balance.

131. Dotsecure criticizes IBFed for cooperating with the Financial Services Roundtable in preparing the opposition to a gTLD application for another financial services top-level domain, “.insurance”. However, cooperation between organizations with common interests and attention to cost control are not, in the Panel’s view, negative factors in the balance.

132. Dotsecure challenges IBFed’s showing of “substantial opposition by the community” by, among other efforts, totaling up the number of opposing comments and comparing that total to the aggregate number of banks in the world. Dotsecure also criticizes several of the comments as coming from non-bank organizations. Those critiques are hyper-technical and constitute an

unpersuasive measurement of opposition, especially in light of the votes by the national associations themselves to approve the IBFed Objection.

133. Dotsecure does not acknowledge in its Response the representative nature of IBFed itself (an “association of associations”), the representative nature of the IBFed members themselves and the extremely large number banking organizations that are members of those representative associations opposing the Application, the stature, reputation and diversity of those members and the organizations contributing the officers and Board of IBFed as discussed above, or the representative nature of IBFed itself, its members, and the Spanish and Nordic banking associations stating their opposition to the Application.

134. The representative nature of the banking trade organizations stating their opposition to the Application does weigh heavily in the balance towards determining the presence of “substantial opposition.”

135. Dotsecure raises the American Bankers Association’s role as co-sponsor of the competing application for “.bank,” fTLD Registry Services, as a criticism in connection with the determination of “substantial opposition.” The ICANN Guidebook reminds us, although in connection with a different balancing factor, that “an allegation of detriment that consists only of the applicant being delegated a string instead of the objector will not be sufficient for a finding of material detriment.”

136. That is true. However, it is unsurprising that a prominent trade association in the global banking community will co-sponsor an industry-related organization to manage top-level domain operations for the community and at the same time object to granting operation of the same string to a provider with no ties to that target community.

137. Indeed, one prominent bank regulator, the FDIC, has expressly recommended that gTLDs like “.bank” be “managed within an industry and regulatory framework.” Further, the FDIC recommended that “any applications include explicit endorsement of the financial industry community including regulatory bodies.”

138. The FDIC’s recommendations are not binding on ICANN or this Panel. They nevertheless demonstrate that important bank regulatory authorities encourage sensitive financial services strings like “.bank” to be managed by organizations deeply embedded in the relevant community. Overlapping relationships are virtually inevitable in those circumstances, and do not weigh negatively in the balance for testing either “substantial opposition” or, as discussed further below, “material detriment”.

139. For these reasons, the Panel concludes that IBFed has proven the existence of substantial opposition in the global banking community to the Application.

b. Strong Association

140. The Panel turns now to the evidence regarding the strong association between “.bank” and the global banking community that is explicitly or implicitly targeted by that string. Here too, the Panel is persuaded that IBFed has proven the existence of this element.

141. The ICANN Guidebook points us to three non-exhaustive factors that may be of importance in the balance: statements in the Application; other public statements by the Applicant; and assertions by the public.

142. Much of Dotsecure’s argument with respect to the alleged lack of a “strong association” is predicated on their position that no global banking community exists. The Panel has rejected that position elsewhere in this Expert Determination.

143. Dotsecure also argues that the word “bank” may have many dictionary meanings, such as a piggy bank, the bank held by a card dealer, or a blood bank. Accordingly, says Dotsecure, there is no strong association of the term “bank” with the global banking community. That argument is frivolous.

144. Dotsecure is well aware of the strong association. In its own Application for the string, Dotsecure stated “our area specialty will be the global banking industry.” Dotsecure further explains that its mission and purpose will be “to build a unique and trusted Internet space for banking institutions.” Moreover, says Dotsecure, “the mission/purpose for .bank is to be the Global Banking TLD.”

145. Dotsecure is not alone in *de facto* closely associating “.bank” with a specific banking community. Bank regulators, bank clients and the consumer public clearly associate the word “bank” with the banking community. The use of the word “bank” in a business name is strictly regulated by national bank regulatory authorities to, as the Canadian regulator OSFI stated, “protect the ... public from incorrectly assuming they are dealing with a ... bank that is subject to the Bank Act and [the bank regulatory body’s] oversight.”

146. Further, OSFI pointed out that such a regulatory measure “contributes to the public confidence in a [country’s] financial system by protecting the integrity of the word “bank” as a word that is generally reserved for entities that are regulated and supervised as a bank in [the relevant country.]”

147. In Annex C to its Objection, IBFed listed five major jurisdictions in which the term “bank” is restricted by law to banks regulated and supervised by the national bank regulatory authorities; Hong Kong, Australia, Canada, India and New York. Other similar regulatory restrictions on the use of the term “bank” in commerce can be found elsewhere.

148. In the Panel’s view, there is no doubt that the string “.bank” is strongly associated with the global banking community.

c. Material Detriment

149. The final element to be considered in connection with the merits of IBFed’s objection is “material detriment.” The Objector must prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string “.bank” may be explicitly or implicitly targeted (the global banking community).

150. In light of Dotsecure’s express statements in its Application that “our area specialty will be the global banking industry,” that it will build a “unique and trusted space” for “banking institutions,” and that its mission is to be “the Global Banking TLD,” it is manifest that Dotsecure explicitly intends to target the “.bank” gTLD at participants in the global banking community and their clients. The purported technical distinction put forward by Dotsecure between the phrase “global banking community” and similar terms as used by IBFed and the phrases “global banking industry” and “global banking” as used by Dotsecure in its own Application is unpersuasive.

151. In assessing whether or not “material detriment to a significant portion of the community” exists, ICANN directs our attention to several non-exhaustive factors “that could be used by a panel in making this determination.” Those factors include but are not limited to the nature and extent of damage to the reputation of the global banking community that would result from Dotsecure’s operation of the “.bank” string, evidence that Dotsecure will not be acting in accordance with the interests of the global banking community or of users more widely including concerns over the institution of effective security protection for user interests, interference with the core activities of the global banking community that would result from Dotsecure’s operation of the “.bank” name, dependence of the global banking community on the DNS for its core activities, the nature and extent of any concrete or economic damage to the global banking community that would result from Dotsecure’s operation of “.bank”, and the level of certainty that alleged detrimental outcomes would occur.

152. The Guidebook draws the Applicant’s attention to the ICANN Final Report for further discussion of factors that may be relevant to this determination. In connection with the earlier discussion of standards, the Panel has quoted from the Final Report a summary chart of factors for consideration.

153. The ICANN Guidebook reminds us that an allegation of detriment that consists only of Dotsecure being delegated the string instead of IBFed (or here, fTLD Registry Services, an organization sponsored by one of the members of IBFed) will not be sufficient for a finding of material detriment.

154. As previously explained, IBFed asserts that Dotsecure’s Application is deficient in a number of respects. Moreover, IBFed argues that Dotsecure’s lack of any apparent connection to or engagement with the global banking community and the asserted superiority of fTLD Registry Services’ application for “.bank” are decisive factors in determining “material detriment”.

155. IBFed draws the attention of the Panel to the ICANN Governmental Advisory Committee (GAC) advocacy of heightened safeguards in connection with “sensitive strings,” including specifically “.bank.” The GAC justifies that requirement of heightened safeguards on the basis that the sensitive string is “targeted to a population or industry that is vulnerable to online fraud or abuse.” Similarly, the EBF, the FDIC and OSFI, among other public authorities, have all raised

concerns over financial industry strings such as “.bank” and the potential for consumer fraud, cybersquatting and confusion in the mind of the public with respect to this highly regulated industry.

156. For these reasons, bank regulatory authorities have urged that financial services strings be managed only by institutions within the financial services regulatory framework and endorsed by financial services community and financial services regulators.

157. Dotsecure counters that IBFed has misconstrued the role of the GAC and failed to note the responses by ICANN to the GAC comments. As discussed in the preceding Section of this Expert Determination, the Panel has concluded that IBFed accurately characterized the GAC’s concerns. Moreover, ICANN’s responses to the GAC comments direct interested parties to, among other matters, this very type of dispute resolution process to address those concerns.

158. Neither Dotsecure nor any of its affiliates (including Directi, Radix and PDF) have any demonstrated connection or engagements with the broader financial system services community or the more specific global banking community. Indeed, Dotsecure acknowledges this fact in its Response.

IBFed has repeatedly emphasized the fact that Dotsecure “lacks any relationship of the global banking community”. Dotsecure does not deny this, and like to stress the fact that it is not broken any rules or flouted any AGB requirements by applying for .bank. In fact, we submit that the lack of an existing relationship with the banking industry makes Dotsecure a more unbiased candidate to run the .bank registry.

