

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

CASE No. EXP/486/ICANN/103

SPORTACCORD  
(SWITZERLAND)  
vs/  
STEEL EDGE LLC  
(USA)

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.

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**EXPERT DETERMINATION OF A COMMUNITY OBJECTION TO AN APPLICATION FOR A NEW  
GENERIC TOP-LEVEL DOMAIN NAME (<.SPORTS>)**

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The undersigned Expert, appointed by the International Centre for Expertise of the ICC to sit alone as the Expert Panel in the above-referenced matter, hereby issues the following Expert Determination resolving the above-referenced objection:

**A PARTIES**

1. This dispute arises under the programme established by the Internet Corporation for Assigned Names and Numbers ('**ICANN**') for the acquisition and operation of new generic top-level domain names ('**gTLD**'). Background information about that programme can be found in the ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (the '**GNSO Final Report**').
2. Steel Edge LLC of 10500 NE 8<sup>th</sup> Street, Suite 350, Bellevue WA 20166, United States of America (the '**Applicant**'), represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C., 15260 Ventura Blvd. Suite 1810, Sherman Oaks, CA 91403, is a subsidiary of Donuts Inc., which has applied, directly or through its affiliated enterprises (including the Applicant), for more than 300 new gTLDs. The Applicant submitted a New gTLD Application to ICANN for the string <.SPORTS> on 13 June 2012 (Application No. 1-1614-27785: the '**Application**').
3. SportAccord, of 54 Avenue de Rhodanie, Lausanne, CH 1007, Switzerland (the '**Objector**'), is a Swiss association representing Olympic and non-Olympic international sports federations and organisers of international sports events. On 13 March 2013 the Objector filed a 'Community Objection' to the Application, i.e., it objected to the Application on the basis 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](#)'. It is that Community Objection (the '**Objection**') that is being resolved in these proceedings.
4. The Objector has also applied in the same g-TLD application round for the gTLD <.SPORT>, and had a 'String Confusion Objection' against the Application sustained by a different expert on 20 August 2013, on the basis that the string <.SPORTS> is confusingly similar to the string <.SPORT>. As a result, the Expert's understanding is that if this Objection is not upheld, then (absent agreement between them) the Applicant's application for <.SPORTS> and the Objector's application for <.SPORT> will be resolved by the separate 'string contention procedure' established as part of the new gTLD programme.

## B. APPLICABLE RULES AND PROCEDURAL HISTORY

5. The rules applicable to this matter are (1) the ICANN's gTLD Applicant Guidebook (v. 2012-06-04) (the '**Guidebook**'); (2) in particular, the New gTLD Dispute Resolution Procedure attached to Module 3 of the Guidebook (the '**Procedure**'); and (3) the Rules for Expertise of the ICC (the '**Rules**'), as supplemented by (4) the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure.
6. Under Article 3(d) of the Procedure, Community Objections are administered by the International Centre for Expertise of the ICC (the '**Centre**'). On 5 April 2013, the Centre completed its administrative review of the Objection. The Centre determined that the Objection complied with all relevant requirements, and therefore notified the Applicant of the Objection. The Applicant filed a response to the Objection on 22 May 2013 (the '**Response**').
7. Pursuant to Article 13 of the Procedure and Article 3(3) of Appendix I to the Rules, on 25 June 2013 the Centre notified the parties that the Chairman of the ICC Standing Committee had appointed on 20 June 2013 the undersigned, Jonathan Taylor (of Bird & Bird LLP, 15 Fetter Lane, London, UK) to sit alone as the Expert determining this matter, and provided them with the Expert's statement of independence and impartiality. Neither party objected to the undersigned's appointment as Expert. Further to the parties' advance payment of costs in full, the Centre confirmed that appointment on 16 July 2013 and on 26 July 2013 transferred the file to the Expert. All subsequent communications between the Parties, the Expert and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. The language of all submissions and proceedings was English pursuant to Article 5(a) of the Procedure.
8. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of '[the constitution of the Panel](#)'. The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 26 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 9 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). Pursuant to Article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.
9. Article 20 of the Procedure states that for each category of objection to applications for new gTLDs, '[\(a\) ... 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](#)'. The standards defined by ICANN as applicable to Community Objections to new g-TLD applications are set out in Module 3 of the Guidebook, and the most relevant parts are quoted below.

10. The Expert has considered carefully all of the submissions made and the materials put forward by the parties, in the Application, the Objection, and the Response, and the annexes to each of them, to determine whether the Objection meets the standards defined by ICANN. His findings are set out below, first in relation to standing and then in relation to the substantive requirements.

**C. FINDINGS IN RELATION TO STANDING (SECTION 3.2.2 OF THE GUIDEBOOK)**

11. A party raising a Community Objection to an application for a new gTLD must have sufficient standing to make such an objection. (Guidebook, section 3.2.2). To demonstrate that standing, it must show that it is an 'established institution associated with a clearly delineated community' that is 'strongly associated with the applied-for gTLD string'. (Guidebook, section 3.2.2 and section 3.2.2.4).
12. The Expert must therefore determine whether the Objector is (i) an established institution (ii) associated with (iii) a clearly delineated community (iv) that is strongly associated with the string <SPORTS>. The Guidebook identifies factors that may be considered in determining these issues, and they are quoted below; but the Guidebook also explains (at section 3.2.2.4) that the Expert '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'.
13. First, then, is the Objector 'an established institution'?
  - 13.1 According to the Guidebook (at p.3-8), '[f]actors 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'.
  - 13.2 The Objector is a not-for-profit association that has been in existence since 1967, originally under the name 'General Association of International Sports Federations' and (since 2009) under the name 'SportAccord'. (Objection Annex 8). Constituted in accordance with and registered as an association under Articles 60-79 of the Swiss Civil Code, it functions as an umbrella organisation and representative body for its members, which are international sports federations and the organisers of international sports events, recognised as such by the International Olympic Committee, the body that heads the international sports movement. (Objection Annex 7, p.2). It started with 26 members and today it has 107 members, of which 91 are international sports federations and the

other 16 are organisers of international sports events (such as the Commonwealth Games Federation). (See Objection Annex 2).

