

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

CASE No. EXP/450/ICANN/67

JAPAN ASSOCIATION OF NEW ECONOMY

(JAPAN)

vs/

AMAZON EU S.A.R.L.

(LUXEMBOURG)

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.

BEFORE THE INTERNATIONAL CENTRE FOR EXPERTISE
of the
INTERNATIONAL CHAMBER OF COMMERCE

**EXPERT DETERMINATION
OF COMMUNITY OBJECTION**

In the matter of ICC Case No. EXP/450/ICANN/67
Under the Rules for Expertise of the ICC (“Rules”) supplemented by the ICC Practice Note
on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant
Guidebook (“ICC Practice Note”), New gTLD Dispute Resolution Procedure (“Procedure”) of
the gTLD Applicant Guidebook (“Guidebook”)

JAPAN ASSOCIATION OF NEW ECONOMY (JANE) (Japan)

Objector

and

AMAZON EU S. à r.l. (Luxembourg)

Applicant

EXPERT

M. Scott Donahey

October 14, 2013

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I. THE PARTIES AND THE EXPERT

A. Objector

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1). Objector is a general incorporated association duly organized and existing under the laws of Japan engaged in contributing to the sound operation of the Japanese government and the healthy development of regional communities through various new industries including e-business as well as IT business. Objection, Annex A. Objector is represented in this expert proceeding by its duly authorized attorneys:

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2). Applicant is a private limited liability corporation duly organized and existing under the laws of Luxembourg. Response, Annex 2. Applicant is a member of the group of companies under the umbrella of Amazon, a large on-line retailer. *Id.* Applicant is represented in this proceeding by its duly authorized attorneys:

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II. DEFINITION OF ABBREVIATIONS USED

- 3). **GAC** – The Governmental Advisory Committee, an ICANN interest group consisting of representatives of various governmental entities.
- 4). **GNSO** – The Generic Names Supporting Organization, an ICANN interest group.
- 5). **gTLD** – a generic Top Level Domain, the information immediately to the right of the final dot in a domain name or a Uniform Resource Locator (URL), other than the two Roman letter characters used to designate a country code for use only by a given country (ccTLD).
- 6). **Guidebook** -- the gTLD Applicant Guidebook, including Module 3, last revised 4 June 2012.
- 7). **ICANN** – the Internet Corporation for Assigned Names and Numbers.
- 8). **ICC** – The International Chamber of Commerce.
- 9). **ICC Practice Note** -- ICC Practice Note on the Administration of Cases under the Attachment to Module 3 of the gTLD Applicant Guidebook
- 10). **IO** – The Independent Objector appointed by ICANN to determine whether to make an objection to a gTLD application on the grounds of Limited Public Interest and/or Community. The Independent Objector is an individual with considerable experience and respect in the Internet community, who is unaffiliated with any gTLD applicant, and who acts solely in the best interests of the public who use the global Internet. Guidebook, Art. 3.2.5.
- 11). **JANE** – The Japan Association of New Economy, an association founded under the laws of Japan, and the Objector in the present matter.

- 12). **JeBA** – The Japan e-Business Association, the predecessor of JANE.
- 13). **NGPC** – The New gTLD Program Committee, a committee of the Board of Directors of ICANN formed to make recommendations to the board regarding the new gTLD program.
- 14). **PIC** – “Public Interest Commitments,” commitments made by ICANN for the benefit of the public who use the global Internet.
- 15). **Procedure** - New gTLD Dispute Resolution Procedure, Attachment to Module 3 of the gTLD Applicant Guidebook.
- 16) **Rules** - ICC Rules for Expertise.
- 17). **SLD** – The Second Level Domain, the information immediately to the left of the dot in the domain name. The name that is registered by a domain name registrant as an Internet address.

III. PROCEDURAL HISTORY

18). This matter arises out of a Community Objection filed by the Objector on March 13, 2013. On March 16, 2013, the ICC International Centre for Expertise acknowledged receipt of the Objection and the Filing Fee and commenced its administrative review of the Objection in order to determine the Objection’s compliance with the Procedure and the Rules. Procedure, Art. 9. On April 4, 2013, the ICC International Centre for Expertise notified the Objector that it had completed its administrative review and that it found the Objection to be in Compliance with Articles 5-8 of the Procedure and with the Rules. On April 12, 2013, ICANN (the Internet Corporation for Assigned Names and Numbers) published its Dispute Announcement. Procedure, Art. 19(a). By letter dated April 15, 2013, the ICC International Centre for Expertise invited Applicant to file its Response within thirty (30) days in accordance with Article 11(b) of the Procedure and to pay the required Filing Fee pursuant to Article 11(f) of the Procedure and Article 1(1) of Appendix III to the Rules. Applicant filed a Response to the Objection on May 15, 2013. By letter dated May 17, 2013, the ICC International Centre for Expertise notified the parties that it had received Applicant’s Response and the required Filing Fee on May 15, 2013.