159. While Dotsecure may not have broken any rules or requirements in applying for the “.bank” gTLD, Dotsecure’s admitted lack of an existing relationship with the banking industry is sufficient by itself to create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the global banking community and users of banking services worldwide for the following reasons.

160. Dotsecure has in effect admitted that it has no real familiarity with the highly complex world of national and international banking regulation (“Dotsecure does not deny ... the lack of an existing relationship”). It is extraordinarily difficult to have familiarity with that banking and bank regulatory environment when one has no relationship with the community of banks and their manifold regulatory bodies. Each country regulates its own domestic banking community heavily. Each country further regulates *inter alia* cross-border deposit-taking, finance, payments and collections and other services and products involving banking organizations located in other countries.

161. Within each country there may be several regulators of the banking community: central banking and monetary authorities such as the Bank of England and the Federal Reserve Board; general financial institution regulators (illustratively, the Prudential Regulation Authority in the United Kingdom); regulators focused specifically on commercial banks themselves (for example, the Office of the Comptroller of the Currency, the Federal Reserve Board and the FDIC regulate, respectively, national banks, state member banks and state non-member banks in the United States and the Prudential Regulation Authority regulating banks and other financial institutions in the United Kingdom; regulators with authority over the largest financial institutions giving rise to

concerns over systemic risk (the Financial Stability Oversight Council in the United States); regulators serving as receivers or liquidators for distressed banks (for example, the FDIC in the United States and the Bank of England's Special Resolution Unit in the United Kingdom); regulators focused on holding companies that may offer a variety of different financial products and services through subsidiaries, including banking (for example, bank holding company regulation by the Federal Reserve Board in the United States); consumer protection agencies such as the new Consumer Finance Protection Bureau in the United States; and regulators focused on particular transactions or activities in which banks are heavily engaged (for example, securities activities regulated by the Securities and Exchange Commission and derivatives and commodities trading activities regulated by the Commodities Futures Trading Commission in the United States and "conduct" regulation generally by the Financial Conduct Authority in the United Kingdom); and numerous law enforcement agencies concerned with financial crimes.

162. Such a complex overlapping regulatory environment exists not only in the United States and the United Kingdom, but also in every other major financial center in the world too. Additionally, for many parts of the world, such as in the European Union, national bank regulation in its many forms must co-exist with supranational bank regulation as well. Nor is supranational regulation of banks found in a unified authority either; illustratively, several constituent bodies of the European Union regulate banks and banking services.

163. Lack of experience and lack of existing relationships in that complex regulatory environment are highly likely to result in inadvertent non-compliance with bank regulatory measures, in delays in obtaining regulatory consents, in difficulties resolving overlapping requirements imposed by a multiplicity of regulators and policymakers, and in significant concerns on the part of regulatory authorities over the possibility of fraud, consumer abuse, tax evasion and money laundering, other financial crimes and improper avoidance of regulatory measures by means of the Internet. Those concerns were highlighted by bank regulatory authorities in their comments to ICANN with respect to sensitive financial services strings such as ".bank."

164. The prospects for delays, non-compliance and confusion are, in the view of the Panel, likely directly and adversely to affect the reputation of the banks that comprise the global banking community. Moreover, those prospects are most definitely not in the interest of users of the global banking system on the Internet or regulators seeking to maintain systemic stability.

165. To the extent the delays and regulatory approvals materialize, financial payments and transfers effected online through the top-level domain will necessarily be adversely affected. Those consequences will at a minimum interfere with funds transfers and settlements, a core activity of the global banking community, and thus create a substantial likelihood of material systemic risk as well as material risk to individual banks and their customers.

166. Dotsecure's admitted lack of relationships and familiarity with banking or the global community raises the level of certainty with respect to the likelihood of these injuries materializing to a high level, far too high to sustain the Application.

167. In addition to the demonstrable likelihood of material detriment resulting from Dotsecure's inadequate engagement with the banking community and regulatory bodies, IBFed criticizes the

reputation and reliability of Dotsecure and other members of the Directi family of companies, including Radix and PDR.

168. IBFed notes that, according to the October 2012 report from the Anti-Phishing Working Group, “Directi accounted for the largest percentage of malicious domain name registrations of any named registrar.”

169. IBFed also asserts there are “numerous documented instances” in which financial services enterprises have filed an ICANN Uniform Domain-Name Dispute-Resolution Policy proceeding “to combat abusive domain name registrations sponsored by PDR.” IBFed additionally claims that Directi and its affiliates do not “proactively address cybersquatting and other abusive registration practices directed at the banking and financial services sector.”

170. Dotsecure and Directi vigorously reject these allegations. Dotsecure calls them “irrelevant allegations against legal entities separate from Dotsecure in an attempt to smear Dotsecure,” “numerous baseless assumptions” and “factually incorrect statements.”

171. Directi itself also challenges IBFed’s claims in a letter annexed to the Response. In particular, Directi replies that the Anti-Phishing Working Group did not provide timeliness data that leads to a contrary conclusion. Further, Directi argues that those anti-phishing statistics are based on domains that lack any significant restrictions on domain name registrations (.net, .com, .org and .in). Consequently, says Directi, the purported lack of quality control lies in the structure of the domains themselves rather than in failures by Directi and its affiliated companies.

172. Directi also objects to IBFed’s criticism of PDR for failing promptly to suspend abusive domain registrations. Directi states that Directi /PDR was not notified of abuse before the filing of a UDRP proceeding in any of the 70 instances identified by IBFed.

173. IBFed in addition challenges the credibility of Dotsecure’s security protections, noting both the record of abusive domain practices at Directi-related registries and the absence in Dotsecure’s initial Application of legally enforceable security safeguards.

174. Dotsecure again rejects these objections in its Response and Additional Written Submission. Moreover, Dotsecure filed a Public Interest Commitment (“PIC”) statement on 13 May 2013 making their commitments in the Application legally enforceable. In that PIC statement, Dotsecure elected to make five specific commitments, rather than committing to the general obligation in paragraph 2 for “all commitments, statements of intent and business plans” in the Application. Response, Annex 6.2. Accordingly, only those five specific commitments are legally enforceable.

175. Finally, IBFed challenges the financial resources of Dotsecure, basing that attack on the absence of information about the financial circumstances of Dotsecure and the other members of the Directi family of companies (“it is unclear whether Dotsecure is adequately resourced and whether funds are properly segregated for its 31 applications”).

176. Dotsecure responds that these allegations are unsupported and inaccurate. In addition, Dotsecure notes that ICANN itself will undertake a financial review before deciding on the

Application. Dotsecure does not offer, however, any financial information to address IBFed's allegations.

177. These are very serious allegations. If the material detriment to the community arising out of Dotsecure's lack of experience with banking was not so obvious, the Panel would have ordered a hearing to more fully develop the evidence with respect to these other claims by IBFed and Dotsecure's responses. In the circumstances, however, a hearing was not an appropriate use of time and resources of the parties and the Panel. The material detriment arising out of Dotsecure's lack of relationship and familiarity with the global banking community, banking and bank regulators is too clear.

178. IBFed further argues that the Panel should take into account the presence of the competing application by fTLD Registry Services for ".bank" as part of the balancing in which the Panel must engage. IBFed contrasts fTLD Registry Services, an organization "created and governed by members of the global banking community," with the for-profit Dotsecure.

179. The Panel notes, though, that fTLD Registry Services is also a for-profit company. Thus, the crucial difference comes back to a string manager embedded inside the global banking community as contrasted with a string manager having no ties to this highly regulated and tightly interwoven community.

180. IBFed argues that members of the global banking community will be less concerned about cybersquatting and abusive registrations if an organization sponsored by the banking community manages the string, a point that is consistent with the comments of the FDIC to ICANN. If the top-level domain is managed by a non-profit member of the global banking community rather than a for-profit outsider, says IBFed, banks will save considerable money by making fewer defensive registrations.

181. In this regard, IBFed recalls the concerns stated by U.S. bank regulator FDIC that inadequate management of the ".bank" gTLD "could force trade name protection costs onto the financial industry during a period of economic stress."

182. In contrast, Dotsecure asserts that the ABA's participation in fTLD Registry Services, while also serving as an active member of IBFed and its Board, is a "classic conflict of interest." Dotsecure further argues that its lack of relationship with the banking community is an advantage because that absence reduces the prospect for bias in operation of the top-level domain.

