

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

CASE No. EXP/409/ICANN/26

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

AFILIAS LIMITED

(IRELAND)

This document is a copy of 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.

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# EXPERT DETERMINATION IN

## EXP/409/ICANN/26

### INTRODUCTION

1. This expert determination arises out of a Limited Public Interest Objection by Professor Alain Pellet, Independent Objector (“Objector”), to the application of Afilias Limited (“Applicant”) for the generic top level domain (gTLD) “.health” (Application No. 1-868-3442).

2. Objector’s address is:

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6. The members of the Expert Panel in this case are:

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7. The principal procedural steps in this proceeding are as follows:
- (a) The Objector filed his Limited Public Interest Objection on March 12, 2013.
  - (b) The Applicant filed its Response on May 14, 2013.
  - (c) The Expert Panel was appointed on June 12, 2013.
  - (d) The Centre confirmed the full constitution of the Expert Panel and accordingly transferred the file to the Expert Panel on July 31, 2013.
  - (e) The Expert Panel undertook the “Quick Look Procedure,” as described in Article 3.2.2.3 of Module 3 of ICANN’s gTLD Applicant Guidebook, concluding unanimously that the Objection was not “manifestly unfounded and/or an abuse of the right to object.”
  - (f) On August 2, 2013, the Objector requested permission to file an additional statement in support of the Objection. On the same day, the Expert Panel granted that request, allowing the Objector until the close of business on Wednesday, August 7, to submit such additional statement, on condition (1) that the statement not exceed 2500 words or 10 pages, whichever is less, and (2) that the statement not address issues already addressed by both parties, but rather limit itself to those issues that arose from the Applicant’s Response. Anticipating that the Applicant might seek likewise to submit an additional statement, the Expert Panel also ruled that, if the Objector does file an additional statement and the Applicant wishes to respond to it, the Applicant may do so, on condition (1) that the statement not exceed 2500 words or 10 pages, whichever is less, and (2) that the statement not address issues already addressed by both parties, but rather limit itself to those issues that the Objector had identified as new issues, and had addressed as such in its additional statement.

- (g) On August 4, the Objector's representative, Phon van den Biesen, requested that the Objector be given until the close of business on Monday, August 12 to submit its additional statement. On August 4, the chair of the Expert Panel, on behalf of the Expert Panel, granted the requested extension, subject to the same two conditions that the Expert Panel had previously imposed. The chair, again on behalf of the Expert Panel, informed the Applicant that if the Objector does file an additional statement and the Applicant wishes to respond to it, the Applicant may do so by the close of business on Monday, August 19, subject to the same two conditions that the Expert Panel had previously imposed.
- (h) On August 12, 2013, the Objector filed with the Expert Panel an additional written statement.
- (i) On August 19, 2013, Applicant's Representative filed with the Expert Panel a written Response to the Objector's additional written statement.
- (j) The Parties did not request that a hearing be held, and none was held.
- (k) This Expert Determination is rendered within the 45-day time limit in accordance with Article 21(a) of the Procedure.

8. This proceeding is conducted subject to :

Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure")

Rules for Expertise of the ICC ("Rules")

Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure ("Appendix III")

ICC Practice Note on the Administration of Cases ("ICC Practice Note").

9. Pursuant to Article 5(a) of the Procedure, the language of all submissions and proceedings in this case is English.

10. All communications by the Parties, the Expert Panel and the Centre were submitted electronically, in accordance with Article 6(a) of the Procedure.

11. Abbreviations Used in this Expert Determination are:

“Objector’s Additional Statement”	Additional Written Statement filed by the Independent Objector
“Appendix III”	Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure
“Applicant”	Afilias Limited
“Applicant’s Additional Statement”	The Applicant’s Response to the Objector’s Additional Statement
“Center”	ICC International Centre for Expertise
“GAC”	ICANN Governmental Advisory Committee
“gTLD”	New Generic Top-Level Domain Name
“Guidebook”	Module 3 of the gTLD Applicant Guidebook
“ICANN”	Internet Corporation for Assigned Names and Numbers
“ICC”	International Chamber of Commerce
“ICC Practice Note”	ICC Practice Note on the Administration of Cases
“IGO”	Intergovernmental Organization
“IO”	Independent Objector
“NGO”	Non-Governmental Organization
“Objection”	Objection Form Completed by the Objector
“Objector”	Professor Alain Pellet, the Independent Objector
“Procedure”	Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure
“Response”	Response Form completed by the Applicant
“Response Annex”	Annex to Response Form completed by the Applicant



“Rules”	Rules for Expertise of the ICC
“Standards Memorandum”	Standards Memorandum for Morality and Public Order Research
“U.N.”	United Nations
“WHO”	World Health Organization

## **STANDARDS APPLICABLE TO LIMITED PUBLIC INTEREST OBJECTIONS**

12. In order for a Limited Public Interest Objection to be successful, the Objector must establish that the gTLD applied for is “contrary to general principles of international law for morality and public order” (Guidebook, art. 3.5.3).
  