19). By letter dated June 18, 2013, the ICC International Centre for Expertise notified the parties that on June 12, 2013, the Chairman of the Standing Committee of the ICC International Centre for Expertise, pursuant to Article 3(3) of Appendix 1 to the Rules, had appointed M. Scott Donahey as the Expert for these proceedings and invited the parties to make the advance on estimated Costs calculated by the ICC International Centre for Expertise. By letter dated July 10, 2013, the ICC International Centre for Expertise acknowledged receipt from both parties of the advance on the estimated Costs in the present matter and confirmed that it was transferring the files in the present matter to the expert. The Expert acknowledged that he received the files on July 10, 2013. By letter dated July 23, 2013, the Expert advised the Manager of the ICC International Centre for Expertise and counsel for the parties that the Expert had completed the review of the parties submissions and that the expert saw no need to request additional submissions and no need for an in-person hearing. Procedure, Art.s 17(a) and 19(b). On July 26, 2013, the Expert received a letter from counsel for Objector, requesting a stay of the

proceedings based on advice that ICANN had received from the Governmental Advisory Committee, (“GAC”). The communication showed a copy to the ICC International Centre for Expertise. On July 27, 2013, the Expert received a letter from counsel for Applicant opposing any postponement of the proceedings. The communication showed a copy to the ICC. The determination was submitted to the International Centre for Expertise scrutiny on July 28, 2012, and it has thus been rendered within the 45 day time limit in accordance with Article 21(a) of the Procedure.

20). All transmissions indicated above, and all other communications in this matter, were transmitted electronically. Procedure, Art. 6(a).

IV. LANGUAGE OF THE PROCEEDINGS

21). The language of all submissions and the proceedings is English. Procedure, Art. 5(a). It is noted that Objector submitted as Annex B to the Objection a “Business Certificate” entirely in the Japanese language. This submission was not accompanied by a certified or otherwise official translation of all relevant text as required by Article 5(b) of the Procedure. However, since Objector does not refer to Annex B in his Objection other than to list it as one of the annexes submitted and as Objector does not argue that Annex B impacts in any way the presentation of Objector’s case, and as Applicant did not submit any comments with regard to Annex B submitted by Objector, there is no need to request the missing translation.

V. PLACE OF THE PROCEEDINGS

22). As the ICC International Centre of Expertise is the provider of the dispute resolution services and as the Centre is located in Paris, France, thus Paris, France is the place of the proceedings. Procedure, Art. 4(d).

VI. SUMMARY OF THE PARTIES’ SUBMISSIONS

A. Summary of the Objection

1. Membership and activities of JANE

23). JANE (The Japan Association of New Economy) was established in February 2010 as the “Japan e-Business Association” (“JeBA”). JeBA was formed in order to strengthen Japan’s competitiveness through the expansion of the Internet and e-business. Objection, Annex A. On June 1, 2012 JANE issued a press release stating that from that day forward, JeBA would be known as the Japan Association of New Economy (JANE). Objection, Annex C. The purpose of the name change was to acknowledge a change in focus of the Association. Rather than focus on e-Business as the core of the Association, JANE shifted focus to include other new industries in order to increase Japan’s economic competitiveness. *Id.*

24). At a recent meeting of JANE, the officers and members expressed their intention to press for the development of business and government frameworks relating to innovation and strategies for e-business dependent new industries, to support a fair and competitive environment, and to advocate for a streamlining of the political process to increase public participation with a view to create an environment and framework necessary for growth.

25). JANE has a dual membership structure, including both General Members and Supporting Members. Currently, JANE lists some 261 General Members and 444 Supporting Members. Objection, Annexes D and E.