- 13.3 The Applicant does not challenge the accuracy of any of these facts. Instead, it simply asserts that 'independent evidence' of the existence of the Objector is required, and that copies of its Statutes and a membership list that the Objector drafted itself do not satisfy this requirement. (Response p.6).
- 13.4 The Applicant does not cite any authority for this proposed requirement, and in fact as far as the Expert is aware there is not such requirement. To the contrary, according to the Guidebook, an institution's existence 'may' be demonstrated by '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'. (Guidebook, section 3.2.2.4). The 'may' indicates that this is optional, not mandatory, i.e., other evidence may suffice. The Objector has provided not only a copy of its Statutes (a formal legal document constituting it as an association under Swiss law) but also details of its registration as an association under Swiss law (see Objection Annex 9). More importantly, however, looking beyond the form to the substance, the Applicant has not actually disputed the Objector's account of its creation, its history, and its current membership. As a result, it is more than clear, in the Expert's view, that the Objector's existence as an established institution has been sufficiently evidenced.
14. Next, is the community on behalf of which the Objector claims to bring the objection 'a clearly delineated community'?:
- 14.1 According to the GNSO Final Report, the term '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, Implementation Guideline P). According to the Guidebook, factors that may be considered in determining whether the 'community' identified by the objector is a clearly delineated community 'include, but are not limited to, ... the level of formal boundaries around the community'.
- 14.2 The Objector says that it represents 'the Sport community' (Objection p.6), i.e., 'the community of individuals and organizations who associate themselves with Sport. Sport is activity by individuals or teams of individuals, aimed at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience'. (Objection p.8). It asserts that this community is 'highly organized on local, national and international level. It is clearly delineated by way of its organizational structures and its values'. (Objection p.6). It explains: 'At the base level, the Sport community is structured into local clubs and event organizers. At higher levels, Sport community governance is by

regional, national, and international Sport federations. The Federations collaborate at the local, national and international levels in Sport events or with event organizers, governments, the various bodies of the Olympic Movement, and within associations of federations. SportAccord itself, the Objector, is an association comprising 107 International Sport Federations. Individual practitioners of sport, sport spectators, sport fans and sport sponsors are part of the Sport community and share its values and objectives. Above all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection pp.8-9).

- 14.3 The Applicant asserts that the Objector has 'failed to identify what comprises [the community of individuals and organizations who associate themselves with Sport] or what "boundaries" surround it', and instead is holding itself out as representing a 'boundlessly wide group'. (Response p.6). That group is 'too broad, diverse and wide-ranging in interests to be "clearly delineated".' (Response p.7). The Applicant also notes that there are various parties involved in 'the world of sport' that are not affiliated to the community identified by the Objector (such as spectators, enthusiasts, and commentators, and all those connected with sports whose international federations are not in membership of the Objector), i.e., even if the 'Sport community' identified by the Objector is a valid community, it does not cover everyone in 'the world of sport'. (Response p.6).
- 14.4 The Expert agrees that 'the community of individuals and organizations who associate themselves with Sport', on its face, is a very broad group with no clearly delineated boundaries. If the Objector had stopped there, then the Expert considers that the Applicant would be right that the Objector had failed to satisfy this requirement. However, the Objector does go on to make clear (in the passages quoted at paragraph 14.2, above) that it is referring to the individuals and organisations who associate themselves with organised sport, i.e., sport that is sanctioned and conducted in accordance with a common set of rules that are applied and enforced throughout the sport through a pyramid system of governance and control that has the IOC and the international federations at its apex, member regional federations below them, member national federations below them, and regional, league, club and individual members below them.
- 14.5 In the Expert's view, this is a 'clearly delineated' community (or, as the Applicant has put it [Application p.7], a 'well-established and closely connected group of people or organizations'). Either you participate in official, sanctioned forms of the sport, thereby submitting yourself to be bound by and to comply with the uniformly applicable rules and regulations of that sport (either by becoming a member yourself, or by playing for a member team or in a sanctioned competition), or you participate in informal,

unsanctioned and unofficial forms of sport. Either you follow these official, organised forms of sport (because you are attracted by their adherence to a uniform set of rules) or you follow other (unsanctioned and unofficial) forms of sport. This is the clear distinguishing feature of members of the community identified by the Objector. As the Objector puts it, '[a]bove all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection p.9). To make the distinction clear, this 'Sport community' that the Objector refers to (i.e., individuals and organisations who have committed themselves to a common enterprise of officially-sanctioned sport, governed and regulated by international federations and their members who are recognised by the International Olympic Committee as the sole and authoritative governing bodies of their respective sports) may be more accurately referred to as the 'Organised Sports Movement'. That is how the Expert will refer to it below; and references by the Objector to the 'Sport community' are to be taken to be references to this 'Organised Sports Movement'.