13. According to the Guidebook, the grounds upon which a gTLD string applied for may be considered as “contrary to general principles of international law for morality and public order” are:
  - (i) incitement to or promotion of violent lawless action;
  - (ii) incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin (or similar types of discrimination that violate generally accepted legal norms recognized under principles of international law);
  - (iii) incitement to or promotion of child pornography or other sexual abuse of children; and
  - (iv) a determination that the string applied for would be contrary to specific principles of international law as reflected in relevant international legal instruments.
  
14. Further, according to the Guidebook, the “general principles of international law for morality and public order” referred to must be found in international instruments, including but not limited to:
  - (i) the Universal Declaration of Human Rights (UDHR)
  - (ii) the International Covenant on Civil and Political Rights (ICCPR)
  - (iii) the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- (iv) the International Convention on the Elimination of All Forms of Racial Discrimination
  - (v) the Declaration on the Elimination of Violence against Women
  - (vi) the International Covenant on Economic, Social, and Cultural Rights
  - (vii) the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
  - (viii) the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
  - (ix) the Slavery Convention
  - (x) the Convention on the Prevention and Punishment of the Crime of Genocide
  - (xi) the Convention on the Rights of the Child.
15. In making its determination, an expert panel may consider not only the applied for string itself, but also the intended purpose of the gTLD as set forth in the application.
16. The Objector in this case is an Independent Objector (“IO”). Under Article 3.2.5 of the Guidebook, an IO is exempt from satisfying the usual standing requirements for raising objections, but must act in the best interests of the public who use the global Internet, and must initiate and prosecute the objection in the public interest.
17. As stated in the Objection, and apparently quoting from the Application, the Applicant’s intention in applying for the gTLD in question is “to provide a namespace focused on wellness, fitness, and general physical and mental well-being,” and “to brand ‘.Health’ as a namespace for general wellness information and provide ICANN-accredited registrars the tools to successfully promote ‘.Health’ domains.” Thus, “.Health’ will serve both those delivering health services and those seeking formal and informal information” (Objection, para. 2).

## **SUMMARY OF THE OBJECTION**

18. The Objector contends that the string applied for in this case would be contrary to specific principles of international law as reflected in relevant international instruments of law (Objection, para. 6).

19. By way of background, the Objector underscores that “health” is not just another commodity, but rather “a crucial, existential need for each and every human being.” According to the Objector, health has been recognized as a fundamental human right in various international instruments, including the Universal Declaration of Human Rights adopted by the United Nations (U.N.) General Assembly and, most notably, the International Covenant on Economic, Social and Cultural Rights (article 12 of which provides that the “States Parties to the ... Convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health) and the constitution of the World Health Organization (“WHO”) (Objection, paras. 12, 15).
20. The Objector invokes in particular a General Comment by the Committee on Economic, Social and Cultural Rights of the U.N. emphasizing the specific importance to health of the availability of, and accessibility to, information and ideas concerning health – a principle reinforced by the case law of regional human rights courts such as the European Court of Human Rights (Objection, paras. 17-19). He also underscores the affirmative obligation of States under international law instruments to ensure such availability and access (Objection, para. 20) – an obligation that international law also imposes on private actors, including notably business organizations (Objection, para. 25).
21. The Objector reports that various non-governmental organization had submitted public comments with respect to this and other applications for the “.health” gTLD, expressing concern about the reliability and trustworthiness of a “.health” gTLD that is run by a private enterprise (Objection, para. 23), and that the Governments of Mali and France had expressed similar concerns (Objection, paras. 3, 24). The Objector further reports that the WHO in a letter to ICANN of April 11, 2012 requested ICANN to postpone decisions on “.health” applications in order to allow for consultations with the global health community which might lead to a satisfactory structure of a “.health” gTLD (Objection, para. 34).
22. Turning to the gTLD application, the Objector suggests that launching a “.health” gTLD without giving due consideration to the fundamental rights and obligations at

stake, and without including mechanisms strengthening those rights and obligations, would impair the right to health.