183. As the Panel has previously explained, the business of banking necessarily results in interwoven relationships, whether in syndicate financing, underwriting and placement activities, inter-bank deposit markets, payments and collections, or engagement with regulatory bodies through trade associations. Accordingly, the overlapping roles of the ABA, a major trade association representing the many thousands of banks in the United States banking community, do not weigh negatively in the balance.

184. However, this Panel has not been established by the ICC and ICANN to assess the merits of the fTLD Registry Services application. That is a matter outside this Panel's purview. Accordingly,

it is not appropriate for the Panel to consider whether the granting of the competing application by fTLD Registry Services would result in greater community confidence and fewer defensive registrations. The Panel leaves that question to the competent authorities at ICANN and any dispute resolution panel that may be established to consider the fTLD Registry Services application.

d. Conclusion as to Merits of Objection

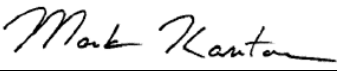
185. For the foregoing reasons, the Panel determines that granting Dotsecure's application for ".bank" would create a likelihood of material detriment to the rights and legitimate interests of a significant portion of the global banking community, the community to which Dotsecure expressly and implicitly targets ".bank."

IV. Decision

186. For all the foregoing reasons and according to Article 21(d) of the Procedure, the Expert renders the following Expert Determination.

1. The Objection is successful.
2. IBFed is the prevailing party.
3. IBFed's advance payment of Costs shall be refunded by the Centre to IBFed.

Date: November 26, 2013

Signature: 
Mark Kantor, Expert

Annex 13

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

CASE No. EXP/471/ICANN/88

SPORTACCORD

(SWITZERLAND)

vs/

DOT SPORT LIMITED

(GIBRALTAR)

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

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

**SPORTACCORD
(Switzerland)**

v.

**DOT SPORT LIMITED
(Gibraltar)**

EXP/471/ICANN/88

EXPERT DETERMINATION

By

Prof. Dr. Guido Santiago Tawil

This document is an original of the Expert Determination rendered in conformity with Article 21 of the ICANN New gTLD Dispute Resolution Procedure

TABLE OF CONTENTS

I. The Parties.....	1
A. <i>Objector</i>	1
B. <i>Applicant</i>	1
II. The Appointed Expert.....	2
III. Summary of the Procedural History.....	2
IV. Procedural Issues and Applicable Rules.....	4
V. Summary of the Parties' Positions.....	5
A. <i>Objector's position</i>	5
B. <i>Applicant's position</i>	6
VI. Findings of the Appointed Expert.....	7
A. <i>Objector's standing</i>	8
B. <i>The "Sport Community"</i>	12
C. <i>The "Substantial Opposition" to the application</i>	16
D. <i>Targeting</i>	19
E. <i>Detriment</i>	20
VII. Decision.....	24

TABLE OF ABBREVIATIONS

Applicant	dot Sport Limited
Appointed Expert	The Appointed Expert as defined in Section II of this Expert Determination
DRSP	Dispute Resolution Service Provider
GNSO	ICANN Generic Names Supporting Organization
gTLD	generic Top-Level Domain
ICANN	The Internet Corporation for Assigned Names and Numbers
ICANN Guidebook	Module 3 of the ICANN's gTLD Applicant Guidebook, version dated June 4, 2012.
ICC	The International Chamber of Commerce
ICC Centre	The International Centre for Expertise of the International Chamber of Commerce
ICC Practice Note	ICC Practice Note on the Administration of Cases
ICC Rules for Expertise	The Rules for Expertise of the International Chamber of Commerce in force as from January 1 st , 2003
Objector	SportAccord
Parties	SportAccord and dot Sport Limited
Rules of Procedure	The ICANN's Attachment to Module 3 – New gTLD Dispute Resolution Procedure

EXPERT DETERMINATION

1. In accordance with Article 21 of the New gTLD Dispute Resolution Procedure (“Rules of Procedure”), the Appointed Expert renders this Expert Determination.

I. The Parties

A. Objector

2. Objector in these proceedings is SPORTACCORD (“SportAccord” or “Objector”), an association established according to the laws of Switzerland, domiciled at

Avenue de Rhodanie, 54
Lausanne CH 1007
Switzerland

3. In these proceedings, Objector is represented by:

Mr. Pierre Germeau
SportAccord
Contact Information Redacted

Tel.: Contact Information Redacted
E-mail: Contact Information Redacted

4. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

B. Applicant

5. Applicant in these proceedings is DOT SPORT LIMITED (“dot Sport Limited” or “Applicant”), a company established according to the laws of Gibraltar, domiciled at :

6A Queensway
Gibraltar, GX11 1AA
Gibraltar

6. In these proceedings, Applicant is represented by:

Mr. Peter Young
Famous Four Media Limited
Contact Information Redacted

Contact Information Redacted

Tel.: Contact Information Redacted

E-mail: Contact Information Redacted

7. Notifications and communications arising in the course of these proceedings were made to the aforementioned e-mail address.

II. The Appointed Expert

8. On July 29, 2013, the Chairman of the Standing Committee of the International Centre for Expertise of the International Chamber of Commerce (the "ICC Centre") appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Articles 7 and 11(5) of the the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 (the "ICC Rules for Expertise"). The Appointed Expert contact details are:

Guido Santiago Tawil
Contact Information Redacted

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III. Summary of the Procedural History

10. On March 13, 2013, SportAccord filed an Objection pursuant to Module 3 of the gTLD Applicant Guidebook, version dated June 4, 2012 ("ICANN Guidebook"), the Attachment to Module 3 – New gTLD Dispute Resolution Procedure ("Rules of Procedure") and the Rules for Expertise of the International Chamber of Commerce in force as from January 1st, 2003 ("ICC Rules for Expertise") supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice

Note”).

11. On March 16, 2013, the ICC Centre acknowledged receipt of the Objection and conducted the administrative review of it in accordance with Article 9 of the Rules of Procedure for the purpose of verifying compliance with the requirements set forth in Articles 5 to 8 of the Rules of Procedure.

12. On April 5, 2013, the ICC Centre informed the Parties that the Objection was in compliance with Articles 5 to 8 of the Rules of Procedure. Accordingly, the Objection was registered for processing.

13. On April 12, 2013, the Internet Corporation for Assigned Names and Numbers (“ICANN”) published its Dispute Announcement pursuant to Article 10(a) of the Rules of Procedure.

14. On the same date, the ICC Centre informed the Parties that it was considering the consolidation of the present case with the case No. EXP/486/ICANN/103 (SportAccord v. Steel Edge LLC; gTLD: “.sports”) in accordance with Article 12 of the Rules of Procedure. Therefore, the ICC Centre invited the Parties to provide their comments regarding the possible consolidation no later than April 16, 2013.

15. On April 15, 2013, Applicant filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Objector.

16. On April 16, 2013, Objector filed its comments on the possible consolidation by e-mail to the ICC Centre, a copy of which was sent directly to Applicant.

17. On April 22, 2013, the ICC Centre informed the Parties that it decided not to proceed with the consolidation. It further invited Applicant to file a Response to the Objection within 30 days of the ICC Centre’s transmission of such letter in accordance with Article 11(b) of the Rules of Procedure.

18. On May 21, 2013, dot Sport Limited filed its Response to SportAccord’s Objection.

19. On May 22, 2013, the ICC Centre acknowledged receipt of Applicant’s Response. It further informed the Parties that the Response was in compliance with the Rules of Procedure.

20. On June 21, 2013, the ICC Centre appointed Mr. Jonathan P. Taylor as expert in accordance with Article 13 of the Rules of Procedure and Article 9(5)(d) of the Rules for Expertise.

21. On July 16, 2013, the ICC Centre acknowledged receipt of Applicant’s objection to Mr. Taylor’s appointment.

22. On July 25, 2013, the ICC Centre informed the Parties that it had decided not to confirm the appointment of Mr. Taylor as Expert in the present case and, there-

fore, it would proceed with the appointment of another Expert.

23. On July 29, 2013, the Chairman of the Standing Committee of the ICC Centre appointed Prof. Dr. Guido Santiago Tawil as Expert in accordance with Article 7 of the ICC Rules for Expertise and Article 3(3) of its Appendix I. On July 30, 2013, the ICC Centre notified the Parties of the Expert's appointment. It further sent the Parties the Expert's *curriculum vitae* as well as his Declaration of Acceptance and Availability, Statement of Impartiality and Independence.

24. On August 2, 2013, the ICC Centre reminded the Parties that the estimated costs had been paid in full by each party and confirmed the constitution of the expert panel.