26). Among JANE's achievements, Objector lists the following:

- a. The publication of a White Paper on e-Business in Japan;
- b. The issuance of statements in connection with legal developments, particularly within the health care and pharmaceutical sector and the impact of these developments on the e-commerce and e-business activities of certain of JANE's members;
- c. The organization of workshops for members related to various topics in e-commerce and e-business;
- d. On December 21, 2012, JANE participated in a meeting with the newly elected Prime Minister of Japan as a representative of Japanese companies involved in e-business and e-commerce.
- e. JANE organized a "New Economics Summit 2013" in April of this year with speakers from diverse countries and international companies active in e-commerce and e-business.

2. The Association between JANE and <.shop>

27). Objector asserts that the gTLD string <.shop> is closely related to the Association's objectives which are related to:

- 1) the globalization of the Internet;
- 2) the promotion of commercial activities on the Internet;
- 3) the need for an environment of fair competition on the Internet;
- 4) The interest in a further expansion of economic activities on the Internet.

28). Objector contends that the daily activities of the majority of JANE's members are strongly associated with the <.shop> generic Top Level Domain (gTLD), because, it is alleged, that millions of customers worldwide use the online sales platforms of JANE's members to browse for and purchase goods and services.

3. Letters of support for the community objection

29). As Annex F to the Objection, Objector attaches letters in support of the filing from three of its 261 General Members: Rakuten, Inc., CyberAgent, Inc., and FreeBit Co., Ltd. There are no letters of support from any of JANE's 444 Supporting Members. The letters appear to be using a template as a model, and many of the paragraphs are identical word for word. The letters contain general statements that the application would have negative effects on JANE and its members, in that Amazon would control access to a generic term relevant to retailing. Objection, Annexes F1, F2, and F3.

4. Applicant's operation of the gTLD <.shop> would be as a "Private Brand Registry"

30). Objector alleges that Applicant holds no trademark rights in the term "shop" or ".shop." Applicant has applied for several generic terms as new gTLDs, terms in which Applicant has no trademark rights. All of these terms are common dictionary words that are in the public domain. Applicant intends to accept registrations of Second Level Domains (SLDs) within the gTLD <.shop> only from its subsidiaries and affiliates, and does not intend to accept registrations of SLDs within the gTLD <.shop> from unaffiliated third parties.¹ Such practices can only support the business goals of Applicant, to the exclusion of Applicant's competitors.

31). Objector contends that Applicant's intended operation of the applied for gTLD <.shop> is inherently anticompetitive and trademark laws in many countries would prohibit the registration of a generic term if it could be monopolized solely by the trademark registrant. It should not be possible to monopolize a generic term on the Internet by registering the term as a gTLD and then refusing to permit third parties to register SLDs within the same generic gTLD.

32). Objector asserts that Applicant's intent to create a Closed Generic gTLD is contrary to ICANN's mission and is a violation of Section 9.3, entitled "Promoting competition, consumer trust and consumer choice," of the Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers, executed on September 30, 2009.

33). Objector requests that the Expert dismiss the application submitted by Applicant for the <.shop> gTLD, or alternatively to impose upon Applicant "the obligation . . . to operate such gTLD in accordance with generally accepted industry standards, which include, but are not limited to allowing third parties to choose, register, and use domain names registered in the .SHOP gTLD under fair, reasonable and non-discriminatory terms and conditions that are widely accepted in the domain name market, considering any and all principles of fair competition, and under financial conditions that are by all means at arm's length with existing industry practices."

¹ A gTLD that consists of a generic term but which limits registration only to subsidiaries and/or affiliates of the registrar is referred to as a "Closed Generic gTLD."

B. Summary of the Response

1. Objector lacks standing

34). Objector is an affiliate of Amazon.com, Inc. Founded in 1994, Amazon.com, Inc. opened on the World Wide Web in July 1995 and today offers the greatest variety of goods at one web site address. Amazon seeks to be Earth's most customer oriented company, where customers can find and discover anything they might want to buy online, and endeavors to offer its customers the lowest possible prices.

35). Citing Article 3.2.2 of the Guidebook and Article 8 of the Procedure, Applicant contends that Objector lacks standing to bring a Community Objection.

36). First, Applicant argues that JANE is not an established institution. Applicant examines in turn each of the three non-exclusive factors to be considered in determining whether the Objector is an established institution set out in Article 3.2.2.4 of the Guidebook.