23. More specifically, the Objector contends that the Applicant has failed to demonstrate awareness of its duty to ensure that the gTLD is organized and managed in such a way as to promote health (including access to reliable health information) as a fundamental right and to collaborate with public authorities in carrying out their own affirmative obligations with regard to the right to health.
24. The Objector notes that, despite health's status as a fundamental right, the Applicant's request for the ".health" gTLD is framed largely in terms that are identical to those that Applicant used in applying for gTLDs relating to "pets," "wine," and "casinos" (Objection, para. 30). The Objector points out in this regard that the application provides for no operating rules, policies or protective measures beyond those that the Applicant practices for the 16 gTLDs for which it currently serves as registry operator or beyond those proposed for the other gTLDs for which it is now applying (Objection, para. 31). According to the Objector, the Applicant, in responding to the Objector's preliminary assessment of the application, showed no recognition that managing a ".health" gTLD is any different from managing other gTLDs on account of the public interest in health or of the State's affirmative obligations in regard to it.
25. The Objector acknowledges that the Applicant made certain "public interest commitments" on March 6, 2013 that substantially modify its proposed mode of operation of the gTLD, but insists that those modifications "do not remedy the concerns set out in [the] Objection" (Objection, para. 32).
26. By way of remedy, the Objector seeks a declaration by the Expert Panel upholding the Objection or, in the alternative, a declaration by the Expert Panel that grant of the application should be made conditional on the Applicant's providing solutions to the concerns raised (Objection, para. 34).

#### **SUMMARY OF THE APPLICANT'S RESPONSE TO THE OBJECTION**

27. Responding to the Objection, the Applicant initially remarks that, in order for an Objection to prevail, the gTLD that is applied for must itself be contrary to accepted

legal norms of morality and public order recognized under principles of international law. It then observes that the term “health” is not a term that is contrary to such norms, and that the Objection must therefore fail. (Response, p. 5).

28. The Applicant cites an explanatory memorandum entitled “Standards for Morality and Public Order Research” (“Standards Memorandum”) published by ICANN that identifies three categories of standards for purposes of the limited public interest objection: (1) standards or principles that are widely if not universally accepted, (2) standards that apply across various jurisdictions in every region of the world, and (3) standards that have not been included for upholding objections because they are only accepted in a limited number of countries or are applied in substantially different ways (Response, p. 7). The Applicant maintains that the standards contained in categories (1) (e.g., sexual exploitation and sexual abuse) and (2) (e.g., incitement to or promotion of violent lawless action”) are entirely contrary to what is generally understood as “health.”
29. According to the Applicant, among the reasons why ICANN has excluded certain standards (e.g., sedition and subversive propaganda, libel, or antitrust law) from qualifying as “norms relating to morality and public order recognized under general principles of international law” is that the relevant standards vary substantially among countries (Response, p. 8). The Applicant would place health in this same category due to “the diversity and disparity of the different national laws, regulations, systems and criteria for being recognized as a ‘health’ product, a ‘health’ service, or an individual to be qualified to practice in the ‘health’ care sector.” The Applicant concludes that no internationally recognized principles and standards exist in relation to the use of the word “health.”
30. The Applicant acknowledges its “duty and stewardship role” in managing the “.health” gTLD and its obligation to perform that management in a “responsible, safe and secure manner.” It describes the Objection as based upon speculation as to how a gTLD might possibly be abused, and rejects that line of argument on the ground that (1) any gTLD is susceptible of abuse, (2) ICANN has set up processes and procedures that provide adequate safeguards, and (3) assessments about how a gTLD, once granted, will be managed are not relevant to the determination of an Objection

(Response, pp. 9, 11). In the Applicant's view, "[i]t is not the Panel's task to determine how an applicant for a new gTLD should conduct its business" (Response, p. 11).