25. On the same day, the electronic file was transferred by the ICC Centre to the Appointed Expert.

26. On August 5, 2013, the Appointed Expert issued Communication E-1 by means of which it informed the Parties that (i) based on their submissions and pursuant to Article 21 of the Rules of Procedure, it would render its Expert Determination, and (ii) at that stage, it did not consider necessary to request the Parties to submit any written statement in addition to the Objection and the Response, including their respective exhibits.

27. In accordance with point 6 of the ICC Practice Note on the Administration of Cases ("ICC Practice Note"), the requirement for the Expert Mission contained in Article 12(1) of the ICC Rules for Expertise has been waived.

28. Pursuant to Article 21(a) of the Rules of Procedure, the time-limit for rendering this Expert Determination expires on September 16, 2013.

29. The Expert Determination was submitted in draft form to the ICC Centre on August 23, 2013, within the 45 day time limit in accordance with Article 21(a) of the Procedure.

IV. Procedural Issues and Applicable Rules

30. SportAccord filed a "Community Objection", defined as "*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*" according to Article 3.2.1. of the ICANN Guidebook, against dot Sport Limited's application for the gTLD ".sport".

31. Pursuant to Article 5(a) of the Rules of Procedure, all submissions –including this Expert Determination– have been made in English. Further, all submissions and communications between the Parties, the Appointed Expert and the ICC Centre were filed electronically as stated in Article 6(a) of the Rules of Procedure.

32. In accordance with Article 4(d) of the Rules of Procedure, the seat of these proceedings is the location of the ICC Centre in Paris, France.

33. For the purpose of rendering this Expert Determination, the applicable rules are: the ICC Rules for Expertise, supplemented by the ICC Practice Note, the ICANN Guidebook and the Rules of Procedure.

V. Summary of the Parties' Positions

34. The issues to be addressed by the Appointed Expert shall be those resulting from the Parties' submissions and those which the Appointed Expert considers to be relevant to make a determination on the Parties' respective positions.

35. Based on the Parties' written submissions (SportAccord's Objection, dot Sport Limited Response and their respective exhibits), the main issues and claims under determination can be summarised as follows.

A. Objector's Position

36. SportAccord claims that it has standing to object to applications for the gTLD ".sport" on the grounds that it is an established international representative institution of the Sport Community,¹ which has been impacted by such gTLD application. Further, Objector states that it is a not-for-profit association constituted in accordance with the Swiss Civil Code and comprises several autonomous and independent international sports federations and other international organizations² which contribute to sport in various fields.³

37. Regarding the description of the basis for the Objection as established in Article 3.3.1 of the ICANN Guidebook, SportAccord states that the Sport Community

¹ According to Objector, the Sport Community is organized on local, national and international levels and is clearly delineated by way of its organizational structures and its values. See: Objection, page 6.

² SportAccord has 91 full members: international sports federations governing specific sports worldwide and 16 associate members: organizations which conduct activities related to the international sports federations. See: Exhibit Ap-2.

³ Indeed, Objector claimed that "*SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events*". See: Objection, page 6. Article 2 of SportAccord Statutes establishes several purposes of this association which, among others, include: "*a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports... d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport... j) to coordinate and protect the common interests of its Members... k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis*". See: Exhibit Ap-1. Objector states that its programs include, among others, "*International Federation (IF) recognition, IF relations, doping-free sport, fighting illegal betting, governance, sports' social responsibility, multi-sports games, the '.sport' initiative, the sports hub, the annual SportAccord Convention and the annual IF Forum*". See: Objection, page 7.

is organized, delineated, of long-standing establishment and impacted by sport-related domain names. In light of this statement, Objector expresses its substantial opposition to the application, claiming representation of a significant portion of the Sport Community. It further argues that there is no evidence of community support for any of the non-community-based applications.⁴

38. According to SportAccord, the Sport Community is both targeted implicitly and explicitly by the application for the “.sport” gTLD.⁵

39. Finally, Objector elaborates on the material “*detriment*” to the rights and legitimate interests of the Sport Community –and to users in general– if dot Sport Limited’s application is allowed to proceed or even finally approved.⁶

40. Based on these allegations, Objector requests that the Appointed Expert acknowledges that (i) the “.sport” gTLD string targets the Sport Community, (ii) there is a substantial opposition to such application from a significant portion of the Sport Community, and (iii) therefore, the application for the “.sport” gTLD is to be rejected.

B. Applicant’s Position

41. Applicant rejects SportAccord’s Objection. From the outset of its Response, Applicant alleges that the “.sport” gTLD is intended and designed to increase availability and access to create, produce and disseminate informative, creative and innovative sport-related content. It further alleges that mechanisms have been established to ensure that the gTLD “*operates and grows in a manner that is responsible, protects consumers and promotes consumer and industry trust and confidence*”.⁷

42. In addition, dot Sport Limited alleges that SportAccord has no standing to object on the ground that it fails to prove that it has “*an on-going relationship*” with a clearly delineated Sport Community as a whole.⁸

43. In relation to the “Community” argument, dot Sport Limited explains that the Sport Community is not “*clearly delineated*” because it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests. It also emphasizes that such “Community” lacks formal boundaries, which is also proved by the fact that there is a disagreement about the entities that make up such “Community”.⁹

⁴ See: Objection, page 8.

⁵ See: Objection, page 10.

⁶ See: Objection, page 11.

⁷ See: Response, page 4. In particular, Applicant claims that the objection process “*is not a substitute for Community Evaluation and was not envisaged to be a mechanism by which one applicant could gain a competitive advantage over another*”.

⁸ See: Response, pages 4 and 5.

⁹ See: Response, page 5.

44. Further, Applicant rejects Objector's argument that the substantial opposition to the application comes from a significant portion of the Sport Community. Indeed, it is Applicant's position that Objector represents a subset of the alleged Community and does not represent the interests, goals, or values of numerous stakeholders in such "Community".¹⁰

45. In any event, dot Sport Limited states that *"there is not a strong association between the "Community" represented by Objector and the applied for ".sport" TLD" string.*¹¹

46. Finally, concerning the material *"detriment"* to the rights and legitimate interests of the Sport Community –as alleged by Objector–, Applicant argues that SportAccord failed to prove a likelihood of material detriment. It further states that the damages alleged by SportAccord are speculative in nature and there is no evidence that such alleged detrimental outcomes would occur.¹²

47. Based on these arguments, dot Sport Limited requests the Appointed Expert to hold that SportAccord's objection is invalid and, therefore, deny the Objection.

VI. Findings of the Appointed Expert

48. In order to make its determination, the Appointed Expert will address the following issues, in accordance with the criteria listed in the ICANN Guidebook :

(1) *Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?*

(2) *Is the Sport Community clearly delineated?*

(3) *Is there a substantial opposition to the application ".sport" gTLD on behalf of a significant part of the Sport Community?*

(4) *Is the Sport Community explicitly or implicitly targeted by the application ".sport" gTLD?*

(5) *Is there any material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed?*

49. In the following Sections, the Appointed Expert sets out and summarises his understanding of the Parties' positions concerning each of these issues, as elaborated by the Parties in their written pleadings, followed by the Appointed Expert's own analysis and determination concerning such issues.

¹⁰ See: Response, page 8.

¹¹ See: Response, page 10.

¹² See: Response, page 11.

A. Objector's Standing

(1) *Does SportAccord have standing to put forward a Community Objection against the application made by dot Sport Limited?*

50. The Appointed Expert is of the view that prior to considering the grounds of the Objection, it is necessary to address this preliminary issue, namely the question of whether SportAccord has standing to put forward a "Community Objection" against the application ".sport" gTLD made by dot Sport Limited.

51. The Appointed Expert will start by deciding this preliminary question in the understanding that if the Appointed Expert finds that the Objector lacks *ius standi* to object, it will become unnecessary to enter into the analysis of the grounds of the Objection.

(i) *Positions of the Parties*

52. Applicant has challenged Objector's standing to file an objection against the application for the ".sport" gTLD. In its Response, Applicant argues that Objector failed to prove that it has "*an on-going relationship*" with a "*clearly delineated Sport Community*" as a whole, failing to meet the standard established in Article 3.2.2.4 of the ICANN Guidebook.¹³

53. While dot Sport Limited recognizes that Objector is an "established institution", it affirms that SportAccord only has an on-going relationship "*with a particular subset of stakeholders*".¹⁴

54. Applicant goes further and states that, in fact, there is no Sport Community since there are so many activities which can be legitimately identified as "sports". Based on this statement, dot Sport Limited reaffirms its position by stating that the alleged Sport Community is not "*clearly delineated*", because "*just about anyone could claim to have an interest in sport*".¹⁵ Additionally, Applicant criticizes Objector's policies for creating obstacles to free and open participation in its activities, membership and leadership.