14.6 The Applicant also asserts that the word 'sport' has an 'infinite number and variety of meanings and perceptions', which means it is impossible to delineate any community meaningfully as a 'sport' community. (Response p.5). It insists that '[s]ports is too broad a term for any person or organization to claim what would amount to ownership over it'. (Response p.6). The Expert agrees that 'the world of sport' encompasses not only the Organised Sport Movement but also individuals and organisation that prefer informal, unsanctioned and unofficial forms of sport. But that does not mean that those who prefer formal, sanctioned official forms of sport do not form a clearly delineated community. Properly understood, this is not an argument that the 'Organised Sports Movement' identified by the Objector is not clearly delineated. Rather it is a separate and distinct argument that the Organised Sports Movement is not synonymous with the gTLD in issue (<.SPORTS>). That argument is addressed at paragraph 15 below.

15. Next, is the Objector 'associated with' the Organised Sports Movement?

15.1 According to the Guidebook, factors that may be considered in determining whether the objector is associated with the community in question '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; ...'. (Guidebook p.3-8).

15.2 The Objector explains that its Statutes create clear mechanisms for international sports bodies to become members of its General Assembly and for individuals from those bodies to be appointed to its governing Council. (Objection p.7). It notes that 91 international federations have become members, as well as 16 organisers of international sports events. It explains that its mission and its activities include helping



its members to govern and regulate their sports more effectively by addressing issues of common interest and concern to them, including establishing permanent liaisons between the international federations, defending their common goals and objectives, preserving their autonomy, and administering programmes for good sports governance, social responsibility, doping-free sport, and the fight against match-fixing and illegal betting. (Article 2 of the SportAccord Statutes, Objection Annex 1).

15.3 The Applicant does not dispute any of the above. Therefore its assertion that the Objector 'lacks any significant relationship with a substantial portion of the community it claims to represent' (Application p.7) must be based on the premise that the Objector is claiming to represent not just the Organised Sports Movement but rather 'the [whole] world of sport'. Once it is clarified that the community that the Objector claims to represent is the Organised Sports Movement, this argument falls away: it is clear that the Objector, with its 91 international federation members, has a significant relationship with the Organised Sports Movement. Indeed, one of its functions is to represent them in matters of common interest, such as this Community Objection.

16. Finally, is the Organised Sports Movement strongly associated with the string <.SPORTS>?

16.1 This seems to the Expert to be self-evident. While there are people who prefer to participate in or follow unofficial, informal and unsanctioned forms of sport, the vast majority prefer to participate in or follow sports that are official and sanctioned by IOC-recognised international federations and their members, and so are played in accordance with their system of uniform rules and regulations. The Objector notes that it has 91 international sports federations in membership, between them those international federations have an estimated 15,000 member national federations, who have an estimated 5 million club members, and (between them) tens or hundreds of millions of individual athletes participating in their respective sports. Many million more members of this community do not participate themselves but follow their sports as fans or as commercial partners (such as sponsors) who seek to associate themselves with those sports. Therefore, although the Organised Sports Movement may not encompass the whole of 'the world of sport', it encompasses the vast majority of it. The Expert accepts the Objector's assertion (Objection p.10) that when that vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model described above.

16.2 The Applicant asserts that this requirement (proof that the community is 'strongly associated with the applied-for gTLD') means 'in other words' that 'the word "sports" must readily and essentially solely bring Objector's organization to mind. Merely stating that proposition reveals its folly'. (Response p.6). First, however, the 'Objector's organization' may not be the same as the 'community' that the Objector claims to

represent. But even if one reads 'Objector's community' in place of 'Objector's organization', the Expert does not agree that that is an appropriate reformulation of the requirement: 'strongly associated with' is not the same as 'readily and essentially solely brings to mind'. The word 'sports' may not 'solely bring to mind' the Organised Sports Movement, but it is 'strongly associated with' that movement.

- 16.3 Alternatively, the Applicant says the Objector must show that the applied-for gTLD is 'uniquely or nearly uniquely' identified with the community the Objector is representing. The Applicant says that the Objector does not meet this requirement, because there are people who are not in the community that the Objector purports to represent who could nevertheless be identified with 'sports'. (Response pp.6-7).
- 16.4 The Expert agrees that the Objector does not meet this alleged requirement: there are people in 'the world of sport' who are not adherents to the Organised Sports Movement. But is it actually a requirement? In support of this alleged requirement, the Applicant asserts that 'ICANN designed the community objection ... "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people"' (Response at p.6), and (again) that 'ICANN envisioned' that the community on whose behalf an objection was brought would be "'uniquely or nearly uniquely" identified' by the applied-for gTLD. (Ibid. p.7). The Expert interprets these remarks as a suggestion that ICANN has said that an objector on behalf of a community must show that the applied-for gTLD must be 'uniquely or nearly uniquely' identified with the community represented by the objector. However, the quote does not come from the Guidebook; and upon inspection of the document from which the Applicant has taken the quote (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda'), it transpires that the words quoted are not the words of ICANN, but rather the words of a private company called eNOM, asserting (as part of its comments on the July 2009 draft of the Guidebook) what it contends the objective of the Community Objection is (or should be). In its 'Commentary and Proposed Position' on the comments on that section of the Guidebook, ICANN does not endorse the eNOM comment, instead simply saying that 'the established criteria' (i.e., those set out in the draft Guidebook) should be used. And (as already noted) eNOM's proposed gloss on the Community Objection criteria did not make its way into the final version of the Guidebook issued in June 2012.
- 16.5 As a result, the Expert considers this submission by the Applicant, which is clearly intended to induce the Expert to reject the Objection, to be extremely misleading. This is (at the very least) unfortunate. In any event, contriving an argument to support a particular position (here, that the Objection should be rejected) creates a strong

inference that there is no valid argument for that position. More generally, it does nothing for the Applicant's credibility.