31. The Applicant claims to have already voluntarily committed to implementing additional safeguards through the "Public Interest Commitment Specification" that it submitted prior to the Objector's filing its Objection. According to the Applicant, its Public Interest Commitment Specification demonstrates awareness of its obligation to ensure that the gTLD is properly set up and managed (Response, p. 11). Thus, the Applicant established (a) detailed eligibility requirements for the registration of a domain name under the ".health" gTLD, and (b) an "Acceptable Use Policy" that permits the Applicant to deny or cancel registration of any registered name that is used in a manner that violates the "'.health' Acceptable Use Policy" reflecting national and international standards. The Applicant emphasizes that a Public Interest Commitment Specification is enforceable under ICANN's Public Interest Commitment Dispute Resolution Policy. Other commitments cited by the Applicant include creation of a ".health non-compliance hotline," enabling public authorities to contact the Applicant to report non-compliance with the ".health" gTLD's eligibility and acceptable use policies and requiring the Applicant to initiate an investigation within 24 hours" (Response, p. 12).
32. The Applicant also professes commitment to putting additional processes and procedures in place after consultation with the ICANN Board (Response, p. 9), including channels of communication with national authorities and international organizations to ensure that the ".health" gTLD performs in accordance with applicable rules (Response, p. 12).
33. According to the Applicant, ICANN's Governmental Advisory Committee (GAC) issued only "Safeguard Advice" in relation to the ".health" gTLD, a move that, in the Applicant's view, signifies that the Committee had no major concerns in relation to this gTLD. The Applicant underscores that the Committee did not, as in other cases, recommend to the ICANN Board that it reject the application (Response, p. 10).
34. The Applicant asserts that its various commitments constitute compliance with the recommendation made by the GAC that gTLDs like ".health" should be "operated in a

way that is consistent with applicable laws,” and more specifically should be equipped with a series of specific safeguards (Response, p. 12).<sup>1</sup>

## **THE OBJECTOR’S ADDITIONAL WRITTEN STATEMENT**

35. In his additional written statement, filed August 12, 2013, the Objector records his dissatisfaction with the assurances given by the Applicant in its Response, both because he finds those assurances inadequate and because he views the Response as failing to appreciate the status of health as a human right and the obligations incumbent on States and the private sector in protecting that right (Objector’s Additional Statement, para. 1).
36. The Objector stresses that he does not direct his Objection to the use as such of the word “health,” but rather to the negative impact the new gTLD applied for would have on that value. The Objector stresses that he also did not direct his Objection to the string as such, but to other matters such as the “proposed safeguards, proposed management, etc.” of the proposed gTLD (Objector’s Additional Statement, paras. 3, 4). The Objector also disputes that the standards that the Objector invoked are among those that ICANN had excluded from consideration (Objector’s Additional Statement, paras. 5-9).
37. The Objector underscores that both national and international authorities are under an obligation to protect the health of individuals, and cites the Applicant’s failure to make mention of such health-related international organizations as the WHO (Objector’s Additional Statement, para. 10).
38. The Objector insists that the fact that the GAC does not specifically oppose ICANN’s consideration of “.health” applications does not lessen the fact that the GAC has

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<sup>1</sup>The safeguards called for by the GAC are that registry operators (1) include in their acceptable use policies a requirement that registrants comply with all applicable laws, (2) see to it that registrants are notified upon registration of this requirement, (3) require registrants who collect and maintain sensitive health and financial data implement reasonable and appropriate security measures, (4) establish a working relationship with relevant regulatory or industry self-regulatory bodies, in particular in combating fraud and other illegal activities, and (5) require registrants to provide a single point of contact for notification on a current basis of complaints and reports of abuse, as well as for communication with the relevant regulatory and industry self-regulatory bodies (Response, pp. 12-13).

expressed concerns over use of such a string – concerns that had led the Objector to file his Objection in the first place (Objector’s Additional Statement, para. 12).

39. The Objector asserts that the Applicant’s Response to the GAC’s Safeguard Advice is a “superficial” one (Objector’s Additional Statement, para. 13). While acknowledging that the Applicant has moved away from its original position that the gTLD would be subject to no content or use restrictions (Objector’s Additional Statement, paras. 2, 15), the Objector continues to find that the Applicant fails to appreciate the fundamental nature of the right to health or the legal obligations of national and international authorities to protect that right.
40. As to the anti-abuse measures and safeguard mechanisms that the Applicant intends to put into place, the Objector asserts that the Applicant’s Public Interest Commitment Specification does not explain how the Applicant would appropriately interact with national and international public authorities in operating the “.health” domain.
41. Finally, the Objector cites the Resolution issued by the Sixty-sixth World Health Assembly on May 27, 2013, dealing with “eHealth standardization and interoperability” (reproduced as an annex to the Objector’s Additional Statement), to the effect that all health-related top-level domain names making reference to health should be operated in such a way as to protect public health and support global public health objectives (Additional Statement, para. 16).