55. Although Objector has not dealt directly with these arguments, which were put forward once SportAccord had submitted its Objection, it claims that it has standing to object to the application for the ".sport" gTLD since it is an established international representative institution of the Sport Community, which has been impacted by the mentioned string application.

56. Objector states that it is a not-for-profit association established since 1967,

¹³ See: Response, page 4.

¹⁴ See: Response, page 5. According to Applicant, "*Objector's mission statement clearly shows that Objector only represents a particular subset of the alleged community, organized sports, failing to represent other stakeholders such as: unorganized sports...; sports equipment manufacturers and retailers; media outlets such as newspapers, TV, bloggers... Objector cannot speak for them*".

¹⁵ See: Response, page 5.

which has an ongoing relationship with the Sport Community due to the fact that it comprises autonomous and independent international sports federations and other international organizations.

57. In particular, SportAccord alleges that it has (i) 91 full members: international sports federations governing specific sports worldwide, and (ii) 16 associate members: organizations which conduct activities closely related to the international sports federations. In Objector's words, "*SportAccord is the umbrella organisation for both Olympic and non-Olympic international sports federations as well as organisers of international sporting events*".¹⁶

58. Finally, in the Objector's view, the Sport Community is highly organized on local, national and international levels and, thus it is clearly delineated by way of its organizational structures and values.

(ii) *Considerations of the Appointed Expert*

59. Pursuant to Article 3.2.2 of the ICANN Guidebook, it is for the Appointed Expert to determine whether the Objector has standing to object.

60. In accordance with the ICANN Guidebook, objectors must satisfy certain standing requirements to have their objections considered by the expert panel. In the case of a "Community Objection", "*established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection...*".¹⁷

61. Therefore, to qualify for standing for a "Community Objection", the Objector shall fulfill two conditions, namely that (i) it is an established institution, and (ii) it has an ongoing relationship with a clearly delineated community.

62. The ICANN Guidebook provides useful guidelines so as to determine whether these two requirements should be considered as satisfied by the Objector.

63. Regarding the first condition to be met (i.e.: "*established institution*"), Article 3.2.2.4 of the ICANN Guidebook lists some key factors which may be considered by the expert panel in making its determination. These factors are: (i) the level of global recognition of the institution, (ii) the length of time the institution has been in existence; and (iii) the public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty.

64. In order to evaluate its standing "*the institution must not have been estab-*

¹⁶ See: Objection, page 6.

¹⁷ Article 3.2.2.4 of the ICANN Guidebook.

lished solely in conjunction with the gTLD application process".¹⁸

65. SportAccord (previously known as "GAISF", the General Association of International Sports Federations) is a not-for-profit association established in 1967.¹⁹ The length of time that SportAccord has been in existence –almost half a century– is sufficient, in the Appointed Expert's view, to consider Objector as a long-established institution and clearly evidences that such association was not created with the sole intention to participate in the gTLD application process.

66. Additionally, the Appointed Expert notes that Objector also meets the standard of "global recognition", as mentioned in the ICANN Guidebook, since it has a very large membership, comprising of 91 international sports federations and 16 organizations related to sports. In the Appointed Expert's opinion, this is also indicative of Objector's public historical evidence of its existence.

67. Even though Applicant has relied on a survey according to which Objector is hardly known to the majority of the public surveyed,²⁰ it is the Appointed Expert's view that the level of global recognition of any institution should be analysed within the context of the community that such institution is claiming to be a part of, not the public in general.

68. Although the facts described above would be enough to confirm Objector's compliance with the first condition, the Appointed Expert notes that the very same Applicant has recognized that Objector is an "*established institution*";²¹ focussing its challenge on the second condition required to file an objection (i.e.: an on-going relationship with a clearly delineated community).

69. Based on these reasons, the Appointed Expert concludes that Objector is an "*established institution*" in the terms of Article 3.2.2.4 of the ICANN Guidebook.

70. Having decided that Objector meets the first standard contained in the ICANN Guidebook, the Appointed Expert now turns to the issue of whether Objector has an on-going relationship with a clearly delineated community.

71. To make a determination on this issue, the Appointed Expert should take into account the guidelines provided in Article 3.2.2.4 of the ICANN Guidebook. To this end, such provision sets out the following elements to be considered: (i) the presence of mechanisms for participation in activities, membership, and leadership, (ii) the institutional purpose related to the benefit of the associated community, (iii) the performance of regular activities that benefit the associated community; and (iv) the level of formal boundaries around the community.

72. Referring to these factors, the ICANN Guidebook states that "*the panel will*

¹⁸ See: Article 3.2.2.4 of the ICANN Guidebook.

¹⁹ See: Exhibit Ap-1.

²⁰ Response, page 8 and Annex A-1.

²¹ Response, page 4.

*perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements”.*²²

73. Applicant has challenged Objector’s standing on the grounds that it only has an on-going relationship “*with a particular subset of stakeholders*” and not the community as a whole.²³

74. In the Appointed Expert’s view, Applicant’s argument is not convincing. First, because even though Objector may not represent the “entire” Sport Community, it acts for a preponderant part of such community.

75. The ICANN Guidebook does not require that an “entire” community agree on an objection to an application. In fact, it would be almost impossible for an institution to represent any community as a whole. If such was the requirement, there would be no reason to provide for the possibility of community objections.

76. It is difficult to imagine which other association may claim representation of the Sport Community besides an institution that represents, as Objector does, more than a hundred well-known sports federations and institutions related to sports.

77. Furthermore, Objector’s declared purposes are closely associated with the benefits of the community members it represents²⁴ and its regular activities are naturally intended to benefit its members.

78. In addition, the Appointed Expert notes that Objector, as an institution that represents multiple sports federations, has explicitly foreseen –through its statutes– different mechanisms for participation in activities, membership and leadership among the sport federations and organizations. For instance, SportAccord’s statutes regulate in detail the procedure to become a member of the institution and participate accordingly.²⁵

²² Article 3.2.2.4 of the ICANN Guidebook.

²³ Response, page 4.

²⁴ According to Objector’s statutes (See: Exhibit Ap-1): “*The objectives of SportAccord are: a) to promote sport at all levels, as a means to contribute to the positive development of society; b) to assist its Full Members in strengthening their position as world leaders in their respective sports; c) to develop specific services for its Members, and provide them with assistance, training and support; d) to increase the level of recognition of SportAccord and its Members by the Olympic Movement stakeholders as well as by other entities involved in sport; e) to organise multi-sports games and actively support the organisation of multi-sports games by its Members; f) to be a modern, flexible, transparent and accountable organisation; g) to organise, at least once a year, a gathering of all of its Members, and of other stakeholders of the sport movement, preferably on the occasion of its General Assembly; h) to recognise the autonomy of its Members and their authority within their respective sports and organisation; i) to promote closer links among its Members, and between its Members and any other sport organisation; j) to coordinate and protect the common interests of its Members; k) to collaborate with organisations having as their objective the promotion of sport on a world-wide basis; l) to collect, collate and circulate information to and among its Members”.*

²⁵ See: Exhibit Ap-1, SportAccord’s Statutes, Articles 5 to 15.

79. Regarding Applicant's argument that Objector's policies create obstacles to free and open participation in its activities, membership and leadership (for instance, by excluding some sports activities, such as card games), in the Appointed Expert's view such "obstacles" are simply the conditions that any organization has to meet to become a member of the institution, as occurs in any other field.²⁶

80. In analysing Objector's statutes, membership is open to "*any sport organisation... which groups together the majority of the National Federations (or organisations) throughout the world practising its sport and regularly holding international competitions...*" and "*any sport organisation which groups together the activities of several members... for the purpose of organising competitions*";²⁷ which shows that membership, far from being closed and exclusive, is accessible to any organization which complies with these minimum standards.

81. Finally, although the issue of the existence of a "Sport Community" is related to the merits of the Objection –and will be analysed in section B–, the Appointed Expert is of the view that Objector's "community", which includes multiple organizations associated with sports, is "*clearly delineated*" for the purpose of objecting to the application for ".sport" gTLD made by dot Sport Limited.

82. Therefore, in the Appointed Expert's view, SportAccord is an established institution which has an ongoing relationship with a clearly delineated community and, consequently, has standing to object to Applicant's application in the present case.