16.6 As a result, the Expert rejects the suggestion that the Objector must show that <SPORTS> uniquely or nearly uniquely identifies the Organised Sports Movement. The fact that not every single person who participates in or 'consumes' sport in one way or another is a member of the Organised Sports Movement does not mean that the Objector does not meet the standing requirements, properly construed.

17. Based on the foregoing, the Expert determines that the Objector meets all of the standing requirements set out in the Guidebook, and therefore has standing to object to the Application.

**D. FINDINGS IN RELATION TO THE SUBSTANTIVE REQUIREMENTS FOR A COMMUNITY OBJECTION (SECTION 3.5.4 OF THE GUIDEBOOK)**

18. There is a presumption in favour of granting new gTLDs, and therefore a corresponding burden on those who object to an application for a new gTLD to show why the application should not be granted. (See Guidebook, section 3.5). To sustain a Community Objection, the objector must show 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'. (Ibid., section 3.2.1). According to section 3.5.4 of the Guidebook, in order to do that, the Objector must satisfy each of the following four substantive requirements. If it does so, it has made the requisite showing; if it does not, then it has not.

**D.1 The Objector must prove that the community it invokes is 'a clearly delineated community'**

19. The Guidebook states: '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 ...; 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'.

20. The Objection proceeds on the basis that this requirement – proof that the community invoked by the Objector is a 'clearly delineated community' – is the same as the second of the standing requirements (that the Objector shows that that the community that it claims to be associated with is 'a clearly delineated community').

21. The Applicant in contrast asserts that the test here must be 'more stringent' than the test applied in the context of standing, because 'ICANN would have no reason to make "clearly delineated" a substantive element of objection if it meant nothing more than the criterion for standing. Rules "should be interpreted so as not to render one part inoperative".' (Response p.7). It therefore proposes the following test: 'Objector must show that the string itself describes a clearly delineated community', and then notes that 'sports' means many different things, and therefore does not meet that test. (Ibid. pp.7-8).
22. The Applicant's argument is superficially attractive. The Expert does not accept it, however, for the following reasons:
  - 22.1 Where a set of rules uses a specific phrase ('clearly delineated community') twice, it would be strange to interpret that phrase one way the first time it appears and another way the second time it appears. It is so counter-intuitive that absolutely compelling grounds would be required to adopt that approach.
  - 22.2 Without wishing to split hairs, technically speaking, interpreting the phrase in the same way each time it appears does not render the second requirement 'inoperative' (as the Applicant suggests) – the Objector has to show that he meets it. Rather, it renders the second requirement redundant (because it does not add anything to what has gone before). Redundancy is never ideal, but the Expert does not consider it to be a compelling reason to construe the same phrase differently in two parts of the same rule.
  - 22.3 The fact that the Applicant suggests that 'clearly delineated community' as it appears in the first substantive requirement should be construed to mean that 'Objector must show that the string itself describes a clearly delineated community' is both ironic (because the Applicant has also suggested that that is how the second standing requirement should be construed, i.e., it proposes the same redundancy that it says the Expert should avoid) and unhelpful to the Applicant (because it is a repeat of the requirement that the Applicant suggested – wrongly – was an ICANN requirement). (See paragraph 16.4 above).
  - 22.4 While there is no system of binding precedent in an expert determination, the Expert does place reliance on the fact that another expert, construing exactly the same rules, has found that the first substantive requirement adds nothing beyond what is required by the second standing requirement: see Expert Determination dated 3 September 2013 (<FLY>), Case No. EXP/493/ICANN/110, para 13.

23. As a result, since the Expert has already found (in the context of the second standing requirement) that the community that the Objector invokes in the Objection (i.e., the Organised Sports Movement) is a clearly delineated community, it follows that the Objector has also satisfied this first substantive requirement.

**D.2 The Objector must prove that the opposition to the Application by the community invoked by the Objector is substantial**

24. The Guidebook states (at section 3.5.4, p.3-23): ‘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 recognised stature or weight among sources of opposition; diversity amongst sources of expressions of opposition, including regional, subsectors of community, leadership of community, membership of community; historical defence of the community in other contexts; and costs incurred by 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’. The Applicant suggests that the Objector must establish each of these factors (Response p.8), but in fact the words quoted make it clear that these factors are not an exhaustive list of potentially relevant factors, and that therefore the Objector may meet its burden by establishing all of them, or some of them, or even none of them, provided that it establishes enough relevant factors (which may or may not be factors listed in the Guidebook) to outweigh any countervailing factors established by the Applicant.
25. The Objector states that it has received 'not just significant, but overwhelming' support for the Objection from the community it represents (i.e., the Organised Sports Movement). (Objection p.10). It notes that its Executive Committee, on whose authority the Objection has been filed, speaks for its entire membership, i.e., the 107 international sports federations/event organisers listed at Annex 2 to the Objection. It also submits with the Objection individual statements of support for the Objection from 55 of those members, as well as further statements of support from the International Olympic Committee (the body at the apex of the Olympic Movement) and the World Anti-Doping Agency (a foundation made up of representatives of both the Olympic Movement and public authorities). (Objection Annexes 3 and 4).
26. The Applicant’s contention that this does not represent a 'meaningful number of expressions of opposition' from the community in question appears to be premised on that community being anyone with any interest in any form of sport. Once it is clarified that the ‘Sport community’ to which the Objector refers is actually the Organised Sports Movement, that contention falls away: the IOC and 55 international federations, as well as WADA, are a meaningful portion of the Organised Sports Movement by anyone’s reckoning.