## **THE APPLICANT’S RESPONSE TO THE OBJECTOR’S ADDITIONAL WRITTEN STATEMENT**

42. In Applicant’s Additional Statement, filed in response to Objector’s Additional Statement, the Applicant acknowledges that health is a fundamental human right that both States and the private sector are bound to protect (Applicant’s Additional Statement, p. 4).
43. The Applicant asserts, however, that a gTLD application may be denied only on the basis of an objection that is directed against a string, that is, against the “top-level name,” and that the Expert Panel should refrain from taking into account “the



possibility of someone registering a domain name in a TLD that can be used by the registrant contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Applicant’s Additional Statement, pp. 5- 6). In this context, the Applicant refers to certain recent Expert Determinations relating to Existing Legal Rights Objections (annexed to Applicant’s Additional Statement),<sup>2</sup> in which expert panels declined to consider the risk that third parties might seek to register domain names likely to create confusion with Complainant’s trademark.

44. Thus, the Applicant insists that, in acting upon applications, ICANN does not consider “the actual selection, registration and use of the domain name (Applicant’s Additional Statement, p. 6). It asserts that the mere possibility that the use of a domain name might be contrary to the relevant international standards is not a reason for disapproving the application for a gTLD (Applicant’s Additional Statement, p. 7).
45. In any event, the Applicant insists that its application is in compliance with the GAC’s Safeguard Advice and is responsive to requests for safeguards made both by ICANN and by certain governments in connection with operation of the “.health” gTLD.
46. According to the Applicant, the safeguards and restrictions that the Applicant has already put in place for a wide variety of gTLDs under its management demonstrate the Applicant’s sensitivity to the issues surrounding domain name registration and use (Applicant’s Additional Statement, p. 7). The Applicant reaffirms its commitment to implement any requirements, policies and safeguards imposed by ICANN and to take any steps necessary to avoid abuse (Applicant’s Additional Statement, p. 8).

## **THE “QUICK LOOK” PROCEDURE**

47. As noted in paragraph 7(e), *supra*, the Expert Panel performed the “Quick Look Procedure,” as described in Article 3.2.2.3 of the Guidebook, concluding unanimously

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<sup>2</sup> *I-REGISTRY Ltd v. Vipspace Enterprises LLC*, Case No. LRO2013-0014, July 4, 2013); *Express, LLC v. Sea Sunset, LLC*, Case No. LRO2013-0022 (July 9, 2013); *Blue Cross and Blue Shield Association v. Afiliast Limited*, Case No. LRO2013-0004 (Aug. 16, 2013).

that the Objection was not “manifestly unfounded and/or an abuse of the right to object.”

## **FINDINGS OF THE EXPERT PANEL**

48. Based on the Objection and the Response, the additional statements submitted by the parties, and the various annexes to these submissions, the Expert Panel makes the findings that follow.
49. A premise of the Objection in the present case is that health is a fundamental human right and that, under various relevant international legal instruments (such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Economic Commission for Europe (“UNECE”) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), protection of that right has become an international legal obligation of the State as well as the private sector. The Expert Panel does not understand the Applicant to contest these propositions, and it accepts them. There can be no dispute that, as the Objector asserts, health is not just another commodity, but rather “a crucial, existential need for each and every human being,” and that this is recognized internationally.
50. The Expert Panel also finds that the right to health protection may reasonably be understood to include a right of access to information concerning human health, as observed by the United Nations Committee on Economic, Social and Cultural Rights and implemented by such regional human rights courts such as the European Court of Human Rights.
51. However, the fundamental question in this case is not whether the right here asserted exists, but whether, as the Objector claims, the string applied for here would be contrary to that right.
52. Before squarely confronting this question, the Expert Panel addresses here two threshold arguments advanced by the Applicant in this case.
53. First, the Applicant asserts that, in order for an Objection to prevail, the gTLD that is applied for – which in this case consists of the term “.health” – must itself be contrary

to accepted legal norms of morality and public order recognized under principles of international law. In the Applicant's view, the Objection, and *a fortiori* the Expert Panel's assessment, should be focused exclusively on the proposed domain name as such, and not on "the way Respondent will be managing the .HEALTH gTLD." Basically, according to the Applicant's line of reasoning, the string ".health" should not be deemed contrary to public order for the simple reason that the word "health" is in no way offensive to Internet users. Accordingly, few strings – perhaps ".Howtotorture," ".Nazism," ".Childpornography," or ".Howtokillyourwife" – would qualify as contrary to public order and morality.