B. The "Sport Community"

(2) *Is the Sport Community clearly delineated?*

83. Having decided that SportAccord has standing to object to the application for ".sport" gTLD made by dot Sport Limited, the Appointed Expert will now focus on the issue of whether the Sport Community is clearly delineated.

84. The Parties have discussed at length the independent existence of a "Sport Community" and diverging positions were advanced on this issue.

(i) *Positions of the Parties*

85. In its Objection, SportAccord defines the Sport Community as "*the community of individuals and organizations who associate themselves with Sport*".²⁸ According to Objector, Sport is an activity done by individuals or teams of individuals, aiming at healthy exertion, improvement in performance, perfection of skill, fair

²⁶ It should be also noted that not all game cards –as claimed by Applicant– are excluded from Objector's membership. The World Bridge Federation is, for instance, a member of SportAccord.

²⁷ See: Exhibit Ap-1, SportAccord's Statutes, Article 6.

²⁸ See: Objection, page 8.

competition and desirable shared experience between practitioners as well as organizers, supporters and audience.

86. Objector's position is that the Sport Community "*is highly organized*" both at a local level (local clubs, etc.) and a higher level (Sport Community governance is exercised by regional, national, and international Sport Federations, which collaborate at the local, national and international levels in sport events or with event organizers, governments, the various bodies of the Olympic Movement, associations or federations).

87. Even though Objector states that it represents 107 International Sport Federations, individual practitioners of sport, sport spectators, sport fans and sport sponsors are also part of the Sport Community and share their values and objectives.²⁹

88. Finally, Objector explains that the Sport Community "*is clearly delineated*" since it has formal lines of accountability on all levels. In Objector's view, the keyword "*delineated*" should not imply a focus on rigid edges of a community, like card-carrying membership organizations.³⁰

89. Applicant rejects Objector's assertion that the Sport Community is "*clearly delineated*". Indeed, dot Sport Limited contends that the Sport Community lacks this characteristic since "*it is comprised of a significant number of stakeholders who do not necessarily share similar goals, values or interests, thus the community lacks formal boundaries, evidenced by disagreement as to which stakeholders are considered members of the Sport community*".³¹

90. According to Applicant, the alleged Sport Community is associated with a "generic" string (".sport") and, therefore, it cannot meet the "*clearly delineated*" criteria due to its broad definition and the nature of the generic term ("sport"), which is by definition used by a significant number of people, who do not necessarily share similar goals, values or interests.

91. Further, Applicant criticizes Objector's assertion that the Sport Community is "*highly organized*" when there is no organization, for instance, for viewers, the media or amateur sportspeople who play sport for fun in their spare time. In Applicant's view, "*there is therefore confusion as to who actually comprises the sport community. This is simply because there is no clearly delineated community*".³²

92. In addition, dot Sport Limited states that, according to a survey undertaken by itself, there is a low level of public recognition of a Sport Community since 74% of participants surveyed did not see formal organization or registration as a requirement to participate in sports.³³

²⁹ See: Objection, page 9.

³⁰ See: Objection, page 9.

³¹ See: Response, page 5.

³² See: Response, page 6.

³³ See: Response, Annex 1.

93. Applicant also argues that there is no agreement among experts as to the definition of “sport”, giving examples of different accepted definitions. In analyzing Objector’s definition of “sport”, Applicant concludes that such concept fails to recognize other community stakeholders, for example, non-federation sport organizations (such as, community recreational leagues), media outlets that cover sports, equipment producers and retailers, video game industry, etc.

94. Finally, it is not Sport Limited’s position that the Sport Community is not clearly delineated because there is no agreement as to the entities that make up the alleged community. Applicant explains that, for instance, Objector’s membership criteria exclude legitimate sport activities from membership such as poker, electronic gaming and hunting.³⁴

95. To conclude, Applicant states that Objector acknowledged that the Sport Community is comprised of “billions of members” and, consequently, a community comprising the majority of the human race is not clearly, or even slightly, delineated.³⁵

(ii) *Considerations of the Appointed Expert*

96. The Appointed Expert has to decide whether the “Sport Community” is clearly delineated.

97. In accordance with Article 3.5.4 of the ICANN Guidebook, “...for an objection to be successful... the objector must prove that the community expressing opposition can be regarded as a clearly delineated community”.

98. As mentioned before, the ICANN Guidebook offers useful guidelines in order to determine whether a community is clearly delineated. “A panel could balance a number of factors to determine this, including but not limited to: (i) the level of public recognition of the group as a community at a local and/or global level; (ii) the level of formal boundaries around the community and what persons or entities are considered to form the community; (iii) the length of time the community has been in existence; (iv) the global distribution of the community (this may not apply if the community is territorial); and (v) the number of people or entities that make up the community”.³⁶

99. Having set out the factors to be considered, the ICANN Guidebook further provides that “...if opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail”.

100. The concept of “community” is not defined by the ICANN Guidebook. The

³⁴ See: Response, page 7.

³⁵ See: Response, page 7.

³⁶ Article 3.5.4 of the ICANN Guidebook.

word “community” is broad and allows more than one interpretation. Besides the political (nationality), religious or ethnic meanings or implications that the term may have, it generally refers to a “group of people” that may be considered as a “unit” that share similar interests, goals or values.³⁷

101. Furthermore, the word “sport” is also a generic term. If someone mentions the word “sport” without any specificity, it is highly probable that different listeners will imagine different aspects, ideas or own preconceptions about what the speaker does want to refer. The same occurs with other generic terms such as “health”, “law”, “government”, “commercial”, etc.

102. Nevertheless, the generic nature of these words does not constitute an obstacle for a community to identify itself with them. For instance, the word “lawyer” (or, more precisely, the “.lawyer” gTLD) may identify the community of lawyers around the world, even though it would be difficult (or impossible) to find that all lawyers share the same goals, values or interests.

103. In the case at hand, it is the Appointed Expert’s view that the community represented by Objector (international sports federations and organization) enjoys a high level of public recognition in its field and has existed for decades. Further, since it was established in 1947, it has succeeded in increasing the number of its members, rather than becoming smaller or less representative.

104. Further, regarding the “*number of... entities that make up the community*”, an aspect that the ICANN Guidebook highlights as relevant, the Appointed Expert notes that Objector is comprised of 91 well-known international sports federations and 16 organizations related to sports. If SportAccord had not obtained a high level of recognition in the sport field since it had been established, some of the well-known federations included in such association would not have remained part of it.

105. In any event, the Appointed Expert understands that this is not a case in which a single sport association or organization claims for the priority use of the “.sport” gTLD –irrespective of other federations or organization which could claim for the same right or interest–, but the whole community of sports federations and organization (or, at least, the most part of it) represented by Objector.

106. Finally, the Appointed Expert cannot accept Applicant’s argument that the Sport Community is not organized when Objector has proved that it has its own mechanism of participation, programs and organization through its statutes and government bodies. The fact that the media (which may constitute a different community) or viewers are unable to be part of this association is irrelevant to consider Objector as a delineated community. Otherwise, no community could be

³⁷ According to the British English Dictionary, the word “community” has three different meanings “1) the people living in one particular area or people who are considered as a unit because of their common interests, social group, or nationality, 2) a group of animals or plants that live or grow together, 3) the general public”. See British English Dictionary, Cambridge Ed., 2013.

recognized under the ICANN gTLD proceedings since it would be easy for any Applicant to find secondary or not closed-related members outside of it.

107. The “Sport Community”, in the Appointed Expert’s view, is a community that clearly distinguishes itself from other communities by its characteristics, objectives and values.

108. Therefore, the Appointed Expert concludes that the Sport Community is clearly delineated for the purpose of these proceedings and, consequently, Applicant’s objections in this respect must also fail.

C. The “Substantial Opposition” to the Application

(3) *Is there a substantial opposition to the application for the “.sport” gTLD on behalf of a significant part of the Sport Community?*

109. Having decided that the Sport Community is clearly delineated, the Appointed Expert now turns to determine whether there is a substantial opposition of a significant part of the Sport Community.

(i) *Positions of the Parties*

110. Objector highlights that it expresses opposition on behalf of the 107 International Federations encompassed in such association, as listed in Appendix A-2 of the Objection. Objector has proffered more than 50 letters of opposition from different federations and also points to other individual oppositions.³⁸

111. SportAccord notes that while many international sport bodies, international sport federations and specialized agencies have already expressed their opposition, there is no evidence, by contrast, of community support in favour of the application “.sport” gTLD made by dot Sport Limited.