27. The Applicant's challenge to the 'stature of those ostensibly voicing opposition' is also rejected: the IOC, WADA and the international federations in membership of the Objector are the ultimate governing bodies of organised sport; there is no higher authority than them.
28. Accordingly, the Expert finds that the Objector has also satisfied this second substantive requirement.

**D.3 The Objector must prove that there is a strong association between the community it represents and the applied-for gTLD string**

29. The Guidebook states (at section 3.5.4): '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; and 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'.
30. Once again, this appears to be a repeat of one of the standing requirements, namely the third requirement that the community with which the objector is associated is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection'. (See paragraph 16 above). Given the identical wording, the Expert considers that, absent compelling reason, they must mean the same thing in both contexts, and therefore satisfaction of the standing requirement inevitably means satisfaction of the third substantive requirement as well. Once again, the Expert draws support for that conclusion from the fact that the expert in Expert Determination dated 3 September 2013 (<.FLY>), Case No. EXP/493/ICANN/110, para 13, took the same approach.
31. Is there anything in the submissions that the parties make on this point that compels a different conclusion in this context? The only new elements are the concepts of 'explicit targeting' and 'implicit targeting', which the parties deploy to show (or to refute) the required association between the Organised Sports Movement and <.SPORTS>. This is presumably because the relevant sub-paragraph in section 3.5.4 (quoted at paragraph 29 above) is headed 'Targeting', but then no mention is made of those concepts as factors of possible relevance to this third substantive requirement. Instead, the concepts are only specifically mentioned in the context of the fourth substantive requirement. (See paragraph 38 below). This is slightly strange, but the Expert is content to review the submissions on 'explicit targeting' and 'implicit targeting' at this stage to see if anything in them compels him to depart from the conclusion previously reached (in the context of the standing requirements) that the Organised Sports Movement is strongly associated with the <.SPORTS> gTLD.
32. According to the GNSO Final Report, 'explicit targeting means there is a description of the intended use of the TLD in the application'. This must mean 'a description of the intended use of the TLD in the application that reveals that it is targeted at' the community in question. The

Objector argues that it must be found that the Application explicitly targets the Sport community the Objector represents, because if 'there is an ICANN community, it would be contradictory to pretend that there is no such thing as a Sport community'. (Objection p.10). With respect, the Expert finds this argument very difficult to follow. In response, the Applicant states that the express purpose of applying for this gTLD is 'maximising Internet participation', to which end it will 'encourage inclusiveness in the registration policies'. It says: 'This TLD is a generic term and its second level names will be attractive to a variety of Internet users. No entity, or group of entities, has exclusive rights to own or register second level names in this TLD.' In other words, the intended use of the TLD is 'open and the string itself is not tied to a specific community'. Therefore it is not targeted at any specific community. (Application p.9). However, the Expert does not believe that it follows that because the <.SPORTS> TLD will be made available to anyone, whether they are a member of the Organised Sports Movement or not, therefore use of that TLD cannot be targeted at that community. This factor seems neutral at best.

33. According to the GNSO Final Report, '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'. On its face, this looks like a subjective test (i.e., does the Objector actually make such assumption/hold such belief?) rather than an objective test (is the assumption/belief reasonable?), which is slightly unusual (usually an objective approach is taken), although not unheard of. However, the Expert would normally want any subjective assumption or belief to be shown to be objectively reasonable.
34. The Objector certainly states a subjective assumption and belief that the intent and/or the effect of the use of the <.SPORTS> gTLD will be a targeting of the Organised Sports Movement. It asserts that 'modern usage' of the word 'sport' is almost exclusively associated with organised sport (i.e., what the Expert has termed the Organised Sports Movement) and thus the gTLD <.SPORTS> is clearly targeted at organised sport. (Objection p.10). It also asserts a belief that the gTLD will give associated websites 'a false sense of official sanction' that could confuse users into thinking their content is issued by or endorsed by the Organised Sports Movement. (Ibid).
35. The Applicant's response is (i) to deny that the word 'sports' mainly calls to mind organised sports (rather, it 'represents a generic form of activity and expression'); (ii) to insist that therefore <.SPORTS> is not targeted exclusively at organised sports; and (iii) to assert that the Objector has not provided any evidence to support its belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement. (Application p.9).
36. The Expert has already rejected the first two of these contentions in the context of the standing requirements, including pointing out that there is no requirement that the .SPORTS gTLD must only call to mind the organised sports movement. (See paragraph 16 above). The Expert also

considers the Objector's belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement to be a reasonable belief. (See paragraph 43.3, below).

37. As a result, the Expert sees no compelling reason to depart from his conclusion (in the context of the standing requirements: see paragraph 16 above) that there is 'a strong association' between the <.SPORTS> gTLD and the Organised Sports Movement.