54. Relatedly, according to the Applicant, an Objection should not concern itself with the manner in which a string, once authorized, is actually used. The Applicant contends that focusing on the eventual use or abuse of a string "is outside of the (Independent) Objector's mandate, which is limited to reviewing whether the string *as such* is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law" (Response, p. 11). "[T]he Guidebook does not provide the Objector with the means nor the authority to speculate on how a top-level domain could potentially be abused, and whether or not such abuse would qualify as behavior that is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law" (Response, p. 9).
55. Thus, the Objector and the Applicant differ substantially as to the proper scope of inquiry by an expert panel in a Limited Public Interest Objection. The Expert Panel accordingly deems it necessary to clarify its understanding as to that scope.
56. The Expert Panel finds that the Applicant's position in this regard is mistaken.
57. An expert panel charged with deciding a "Limited Public Interest" objection cannot properly assess the compatibility of a proposed string with public order and morality without taking into account the context of its application, including the likely effects of the operation of the string on the Internet community. Indeed, such an inquiry corresponds precisely to the mandate of such an expert panel. A GAC communiqué of April 11, 2013 issued in Beijing, supplied by the parties, specifically calls, in the case of strings using the term ".health," for safeguards against improper use to be

implemented with respect to issues such as privacy, consumer protection, and regulatory compliance, all of which pertain to the operation, rather than the registration as such, of a gTLD.

58. The Expert Panel is not dissuaded from this view by the Applicant's reliance on the Expert Determinations annexed to its Additional Statements.<sup>3</sup> The objections in those cases were filed within the framework of ICANN's policy of protecting Existing Legal Rights, largely in the trademark law field. In ruling on an Existing Legal Rights Objection, an expert panel assesses whether attribution of the proposed gTLD string would infringe upon the existing legal rights of the objector by taking "unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ('mark') or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector's mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark or IGO name or acronym" (Guidebook, art. 3.5.2, Procedure, art. 8(a)(iii)(bb)). In such cases, it would be beyond the scope of an expert panel's mandate to assess whether the rights of a trademark holder may be impaired by registrants of second level names. In fact, a different kind of procedure is provided within the ICANN system for the settlement of disputes over the alleged infringement of trademark rights by the attribution of second level domains<sup>4</sup>.
59. By contrast, the present Expert Panel has the task of establishing whether attribution of the proposed string would result in a violation of generally accepted legal norms of morality and public order recognized under principles of international law. Such an inquiry requires balancing the interests of the Applicant (as well as of potential registrants of second level names) against broader public interests, including protection of human rights. This in turn cannot be done without giving consideration to the potential effects on the Internet community of the way in which a proposed string is managed. It is not by chance that, under the new gTLD dispute resolution procedures, Limited Public Interest Objections and Existing Legal Rights Objections

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<sup>3</sup> See *supra*, note 2.

<sup>4</sup> ICANN Uniform Domain Name Dispute Resolution Policy, effective Dec. 1, 1999.

are determined by expert panels whose composition differs both in the number of panel members and in their expertise.<sup>5</sup>

60. The Expert Panel is also unimpressed by the Applicant's citation of ICANN's Standards Memorandum in support of the proposition that health must be excluded from the category of "norms relating to morality and public order recognized under general principles of international law," due to the great diversity in health standards across countries. The Applicant's attempt in this context to assimilate health to sedition, libel or antitrust – which the explanatory memorandum cites as examples of matters in which the diversity of standards among countries prevents them from achieving the status of international law norms – is unconvincing. Countries clearly disagree over what amounts to sedition or libel and have widely different policies in the area of antitrust. But there is no basis on which to conclude that countries differ widely over the question of what constitutes health. The fact that some countries achieve higher – indeed much higher – standards than others does not mean that they do not understand health in the same way or that health lacks a near-universal meaning.
61. In conclusion, an expert panel does not look merely at the simple wording of the proposed string, but also at its probable use and operation. Without doing so, an expert panel could not possibly come to any determination as to whether the gTLD that has been applied for would impair interests protected by any fundamental norm of international law – and making such a determination is precisely an expert panel's mandate.
62. Having rejected the threshold propositions advanced by the Applicant, the Expert Panel now confronts the Objector's challenge directly.
63. First, the Objector questions whether, as a general proposition, a ".health" gTLD should be run by a private enterprise – concern to that effect having been voiced by

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<sup>5</sup>In proceedings addressing Existing Legal Rights Objection, "[t]here shall be one Expert or, if all of the Parties so agree, three Experts with relevant experience in intellectual property rights disputes" (Article 13(b)(ii)). Differently, in proceedings involving a Limited Public Interest Objection "[t]here shall be three Experts recognized as eminent jurists of international reputation, one of whom shall be designed as the Chair. The Chair shall be of a nationality different from the nationalities of the Applicant and of the Objector" (Article 13(b)(iii)).

various non-governmental organizations as well as by two countries, France and Mali in particular.