37). The first factor which Applicant discusses is the "[l]evel of global recognition of the institution [making the objection]." Guidebook, Art. 3.2.2.4. Applicant asserts that Objector has failed to produce any "verifiable evidence that it is an established institution of the community." Response, Annex 4, ICANN Generic Names Supporting Organization ("GNSO"), Final Report, August 8, 2007, at the fifth page ("The objector must provide verifiable evidence that it is an established institution of the community . . .") Applicant asserts that the members of Objector are for the most part Japanese companies, and even those are a tiny percentage of global business involved in e-commerce and e-business.

38). The second factor which Applicant discusses is the length of time that the institution has been in existence. Applicant notes that Objector has been in existence for less than four years. Objection, Annexes A and C. The GNSO Final Report states that an established institution is "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." Response, Annex 4, at 5. Therefore, Applicant contends that Objector is not an established institution.

39). Applicant further contends that Objector does not have "an ongoing relationship with a clearly delineated community." Guidebook, Art. 3.2.2.4. Applicant argues that Objector has failed to show that its purpose is to benefit the "community." Applicant contends that Objector's statements as to purpose are intended to benefit the Japanese economy and its competitiveness.

2. The real nature of the Objection is that Objector is opposed to competitive business models

40). Applicant argues that Objector is trying to restrict new business models, and that Objector has no rights in the term “shop.” Objector’s real concern is that Applicant is a competitor of the members of Objector, and that Applicant’s business model is a competitive threat to Objector’s members. Applicant asserts that it merely took advantage of the rules for the registration of new gTLDs, Objector failed to do likewise, and this is the crux of the Objection. This is simply an attempt to interfere with the legitimate activities of Applicant, a competitor to the members of Objector.

3. Even if Objector were found to have standing, the Objection would fail on the merits

a. Objector has failed to show that it represents a “clearly delineated community”

41). In the present case, Applicant argues that the purported “community” consists of people and companies that share an interest in e-commerce or e-business and which are predominantly, if not entirely, Japanese. No showing has been made that this segment is representative of companies involved in e-commerce or e-business as a whole. Applicant contends that Objector has existed for less than four years, that its membership is less than 700 companies and related entities and all are apparently based in Japan. Such a “community” is not “clearly delineated.”

b. Objector has failed to show that community opposition is “substantial”

42). Applicant asserts that Article 3.5.4 of the Guidebook requires that Objector must prove that the “community opposition to the application is substantial.” Applicant argues that the only objection lodged against the application for <.shop> was that filed by Objector.

43). Moreover, Applicant contends that Objector failed to provide any evidence that it attempted to determine the views of its members, or of consumers, or of other groups that could belong to an identifiable community.

44). Applicant contends that the evidence supporting the Objection is wholly inadequate. Applicant argues that Objector produced only three supporting letters, all of which contain nearly identical language, and all of which were drafted on the same day. Objection, Annexes F1, F2, and F3. Applicant asserts that the documents appear to be form letters and are wholly lacking in specific objections.

45). Applicant notes that an Objector must prove a strong association between the community invoked and the applied for gTLD string. Art. 3.5.4, Guidebook. Applicant argues that the term “shop” encompasses far more than e-business or e-commerce. Applicant contends that therefore the Objection must fail on this ground alone.

c. Applicant contends that its operation of the applied for gTLD will promote competition and innovation in the marketplace

46). Applicant argues that the real basis of the Objection is an attempt to prevent the <.shop> gTLD to be allocated to a competitor of Objector. Applicant contends that alternatives to <.shop> are numerous and that their registration by others would serve to increase and promote competition.

47). Further, Applicant asserts that the notion that Applicant will use the Closed Generic gTLD to stifle competition downstream is absurd. The addition of other and alternative gTLDs will serve to increase, rather than decrease, competition. Applicant argues that it is a well-settled principle that competition laws are designed to protect competition, not competitors.

48). Applicant contends that the allocation to Applicant of the new gTLD <.shop> will not result in “damage to the reputation of the community,” “interference with the core activities of the community,” or “economic damage to the community” each of which is one of the non-exclusive factors that must be considered in determining whether Objector has proved 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 directed.”

Guidebook, Art. 3.5.4.

49). Applicant argues that the award of <.shop> to Applicant will not cause any of the harms a community objection is meant to prevent. Applicant asserts that the Guidebook provides that the harms that one must consider include “damage to the reputation of the community,” “interference with the core activities of the community,” and “economic damage to the community.” Applicant contends that Objector has offered no evidence that any of these will occur. Rather, it is Applicant’s position that increased competition in the ecommerce market will result from the award of <.shop> to Applicant, with resulting economic benefits to consumers and internet users generally.