**D.4 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**

38. Finally, the Guidebook states (at page 3-24): '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'.
39. The Expert does not consider that the reference to 'the community to which the string may be explicitly or implicitly targeted' adds anything material to the already-discussed requirement of proof that the community that the objector is associated with is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection' for purposes of standing (see paragraph 16 above) and of proof of 'a strong association between the applied-for gTLD string and the community represented by the objector' in the context of the third substantive requirement (see paragraphs 29-37 above). Since the Expert has already found that those requirements are satisfied, including finding it reasonable to believe that websites using the string <.SPORTS> will be at least implicitly targeting the Organised Sports Movement (see paragraph 29 above), it follows that this part of the fourth substantive requirement is also met.
40. That leaves the question of whether the Applicant's proposed operation of the string 'creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of' the Organised Sports Movement. The Guidebook provides the following guidance on this issue (at page 3-24): '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 on the DNS [domain name system] 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; and level of certainty that alleged detrimental outcomes would occur'. Again, the Objector does not have to establish that each of these factors is present in order to sustain its burden. It can invoke some of these factors (and/or other factors that it can show are relevant), and those factors are then balanced against any countervailing factors established by the Applicant. However, since the Objector has the burden on this point as well, the factors it invokes must outweigh any factors invoked by the Applicant, or else the Objection must be rejected.

41. The Objector's submissions on this point (Objection pp. 11-18 and related annexes) can be summarised as follows:

41.1 First, the Objector contends that the Organised Sports Movement would suffer both economic and reputational damage from the Applicant's operation of the <.SPORTS> gTLD, because the Applicant's intended operation of the gTLD would 'disrupt Sport community policies, promote ambush marketing, increase cybersquatting and abet abuse in a way that specifically targets the Sport community'. This argument runs as follows:

41.1.1 The Organised Sports Movement already suffers serious detriment from users' abuse of the 22 existing TLDs to target and exploit the reputation and goodwill of the Sport community, including ambush marketing and brand jacking, cybersquatting and typo-squatting. (For example, the IOC alone already has to deal each year with between 5,000 and 10,000 domain name registrations that infringe its rights [Objection Annex 11], and approximately 4,500 Olympic-related domains are removed from major domain auction services each year; while the IOC has been forced to register and maintain 'hundreds of defensive registrations in many existing TLDs'). Another well-established type of abuse is the misuse of sports themes for pornography (e.g., Olympicporn.com).

41.1.2 The <.SPORTS> gTLD will be an even more effective means for abusers to target and exploit the reputation and goodwill of the Organised Sports Movement, because that TLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction'. The Objector asserts that this 'would inevitably erode consumer trust by misleading individuals through unofficial content'. For example, if users were to use the 'false sense of official sanction' arising from the <.SPORTS> gTLD to give credibility to websites selling tickets to sports events that they do not have and/or do not have the right to re-sell, so that the purchaser is defrauded out of his or her money, which would 'destroy consumer confidence and trust in the respective organizers and jeopardise events'.

41.2 The Objector also contends that the Applicant's proposed operation of the <.SPORTS> gTLD would interfere with the Organised Sports Movement's use of the Internet to promote the integrity of organised sport and to promote public confidence in the ability of the Organised Sports Movement to preserve that integrity. This argument runs as follows:

41.2.1 The Organised Sports Movement relies on mass communication via the Internet on issues such as anti-doping, anti-drug, anti-racism, ticket scalping and gambling to protect public confidence in the integrity of sport and in the ability of sports governing bodies to protect that integrity.

41.2.2 The Objector notes that the Applicant's policy of unrestricted access would inevitably mean that 'a large number of the .sport(s) domain holders in such a regime would be outside of the sport community', using the gTLD not only to exploit improperly the goodwill and other assets of the Organised Sports Movement, but also in ways that will distort and contradict the messages that the Organised Sports Movement is seeking to send about the integrity and values of (organised) sport.

41.2.3 Visitors to <.SPORTS> websites may perceive, because of that TLD, that the content of those sites is linked to, and even sanctioned by, the Organised Sports Movement. Unscrupulous users may take advantage of this to suggest, for example, that doping products (e.g., supplements) or gambling products that they are selling are connected officially to/endorsed by the Organised Sports Movement. This may cause athletes to believe that substances such as steroids are officially sanctioned when their use is in fact prohibited; and/or may lead followers of a sport to believe that its governing bodies are not in fact firmly opposed to activities that have the potential to corrupt that sport (such as certain inappropriate or illegal gambling activities), and so to lose confidence in the strength and commitment to integrity of the Organised Sports Movement.

41.2.4 The Objector asserts that the sheer number of existing domain names containing doping-related keywords (Objection Annex 15) illustrates the risk to the credibility of sport that a sports-specific gTLD would present.

41.2.5 The Objector also highlights the risk of racist content or innuendo appearing with a 'false aura of official sanction', and the difficulty in ensuring removal of such content due to a lack of legal mechanisms and practical access. It is also concerned about 'content inducing dangerous and violent behaviour'.