64. Second, according to the Objection, the Applicant has failed to demonstrate awareness of its duty to ensure that the gTLD is organized and managed in such a way as to promote health as a fundamental right. More specifically, the Applicant is claimed to have failed to provide mechanisms that would ensure that due consideration is given to protection of that right.
65. The Expert Panel takes up these arguments in turn, bearing in mind that the Objector bears the burden of proof as to both.
66. As for the abstract proposition that no “.health” gTLD should be run by a private enterprise, the Objector has failed to adduce any evidence to that effect other than the statements by certain NGOs and two countries. Significantly, the WHO, which has unique standing in the field of public health at the international level, has not taken that position. By urging consultation with the global health community before application for a “.health” gTLD is acted upon, the WHO impliedly rejected that position.
67. Moreover, ICANN’s own GAC also rejected the proposition that the Objector advances. Rather than categorically reject the grant of a string application of the present sort to a private enterprise such as the Applicant, the GAC merely issued “Safeguard Advice” in relation to the operation of the proposed gTLD. Significantly, the GAC did not, as it did in other cases, recommend to the ICANN Board that it reject the application.
68. In sum, in the absence of supporting data or other evidence of some kind, the Expert Panel cannot accept the Objector’s bald assertion that no private enterprise can reliably and responsibly manage a “.health” gTLD.
69. The Objector’s second basic argument is that the Applicant has failed to demonstrate awareness of its duty to ensure that the gTLD is organized and managed in such a way as to promote health as a fundamental right that is clearly established under international law.

70. This is a legitimate concern. The Expert Panel recognizes that a “.health” string will operate in a very sensitive domain in which the risks of a failure of due diligence or abuse, including fraud, are particularly high. Both the Objector and the Applicant acknowledge that strings such as “.health” that are linked to the health sector are likely to generate a high level of trust in consumers, inducing them to believe that information available under that domain name is scientifically sound.
71. The Expert Panel is thus called upon to determine whether the guarantees that the Applicant proposes to put in place in order to manage the domain in conformity with public interest requirements are likely to be effective, especially, but not only, in regard to the elderly, children and persons with disabilities. For example, the Convention on the Rights of Persons with Disabilities, brought to the attention of the Expert Panel by the parties, binds contracting states to “ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities... [t]o promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information... [t]o promote access for persons with disabilities to new information and communications technologies and systems” (art. 9.2).
72. Significantly, notwithstanding its position that the outcome of a gTLD application should not be based on predictions about how the domain registry will be managed, the Applicant’s Response enters in those matters in some detail (Response, pp. 11-13). Indeed, as the Objector itself acknowledges, in March 2013, the Applicant made a series of public interest commitments – in the form of a Public Interest Commitments Specification – that reflect significant safeguards in connection with the operation of the gTLD. The Expert Panel finds that the commitments made by the Applicant are, by any standard, substantial and respond directly to the concerns that had been voiced by the public health community up to that time. Accordingly, the Expert Panel finds that the Applicant has expressly acknowledged its “duty and stewardship role” in managing the “.health” gTLD and its obligation to perform that management in a “responsible, safe and secure manner.”
73. It is unrefuted that the Applicant has established detailed eligibility requirements for the registration of a domain name under the “.health” gTLD. To that end, the Applicant’s Public Interest Commitments Specification states that “[o]nly persons or

entities that are licensed as a healthcare provider qualify to be a registrant of a .HEALTH domain name. Such license must be granted by a governmental body, or an organization authorized by a governmental body to issue such licenses” (at p. 1). This approach resembles the one recommended by the GAC in a communiqué issued in Beijing on April 11, 2013 (i.e., a month after the Applicant issued its Public Interest Commitments Specification), regarding strings that are linked to regulated or professional sectors.<sup>6</sup> The Expert Panel thus assumes that the attribution of a second level domain name will be conditioned on the registrant clearly indicating the kind of license it has been granted in the health sector and the institution that has issued it.