112. According to SportAccord, “*the portion of the community expressing opposition through its representative organization is not just significant, but overwhelming*”.³⁹ It also argues that Applicant’s application targets the most visible and highly organized segments of the Sport Community, represented by national and international sport federations.

113. Finally, Objector elaborates on the argument that although individual practitioners of the Sport Community (who do not need organization to practise sports) have not made opposition to the application, it is natural that the organized segment of such Community reacts and raises objections on behalf of their stakeholders.

114. In turn, Applicant claims that SportAccord has failed to prove “substantial

³⁸ See: Objection, page 9.

³⁹ See: Objection, page 10.

opposition” to the application, since Objector represents a subset of the alleged community and does not represent the interests, goals, or values of numerous stakeholders in the alleged community (for instance, sports excluded from membership and the other stakeholders not represented by Objector).⁴⁰

115. Applicant insists on the “relative” low number of oppositions compared with the composition of the alleged community. In Applicant’s own words, “*expressions of opposition from Objector are small compared to the large composition of the alleged ‘sport’ community*”.⁴¹

116. Further, dot Sport Limited also claims that Objector did not provide examples of support from members of the alleged community that do not comprise its membership. Based on this argument, Applicant states that Objector does not encompass all sport activities by any means.

117. Applicant also alleges that Objector organized a campaign among its members to support its Objection by using a standard template letter that requires no thought or effort to sign it.⁴² Notwithstanding so, Applicant notes that only half of SportAccord’s members have actually shown support to the Objection. Further, Applicant states that Objector has offered no proof that its membership as a whole signed on to the opposition.

118. Regarding the counter-argument related to individual sport practitioners (not organized) advanced by Objector, dot Sport Limited answers that such assertion “*totally ignores the fact that the sports industry includes a great number of professional organisations such as media outlets, who could easily have objected*” but did not do so.⁴³

(ii) *Considerations of the Appointed Expert*

119. The Appointed Expert has to decide whether there is a substantial opposition to the application for the “.sport” gTLD on behalf of a significant part of the Sport Community.

120. To this end, the Appointed Expert will focus on Article 3.5.4 of the ICANN Guidebook, which establishes the standards to be analysed in order to make a determination on this issue.⁴⁴

⁴⁰ See: Response, page 8. Moreover, dot Sport Limited states that, according to the sports survey undertaken by itself, the vast majority of the public are not even aware of the existence of SportAccord.

⁴¹ See: Response, page 8.

⁴² See: Response, page 9.

⁴³ See: Response, page 9.

⁴⁴ According to such provision, “*a panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: (i) number of expressions of opposition relative to the composition of the community; (ii) representative nature of entities expressing opposition; (iii) level of recognized stature or weight among sources of opposition; (iv) distribution or diversity among sources of expressions of opposition, including: (a) regional (b) subsectors of community, (c) the leadership of community, (d) membership of community; (v) historical defense of the*

121. In order to determine the appropriate standard to evaluate the Objection, it should be noted that Article 3.5.4 of the ICANN Guidebook does not require that the “entire” community expresses its opposition. Rather, it requires that Objector proves a “substantial” opposition within the community it has identified itself as representing.

122. Therefore, the Appointed Expert is of the view that the argument on the “relative low number” of oppositions compared to the composition of the Sport Community, as put forward by Applicant, should be balanced with the relevance and representative nature of each opposition within the community. For instance, in the present case, the opposition made by an individual rugby player or fan will not have the same weight in order to determine if an objection represents substantial opposition as the one made by the International Rugby Board.⁴⁵

123. In this respect, the Appointed Expert is satisfied with the evidence produced by Objector, which includes 55 letters of opposition submitted by different recognized sport federations,⁴⁶ together with other statements from different reputable sport organizations and specialized agencies, such as the International Olympic Committee (IOC), the World Anti-Doping Agency (WADA) or the United Nations Office on Sport for Development and Peace (UNOSDP).⁴⁷

124. Aside from this, the Appointed Expert notes that Objector represents all its members in these proceedings. Indeed, in accordance with its internal organization, the fact that SportAccord’s Executive Council has decided to object to dot Sport Limited’s application implies that all members of the association are deemed to have agreed to such decision to object.⁴⁸

125. Therefore, to require individual letters from all SportAccord’s members –as Applicant has suggested– is simply redundant. The fact that other sport federations represented by Objector did not explicitly object to dot Sport Limited application should not be seen, in the Appointed Expert’s view, as an opposition to SportAccord’s claim.

126. Consequently, based on the representative nature of the Objector for the Sport Community, the relevance of the entities which have expressed their opposition (either individually or through the Objector) and the global recognition of the entities which are represented by Objector in these proceedings, the Appointed Expert concludes that there is a substantial opposition to the application “.sport” gTLD on behalf of a significant part of the Sport Community as established in Article 3.5.4 of the ICANN Guidebook.

community in other contexts; and (vi) costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition”.

⁴⁵ See: Objection, Appendix A-3, tab 34.

⁴⁶ See: Objection, Appendix A-2.

⁴⁷ See: Objection, Appendix A-3.

⁴⁸ SportAccord’s Statutes, Article 33.3 “...the Council represents and commits SportAccord with regard to third parties”. See Exhibit Ap-1.

D. Targeting

(4) *Is the Sport Community explicitly or implicitly targeted by the application “.sport” gTLD?*

127. The next issue to be decided by the Appointed Expert is whether the Sport Community has been explicitly or implicitly targeted by the application for the “.sport” gTLD made by Applicant.

(i) *Positions of the Parties*

128. Due to the fact that word “sport” is almost exclusively associated with organized sport, sport for leisure and sport for health, Objector states that the Sport Community is “*explicitly*” targeted by the application for the “.sport” gTLD. In any event, SportAccord also argues that the “.sport” gTLD string “*implicitly*” targets the Sport Community.

129. Therefore, Objector concludes that the criterion of “*strong association*” between the Sport Community and the gTLD string “.sport” is, in its view, completely satisfied.⁴⁹

130. Conversely, Applicant alleges that Objector failed to prove a “*strong association*” between the applied-for gTLD string and the alleged community since SportAccord does not represent the community as a whole. According to dot Sport Limited, “*whereas Applicant’s use of the TLD would target the entire sports industry, Objector plans to restrict the TLD at launch to persons of their choosing, beginning with Federations and other governing sports bodies, before later opening up the TLD to persons of its choosing outside the restricted definitions, using vague and unspecified post validation procedures and unspecified eligibility requirements*”.⁵⁰

131. Applicant considers that it has a broader target than the alleged Sport Community, and the “*strong association*” alleged by Objector is purely ancillary or derivative.

(ii) *Considerations of the Appointed Expert*

132. It is for the Appointed Expert to decide whether the Sport Community is explicitly or implicitly targeted by the application for the “.sport” gTLD.

133. Pursuant to Article 3.5.4 of the ICANN Guidebook, “*the objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: (i) Statements contained in application; (ii) other*

⁴⁹ See: Objection, page 10.

⁵⁰ See: Response, page 10.

public statements by the applicant; (iii) associations by the public”.

134. In the Appointed Expert’s opinion, since the community represented by Objector is the “Sport Community”, it is evident that the application for “.sport” gTLD made by Applicant explicitly targets such community.

135. Having recognized that the Sport Community is clearly delineated, it cannot be denied that there is a strong (or even identical) association between the applied-for gTLD string “.sport” and the community represented by Objector.

136. Therefore, the Appointed Expert concludes that the Sport Community has been explicitly targeted by the “.sport” gTLD.

E. Detriment

(5) *Is there any material detriment to the rights or legitimate interests of the Sport Community if the application for the “.sport” gTLD is allowed to proceed?*

137. Finally, the Appointed Expert has to address the issue of whether the application for the “.sport” gTLD causes any material detriment to the rights or legitimate interests of the Sport Community.

(i) *Positions of the Parties*

138. Objector states that the “.sport” gTLD application made by dot Sport Limited lacks accountability to the Sport Community. Regarding the detriment that such application may generate, SportAccord points to ambush marketing, cybersquatting, typo-squatting, brand-jacking, misuse of sport themes for pornography, the systematic exacerbation of naming conflicts and the massive utilization of name-defensive registrations, giving examples on how each situation (in any given scenario) may affect the rights or legitimate interests of the Sport Community.⁵¹

139. In its Objection, SportAccord describes other possible detriments, such as the false sense of official sanction that consumers may have if an unaccountable registry operator manages such domain.⁵²

140. Further, according to Objector, *“Under the United States Department of Commerce’s agreement with ICANN, the Affirmation of Commitments, ICANN must demonstrate that the new gTLD program contributes, in part, to consumer trust. Delegating “.sport” to an unaccountable registry operator, which lends a false sense of official sanction to the .sport domain name space, would inevitably erode consumer trust by misleading individuals through unofficial content”.*⁵³

⁵¹ See: Objection, page 11.