- 41.3 The Objector asserts that sports bodies 'would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access', i.e., because the existing ICANN anti-abuse policies are of limited effectiveness, being expensive, burdensome, and impracticable in many respects. For example, 'IOC has filed numerous UDRP complaints. However, UDRP proceedings are too costly for systematic use'. It is therefore concerned about creating many further opportunities for abuse (indeed, more targeted abuse) through the <.SPORTS> gTLD. It says the only way to prevent abuse of the kind it has identified would be to submit the gTLD operator to 'a sport-specific acceptable use policy covering general sports values and sport-related economic interests, such as safeguards against ambush marketing', and to make it accountable to the Sport community for compliance with that policy, by means of 'direct oversight before and after domain registration, as well as a path for rapid corrective or disciplinary action ... '. Otherwise, for example, 'an unaccountable operator of a .sport TLD will not be willing or able to monitor its name space with respect to doping-abetting content' and is therefore 'certain to encumber community efforts against doping'.
- 41.4 The Objector notes that the Applicant 'lack[s] accountability to the Sport community' and that 'the TLD policies described in [the Application] are devoid of any oversight mechanism specific to the Sport community'. It asserts that, rather than having an interest in 'protecting the official message and image of the [Organised Sport Movement]', the Applicant 'has a pecuniary interest in maximising the registration of second-level domain names, including unauthorized registrations of community stakeholders' names, variants of those names, and misspellings of those names'. It notes in this regard that Donuts (the Applicant's parent company) is closely associated with Demand Media Group (Response Exhibit 1, Q.23), which has had 22 rulings against it since September 2008 for bad faith domain name registrations, typo-squatting, and cyber-squatting. (Objection Annex 12, email dated 28.07.12, para 7). It notes that Demand Media Group has an option to 107 of the gTLDs for which Donuts and its affiliates have applied. (Objection p.26).
- 41.5 The Objector asserts that, as a result of the above, the Olympic Sports Movement will suffer substantial monetary damage, but also reputational damage, and damage to the values and image of sport (Objection p.17, and Annex 13); ICANN and internet governance capabilities will be overloaded; and society will lose the benefits that could have been achieved through responsible management, as well as an opportunity to create a 'powerful organizational tool' (just as the .edu TLD was harnessed in the US for educational benefits rather than monetised). The Objector asserts that these effects will be 'largely irreversible', in that they will 'destroy the image of the domain', and 'it will not be possible to clean it up and get the public to "unlearn" the perception of abuse and chaos'.

42. In response, the Appellant makes the following submissions:

- 42.1 The Applicant acknowledges the risks of cyber-squatting and similar forms of abuse, but asserts that it is 'committed to safeguards that surpass ICANN's requirements for the new TLDs' that will 'reduce the extent of bad behaviour seen in large registries now'. (Response Annex 10). It asserts that the Objector 'tenders not a shred of evidence that Applicant's proposed string would create any greater or different harm to the sport "community" than it apparently experiences under the existing regime'. (Response p.10). In other words, if harm arises, it will not have been caused by the <.SPORTS> gTLD. (Ibid.).
- 42.2 The Applicant openly acknowledges and indeed seeks to make a virtue out of the fact that it 'will not limit eligibility or otherwise exclude legitimate registrants in second level names'. (Response Annex 3 p.12). For example, it says that it would give access to the <.SPORTS> gTLD to 'bloggers, athletes, enthusiasts, and even those not specifically identified with the term'. (Response p.4). However, the Applicant disagrees with the Objector that this will cause material detriment to the Organised Sports Movement. In particular, it says that it will put in place registration policies that include the 14 mechanisms required by ICANN for the new gTLDs, but also 'eight innovative and forceful mechanisms and resources that far exceed [those] already powerful protections', to 'address the exact type of concerns raised by Objector'. (Response tab 3, Exh 1). It asserts that these mechanisms 'protect and eradicate abuse, rather than attempting to do so by limiting registrant eligibility'. (Response tab 3 Exhibit 1, p.11).
- 42.3 The Applicant acknowledges these policies will not prevent the Olympic Sports Movement losing domain names corresponding to non-trademark protected individuals, events and organisations to speculators, but contends that this is a 'reasonable consequence rather than a detriment' within the meaning of the Guidebook. (Response p.12). It argues that it would be improper to give recognition in this context to anything that is not already protected by intellectual property law, and that imposing registration restrictions as suggested by the Objector would 'hinder free speech, competition and innovation in the namespace', which would be contrary to the objectives of ICANN. (Response p.11).
- 42.4 In summary, the Applicant contends that 'the world of sport has not collapsed as a result of the Internet, and will not do so with a new gTLD that provides greater protections than cyberspace has ever known'. (Response p.13). It also asserts: 'In essence, the Objection contends that harm will result unless Objector runs the domain. That notion stands for the one proposition that ICANN has expressly stated cannot form the basis for a finding of detriment: "An allegation of detriment that consist of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment"'. (Response p.5).

43. The Expert's analysis of the foregoing factors identified by the parties is as follows:

43.1 The Applicant does not dispute that use of current TLDs includes abusive use that unfairly prejudices the intellectual property rights of members of the Organised Sports Movement. It simply says that there is no evidence that such abuse will be 'any greater or different' if the Applicant is delegated the <SPORTS> gTLD. That does not seem to the Expert to be a very attractive argument. The test is whether the Objector can show any detriment from the proposed use of the new gTLD; there is nothing to suggest that detriment of the type that it already suffers from abuse of the existing TLDs should be excluded for these purposes. And in any event, the creation of the new TLD would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the Organised Sports Movement to identify and try to take action against such abuse). And if it is correct that the new gTLD risks giving new sites and their content an aura of official sanction (which the Expert finds to be a reasonable assertion: see paragraph 43.3 below), then not only are there more opportunities for abuse, but the risk of detriment is greater from them. As a result, the Expert considers that this factor tips in favour of the Objector.