50). Applicant contends that there is nothing inherently harmful or improper in the operation of a Closed Generic gTLD, and that if ICANN believed there were, ICANN could have barred the operation of a Closed Generic gTLD. Moreover, Applicant asserts that the exclusive use of a generic word is not contrary to industry standards. Finally, there is no basis to require Applicant to allow third parties to register in the gTLD <.shop.>

VII. EXPERT DETERMINATION

A. The Controversy Surrounding “Closed Generic gTLDs”

51). The gravamen of the Objection is that allowing Applicant to obtain the gTLD <.shop>, which is a generic term in which Applicant has no intellectual property rights, and then close the registrations in the gTLD to subsidiaries and affiliates of Applicant is inherently anticompetitive and not in keeping with ICANN’s mission statement. The nature of this

Objection has been the subject of numerous comments regarding the new gTLD application process, and more recently was the one of the items discussed by the Governmental Advisory Committee of ICANN, one of the many interest groups which offers counsel and advice to ICANN on the development of its policies.

52). On April 11, 2013, following the ICANN meeting in Beijing, the People's Republic of China, GAC made recommendations to ICANN in the form of a resolution, which recommendations concerned the New gTLD application and approval process (the "GAC Beijing Communique"). Among the recommendations was one directed to the awarding of Closed Generic gTLDs. GAC Beijing Communique, Annex I, Safeguards on New gTLDs, Category 2, Restricted Registration Policies. The GAC resolution on this subject stated:

"As an exception to the general rule that the gTLD domain name space is operated in an open manner registration may be restricted, in particular for strings mentioned under category 1["Consumer Protection, Sensitive Strings, and Regulated Markets"], above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue advantage."

Id. Among the non-exhaustive list of strings that GAC "considers generic terms, where the applicant is currently proposing to provide exclusive registry access," is the string that is the subject of the present Objection, <.shop>.

53). In response to this proposed change in application and award policy, ICANN initiated a new public comment forum to obtain community input on how ICANN's New gTLD Program Committee, a committee of the Board of Directors of ICANN formed to make recommendations to the board regarding the new gTLD program ("NGPC") should address the GAC recommendations. The NGPC then made recommendations in the form of resolutions to the ICANN Board concerning the GAC recommendations, one of which specifically addressed Closed Generic gTLDs. Approved Resolution, Meeting of the New gTLD Program Committee, June 25, 2013, Category 2 Safeguard Advice re Restricted and Exclusive Registry Access ("Closed Generic gTLD Recommendation"). In that resolution, NGPC stated:

"For applicants seeking to impose exclusive registry access for 'generic strings', the NGPC is being asked to defer moving forward with the contracting process for these applicants, pending a dialogue with the GAC."

54). The term 'generic string' is defined in the PIC ("Public Interest Commitments," commitments made by ICANN for the benefit of the public who use the global Internet) Specification, Annex 1 to the Closed Generic gTLD Recommendation which sets out for **discussion purposes only** the proposed modification resulting from the GAC recommendations:

"1. Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.

2. Registry Operator of a "Generic String" TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person's or entity's "Affiliates" (as defined in Section 2.9(c) of the

Registry Agreement). “Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.”

Closed Generic gTLD Recommendations, Annex 1. In order to allow sufficient time to consult with GAC and other interested ICANN constituencies, NGPC directed ICANN staff to defer moving forward with the contracting process for applicants seeking to establish “Closed Generic gTLDs “pending a dialogue with GAC.” Closed Generic gTLD Recommendations, Resolution 2013.06.25.NG06.

55). Based on the above which involves potential changes in ICANN’s application and award policies, by electronic communication dated July 26, 2013, Objector requested that its Community Objection be put on hold pending the resolution of this matter by ICANN. Respondent objected to any such postponement. A decision by ICANN to revise the policy concerning Closed Generic TLDs is a policy decision, and its considerations are far beyond the strict limits in which an Expert Determination must be made concerning a Community Objection. Whatever and whenever ICANN decides may ultimately determine whether Applicant can enter a contract for a new gTLD registry based on the present application policy, or whether Applicant must submit a new application based on some revised application policy. This policy decision involves numerous considerations that are wholly unrelated to the present proceeding: the fairness of the revision of the requirements after applications have been submitted, whether a revision would require a refund for those applicants who have submitted a proposal and made a deposit based on the original requirements, how such a revision could effectively be enforced, etc. The very definition of “Generic String” seems to assume that a generic term is distinguishable from a branded term, but many generic terms are also brand names. For example, the generic terms “fusion,” “escape,” “fiesta,” “agile,” “equinox,” “insight,” “accord,” “civic,” “pilot,” and “matrix” are a few of the branded names of automobile models of only four of the many automobile manufacturers.