⁵² See: Objection, page 13. SportAccord says that, for example, “Rugby.Sport” domain will lead internet users to believe that the International Rugby Board sanctions such a website.

⁵³ See: Objection, page 13.

141. Objector also notes that if the “.sport” gTLD application is allowed to proceed, the Sport Community would suffer a loss in its image and prestige by the misappropriated use of community-specific keywords. *“The very reason why there is a community-based objection (as opposed to a rights infringement objection) is the fact that keywords targeting a sub-community are a commons and that each member of the sub-community has the right to expect that community institutions ensure the responsible management of those keywords.”*⁵⁴

142. According to Objector, while in many cases there is no concept of individual ownership in terms of intellectual property, each community has a natural concept of collective ownership of keywords essential to it or to its sub-communities. Based on this argument, SportAccord considers that the uncontrolled or unaccountable operation of the “.sport” registry would constitute the *“tragedy of the commons”*, a material detriment which cannot be measured in monetary units.

143. Objector expands on the disruption of Sport Community efforts and achievements. It provides examples of the loss of credibility of community-based governance models and states that community-based communication policies for anti-doping, anti-drug, anti-racism, ticket scalping, illegal or undesirable gambling, etc., will be disrupted if key domain names related to them are used without adherence to those policies. This can only be avoided, in Objector’s view, if the gTLD registry is directly accountable to the Sport Community.⁵⁵

144. Further, SportAccord focuses on the actual and certain damages that the Sport Community would suffer in case the “.sport” gTLD is operated by a registry without appropriate community-based accountability. In Objector’s view, not only would this situation generate an economic damage, but also a detriment of the reputation, the values and the governance of the Sport Community as a whole.⁵⁶

145. Finally, Objector points to the loss of benefits for not operating the “.sport” TLD by the Sport Community itself, the loss of opportunity to create a community-based organizational tool and, most important, the irreversible damage caused by the forfeiture of the opportunity for the Sport Community to build the right image through the operation of the gTLD.⁵⁷

146. Applicant contends that, in fact, Objector failed to prove a likelihood of material detriment to the rights or legitimate interests of the alleged community. In its opinion, Objector speculates that the alleged detriments would befall the alleged Sport Community should the gTLD be delegated to Applicant, but *“most of the alleged detriments are detriments inherent in the nature of the Internet and not attributable to Applicant’s plans for operating the gTLD.”*⁵⁸

⁵⁴ See: Objection, page 14.

⁵⁵ See: Objection, page 15.

⁵⁶ See: Objection, page 17.

⁵⁷ See: Objection, page 18.

⁵⁸ See: Response, page 11.

147. Applicant claims that it has taken measures to address the detriments inherent in the nature of the Internet. *“Thus, Objector’s alleged detriment seems to purely stem from the fact that Applicant would be delegated the gTLD instead of Objector”*.⁵⁹

148. Further, it is dot Sport Limited’s position that Objector proves no kind or amount of damage to the reputation of the Sport Community that would result from Applicant’s operation of the applied-for gTLD string. In Applicant’s words, *“Consumer trust will be a core operating principle: abusive registrations and abuse of the gTLD will result in rapid sanctions”*.⁶⁰

149. In addition, dot Sport Limited accuses Objector of not offering evidence (i) that Applicant is not acting or does not intend to act in accordance with the interests of the Sport Community or of users more widely; (ii) that Applicant’s operation of the “.sport” gTLD string will interfere with the core activities of the alleged community; and (iii) much less that the Objector’s core activities depend on the domain name system.⁶¹

150. Applicant also states that the alleged economic damage to the Sport Community has not been proved by Objector. In any case, abusive behaviour or Objector’s speculative detriments, if they occur, may be easily corrected or penalized. In addition, dot Sport Limited criticizes some evidence advanced by Objector which, in its view, does not show any actual damage to the alleged Sport Community.⁶²

151. To conclude, it is Applicant’s position that the Objector’s alleged damages are hypothetical and would not result from Applicant’s operation of the applied-for gTLD string.⁶³

(ii) *Considerations of the Appointed Expert*

152. The Appointed Expert has to decide on the likelihood of material detriment to the rights or legitimate interests of the Sport Community in the event that the application process ends with the adjudication of the string (“.sport”) to Applicant.

153. The Appointed Expert first notes that, in accordance with Article 3.5.4 of the ICANN Guidebook, *“the objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant por-*

⁵⁹ See: Response, page 11.

⁶⁰ See: Response, page 11. Applicant further believes that there are benefits to rights and legitimate interests of the sports industry created by operation of a free and open TLD by a commercial entity. *“Given that there is no special regulated definition of the word “sport” or any restriction on the use of the word worldwide, combined with the fact that consumers understand that a domain name registration in a particular gTLD does not confer or even define special status for the holder worldwide and for every purpose, there will not be any loss of trust in the sports industry...”*

⁶¹ See: Response, page 12.

⁶² See: Response, page 13.

⁶³ See: Response, page 13.

tion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment”.

154. Such Article also provides the factors that could be used by an expert panel in making this determination. These elements include, but are not limited to, “(i) *nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; (ii) evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; (iii) interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string; (iv) dependence of the community represented by the objector on the DNS for its core activities; (v) nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string; and (vi) level of certainty that alleged detrimental outcomes would occur*”.⁶⁴

155. First, the Appointed Expert finds that the ICANN Guidebook does not call for “actual damage” for an objection to be accepted. It establishes a lower bar, namely a “*likelihood of material detriment*”, logical consequence of the impossibility of assessing any damage when the Applicant has yet to start operating the gTLD string.

156. Therefore, the standard that the Appointed Expert should apply to this issue is the “chance” that detriment will occur, which differs from the standard of “actual damage” invariably applied in litigation or arbitration. In other words, the standard of a “*likelihood of material detriment*” is, in the Appointed Expert’s opinion, equivalent to future “possible” damage.

157. In this regard, the Appointed Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical, such as the risk of cybersquatting, ambush marketing or the misuse of sport themes for purposes foreign to sport values.

158. Notwithstanding so, the Appointed Expert is of the opinion that Objector has proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts.

159. Further, the Appointed Expert shares Objector’s argument that all domain registrations in a community-based “.sport” gTLD will assure sports acceptable use policies. On the other hand, this cannot be warranted by Applicant in the same way in the event that the application for the “.sport” gTLD is approved by

⁶⁴ Article 3.5.4 of ICANN Guidebook.

ICANN.

160. Regarding the economic damage that SportAccord may suffer, the Appointed Expert is of the view that although the figures and calculations on negative externalities provided by Objector may have been exaggerated,⁶⁵ the risk of economic damages which would be inflicted to Objector due to the operation of the gTLD by an unaccountable registry shows a reasonable level of certainty and could not be avoided if the application is allowed to proceed.

161. Therefore, the Appointed Expert is not in a position to accept Applicant's argument that Objector's alleged detriment only relies on the fact that Applicant would be delegated the ".sport" gTLD instead of Objector.

162. Finally, even though SportAccord has not proved that dot Sport Limited will not act (or will not intend to act) in accordance with the interests of the Sport Community, the Appointed Expert considers that this is only one factor, among others, that may be taken into account in making this determination. Conversely, the Appointed Expert sees a strong dependence of the Sport Community on such domain name.

163. For these reasons, the Appointed Expert concludes that there is a strong likelihood of material detriment to the rights or legitimate interests of the Sport Community if the application ".sport" gTLD is allowed to proceed.

VII. Decision

164. Having read all the submissions and evidence provided by the Parties, for the reasons set out above and in accordance with Article 21(d) of the Rules of Procedure, I hereby render the following Expert Determination:

- I. The "Community Objection" which has been put forward by SportAccord in these proceedings is successful.
- II. Objector SportAccord prevails.
- III. The ICC Centre will refund SportAccord the advance payment of costs it made in connection with these proceedings.

Date: October 23, 2013

Signature: 

Prof. Dr. Guido Santiago Tawil
Expert

⁶⁵ See: Objection, Appendix A-13.