74. The Expert Panel does not read this particular commitment as implying that the Applicant will necessarily consider it sufficient for potential registrants to have been granted a license by a single State. This might not be a sufficient guarantee, as health standards vary significantly from country to country, and in any given case may significantly fall short of internationally recognized standards. Thus, the Expert Panel regards it as essential that the Applicant, in managing the gTLD, be attentive to the health standards developed by the relevant governmental institutions at the international level, of which the WHO is the prime example, and remain in close communication with them in the interest of safeguarding the right to health.
75. Significantly, the Applicant has adopted a “.health’ Acceptable Use Policy,” by virtue of which it will be “able to block or even remove domain names in the .HEALTH gTLD if the registrant does not comply with national *or international standards*” (emphasis added).
76. The Expert Panel also recognizes the importance of the Applicant’s establishing a solid working relationship with national and international regulatory bodies in the field of health. However, the Applicant has committed to opening and maintaining channels of communication with national authorities and international organizations to help ensure that the “.health” gTLD performs properly. The Applicant has undertaken to create a “.health non-compliance hotline” which would enable public authorities to contact the Applicant to report non-compliance with the “.health”

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<sup>6</sup> In that document the GAC recommended that “[a]t the time of registration, the registry operator must verify and validate the registrants’ authorisations, charters, licenses and/or other related credentials for participation in that sector” (p. 10).



gTLD's eligibility and acceptable use policies and to require the Applicant to initiate an investigation within 24 hours. The Expert Panel does not have a sufficient basis upon which to conclude that the Applicant will fail to collaborate with public authorities in carrying out their affirmative obligations with regard to the right to health.

77. It is also unrefuted that a Public Interest Commitments Specification such as the one that Applicant has made is enforceable under ICANN's Public Interest Commitment Dispute Resolution Policy.
78. The commitments described here put to rest the Objector's argument that the Applicant framed its request for the ".health" gTLD in terms that are largely identical to those it used in applying for gTLDs, such as "pets," "wine," and "casinos," that do not implicate the public interest to the extent that a ".health" gTLD does. The fact is that the applications for those other gTLDs apparently contain no comparable commitments.
79. The Expert Panel thus finds that the Objector has failed to show that the Applicant is insensitive to, much less unaware of, the importance of the fundamental right to health, the special responsibilities connected to the management of a ".health" gTLD, or the need to put mechanisms in place to ensure that the gTLD is administered and operated in a way capable of preventing abuse and guaranteeing the consumer's right to accurate and reliable health information.
80. At the end of the day, the Objector essentially invites the Expert Panel to speculate as to whether a domain that, from all appearances, is designed to support the fundamental right to health value will fail in practice to do so. The Objector cannot meet its burden of proof in that fashion.
81. As a fallback position, the Objector urges that the Expert Panel, in eventually supporting the Application, declare that grant of the application should be made conditional on the Applicant's providing further safeguards responsive to the concerns raised. Even if it were disposed to make a determination imposing such conditions, the Expert Panel cannot validly do so. The procedures under which the Expert Panel is conducting these proceedings require expert panels to limit themselves to deciding

whether or not an Objection is successful. Whatever outcome it reaches, an expert panel must render an unconditional determination.

82. Pursuant to Article 21(g) of the Procedure, the Expert Panel agrees with the publication of this Expert Determination in full on the ICC's website.

## **DECISION**

83. In light of the above reasons, the Expert Panel hereby renders the following Expert Determination:

1. Prof. Alain Pellet, the Independent Objector and the Objector in this matter, has failed to establish that the gTLD “.health” applied for is “contrary to general principles of international law for morality and public order” (Guidebook, art. 3.5.3).
2. The Applicant Affiliat Limited prevails in this proceeding and the Objection is dismissed.
3. The Applicant is thus entitled to a refund of its advance payment of costs by the International Chamber of Commerce pursuant to Article 21(d) of the Procedure.

84. This Expert Determination constitutes the Expert Panel's final and binding findings.

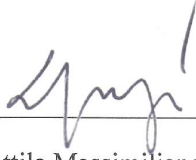
6 November 2013



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Prof. George A. Bermann

Chair of the Expert Panel



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Prof. Attila Massimiliano Enrico Tanzi

Co-Expert of the Expert Panel



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Mr. Erik G.W. Schäfer

Co-Expert of the Expert Panel