56). However, this policy decision is for ICANN to make in consultation with its constituencies. That decision has no bearing on whether Objector has standing to bring a Community Objection and whether that Community Objection should be upheld. That is a separate matter, having strict boundaries and specific limitations on what an expert is capable of determining. In the present case the Expert is limited to determining the specific objection raised by the Objector in accordance with the strict standards that apply to such determinations. Therefore, a postponement of the present proceeding is not warranted, and the request for postponement is denied.

B. The Criteria for Standing to Raise a Community Objection

57). The Guidebook sets out the requirements for standing to raise 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. 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 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.”

Guidebook, Art. 3.2.2.4.

C. Analysis of the Standing Requirements and Factors

1. Is Objector an established institution?

58). Objector was formed in February 2010, so it is approximately 3 ½ years old. It adopted its present name and expanded focus in June, 2012, a little over one year ago. It has some members that are Japanese subsidiaries or affiliates of global companies or are Japanese global conglomerates. Objector’s focus is to promote Japanese businesses and the Japanese economy. As historical evidence of its existence it has attached its articles of association and a list of activities in which it has been engaged. Although Objector’s founding and activities roughly coincide with the announcement and formation of the new gTLD policies and application process, there is no evidence or contention that Objector was “established solely in conjunction with the gTLD application process.” Guidebook, Art. 3.2.2.4.

59). The ICANN Generic Names Supporting Organization Final Report: Introduction of new generic Top-Level Domains, August 8, 2007 (“GNSO Final Report”), recommends that an “established institution” is one that has been in formal existence for at least 5 years. In exceptional cases, standing may be granted for 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.

60). Objector did not argue nor offer any evidence of exceptional circumstances. However, although influential, the GNSO Final Report is not a formal part of the criteria which the Expert is required to consider.

61). When weighing all of the above, the Expert believes that Objector has failed to meet its burden to prove that it is an established institution.

2. Does Objector have an ongoing relationship with a clearly delineated community?

62). Objector's articles of association provides that Objector shall hold general meetings at unspecified times and intervals, at which general members may vote on such issues as expulsion of members, removal or election of directors and auditors, the compensation which auditors and directors should receive, the approval or disapproval of financial statements, changes to the association's articles of association, whether the association should be dissolved, and, if so, how its assets shall be distributed, and any other matters required by law or by the articles of association. Objection, Annex A, Art.s 15, 16, and 17.

63). Accordingly, the Expert determines that Objector has provided a mechanism for participation in activities, membership, and leadership.

64.) For the three remaining factors to be considered in the determination of whether the Objector has an ongoing relationship with an established community, the expert must consider the boundaries of the associated community. The gravamen of the Objection is that a Closed Generic gTLD is inherently damaging to competition. But what are the boundaries of the community that is affected by damage to competition? The Objector provides little guidance on this, other than that its membership includes both eCommerce and eBusiness companies, as well as companies who provide goods and services in the "offline" environment, and that its purpose is to promote competitiveness for the benefit of Japanese companies and the Japanese economy.

65). The GNSO recommends that "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." GNSO Final Report, definitions and guidelines in reference to Recommendation 20. These generalities provide little guidance as to how the community should be defined in the present situation.

66). Although neither party called it to the Expert's attention, the Expert has referenced the analysis of the Independent Objector ("IO," the Independent Objector appointed by ICANN to determine whether to make an objection to a gTLD application on the grounds of Limited Public Interest and/or Community). The IO is an individual with considerable experience and respect in the Internet community, who is unaffiliated with any gTLD applicant, and who acts solely in the best interests of the public who use the global Internet. Guidebook, Art. 3.2.5 See Guidelines, Art. 3.2.5. As the IO was appointed directly by ICANN and is mandated to act in the best interests of the public who use the global Internet. In light of the public interest mandate, the IO may only file Community Objections and Limited Public Interest Objections. *Id.* She or he must be "an individual with considerable experience and respect in the Internet community, unaffiliated with any gTLD applicant." The Expert believes that given the IO's status and his charge to act in the best interests of the public who uses the global Internet in making determinations as to Community Objections, the IO's opinions on the issue of Closed Generic gTLDs are at least worthy of consideration although it should be understood that the IO's opinions are not dispositive of the Expert's Determination in this matter, and should not be perceived as such in connection with unrelated cases in which the IO is a party to the proceedings.

67). The IO appointed by ICANN has given careful consideration of the issue of Closed Generic gTLDs and has published his thoughts thereon. The expert has reviewed the IO's analysis of this issue.

68). The IO has published on his web site (<http://www.independent-objector-newgtlds.org/english-version/home/>) his detailed consideration of this issue in a paper entitled "The Issue of 'Closed Generic' gTLDs Applications – The Views of the Independent Objector."

69). In the context of a Community Objection, the IO has carefully considered the limitations to be placed on the definition of an "identifiable community:"

"[T]he notion of 'community' is wide and broad, and is not precisely defined by ICANN's Applicant Guidebook for the new gTLDs program. It can include a community of interests, as well as a particular ethnical, religions, linguistic, or similar community. Moreover, communities can also be classified in sub-communities (i.e., the Jewish community in New York or the Italian community on Facebook). However, beyond the diversity of communities, there are common definitional elements and a community can be defined as a group of individuals who have something in common (which can include their nationality or place of residence – i.e. the French, South-East Asian or Brazilian community – or a common characteristic – i.e., the disability community) or share common values, interests or goals (i.e. the health or legal community). [W]hat matters is that the community invoked can be clearly delineated, enjoys a certain level of public recognition and encompasses a certain number of people and/or entities."

70). "[A]s a general remark and because I have reviewed all applications, it is difficult in these cases to prove the existence of a clearly delineated community. By definition, a 'generic term' is a term which is used by a significant number of people, who do not necessarily share similar goals, values or interests. A specific community should distinguish itself from others, precisely by its characteristics or specificities. [Such] cannot be the case for a 'generic term' which, by definition goes beyond specificities as it is used by very different persons."

71). "When criteria for this test are not met on this basis, a community objection is not warranted."

72). The Expert finds the reasoning of the IO to be well founded and applicable to the present community objection. The community for <.shop> is difficult to define. It would include not only shop owners, retailers, manufacturers, suppliers of goods and service, but also consumers, chambers of commerce, governmental entities which supervise and which may tax such goods and services, etc. Such an amalgam of interests could not serve as a delineated community.

73). Even if we could consider those interested in the promotion and development of the Japanese economy and its competitive position in a global economy to be a "sub-community," such a sub-community would necessarily include, Japanese consumers, the Japan Chamber of Commerce, and Japanese governmental authorities involved in the regulation of competition, the promotion of commerce, and taxation, at minimum.

74). The Expert determines that Objector has failed to prove that it is an established institution and has failed to prove that it is closely associated with an identifiable community, and therefore Objector has failed to establish that it has standing to bring a Community Objections pursuant to Guidebook Art. 3.2.2.4.

D. Even Assuming Objector had Standing to Bring a Community Objection, Objector has Failed to Prove Substantial Opposition Within the Community Objector has Identified

75). Even if one were to conclude that a subgroup of Japanese manufacturers and retailers could be considered as a delineated community, Objector would be required to prove that there is substantial opposition within the community it has identified. Guidebook, Art.3.5.4, Substantial Opposition.

76). Objector has a total membership, including general members and supporting members, of approximately 700 Japan based manufacturers, retailers, and related businesses. There must be tens of thousands of such entities based in Japan.

77). Moreover, of these 700 member entities, only three have filed letters of support for Objector's filing of the Objection. And those three entities appear to have used an identical template from which to construct their letters of support.

78). The Expert determines that even if Objector had proved the necessary factors to establish standing to bring a Community Objection, that Objection would fail for failure to prove that there was substantial opposition within the Community it has identified itself as representing.

VIII. DECISIONS

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

1. The Objection is dismissed.
2. Pursuant to Article 21 (d), the Expert is restricted to deciding on the prevailing party and the costs, therefore Objector's request to impose conditions must be denied.
3. Applicant is the prevailing party.
4. Applicant's advance payment of Costs shall be refunded by the Centre to Applicant.

Place of Expert Proceedings: Paris, France.

Date: October 14, 2013

Signature: _____

M. Scott Donahey, Expert