43.2 Furthermore, the Applicant openly acknowledges that it will grant use of domain names corresponding to non-trademark protected individuals, events and organisations to speculators. It simply says that this is not a detriment but a 'reasonable consequence' of the freedoms contemplated by the new gTLD programme. This seems to the Expert to boil down to the following question: assuming that such conduct does not infringe a formal legal 'right' of those members of the Organised Sports Movement, does the Organised Sports Movement nevertheless have a 'legitimate interest' in preventing speculators creating and exploiting an unauthorised association between their websites and the individuals, events and organisations in question for their own commercial and other purposes, and to the detriment of those individuals, events and organisations? The Expert sees no reason why this should not be recognised as a 'legitimate interest' in this context. The Applicant's assertion that doing so would 'hinder free speech, competition and innovation in the namespace' seems to the Expert to beg the question. The purpose of the new gTLD programme is indeed stated to be to promote free speech, competition and innovation. However, the creation of the 'Community Objection' mechanism reflects an acknowledgement that those are not absolute values, but instead can and should be subject to proportionate restrictions where necessary to avoid detriment to the rights and legitimate interests of a community. The balance is struck by putting the burden of proof on the party making the objection on behalf of the community to satisfy each of the elements of the Community Objection. Therefore, it adds nothing to say that the Objector's stance would 'hinder free speech, competition and innovation in the namespace'. The only question is whether the required likelihood of detriment to the rights or legitimate interests of the Organised Sports Movement has

been shown. If so, then any hindrance of free speech, competition and innovation that follows is necessarily justified, and so not a reason to reject the objection.

43.3 The Expert also considers that the Organised Sports Movement has a 'legitimate interest' in preserving the integrity of sport and the authenticity of results, and in ensuring the public has confidence in its readiness, willingness and ability to do so. Indeed, unless sport is not only 'straight' but seen to be 'straight', then the public's confidence in uncertainty of outcome – the very essence of sport -- will be compromised, which would be nothing short of disastrous for the Organised Sports Movement. Furthermore, the Expert agrees with the Objector that users of current TLDs (particularly supplement companies) often do seek to suggest that the content of their sites and/or the products they are selling are officially endorsed by the Organised Sports Movement. (See, e.g., Kendrick v. ITF, CAS 2011/A/2518, award dated 10 November 2011, where an athlete was misled into taking a supplement that contained a prohibited substance by the false claim on the manufacturer's website that the supplement had been 'approved' by the 'World Anti-Doping Association' [*sic*]). Therefore, if the Objector is correct that the <.SPORTS> gTLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction', the Expert would agree that a likelihood of detriment to the legitimate interests of the Organised Sports Movement has been established. The Expert has already found that there is a 'strong association' between the <.SPORTS> gTLD and the Organised Sports Movement, in that 'when that vast majority (many millions of organisations and individuals around the world) think of sports, they think of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model described above'. (See paragraph 16.1 above). That does not automatically mean that they would assume that sites (or content on sites) with that string in their domain name would necessarily be 'official' or 'sanctioned' content, but it is clearly reasonable to think there is a risk that they might. For example, it is easy to see that a website with the domain name 'olympic.sports' might be perceived by Internet users as having an aura of authenticity and official association with the International Olympic Committee and/or the Olympic Games. As a result, this is also a factor that tilts in favour of finding the detriment requirement met.

43.4 The Applicant does not make good its assertion that its intended registration policies will 'address the exact type of concerns raised by Objector'. In fact, the 'abuse' that the Applicant seeks to prevent in its policies appears to be confined to infringements of intellectual property rights and 'fraudulent activity' such as distribution of malware, phishing, DNS hijacking or poisoning and spam. (Response p.10 and Exh. 1 Q28.3 [TLD Anti-Abuse Policy]). As noted above, the Applicant openly says it would not prevent ambush marketing through unauthorised use of famous names (because it does not regard that as abusive). (See paragraph 42.3 above). Similarly, there is

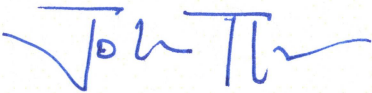
nothing in the Applicant's policies that would prevent users from operating their sites and/or putting content on them in a manner that falsely suggested an association with or endorsement by the Organised Sports Movement. The Expert therefore accepts the Objector's submission that the Applicant 'will not be willing or able to monitor its name space with respect to doping-abetting content', thereby undermining the Organised Sports Movement's ability to fight against doping in sport. It is also relevant in this regard that ICANN has said that '[w]hile ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs'. (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda', p.21).

- 43.5 The Expert agrees with the Applicant that the Objector's assessment of economic and other losses (including opportunity costs) is not particularly compelling. In particular, the Objector has not been able to come up with a meaningful estimate of the economic damage it would suffer if the Application were granted. That is not surprising, however, given the nature of the potential detriment identified by the Objector. Furthermore, and in any event, the detriment test under section 3.5.4 of the Guidebook is that of 'a likelihood of material detriment', not an actual, quantified damage. The Expert does not regard this as a sufficiently strong negative factor to outweigh the factors set out above.
- 43.6 Finally, the Applicant is correct that the Guidebook states '[a]n allegation of detriment that consists of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment'. However, as far as the Expert is aware, the Objector has not applied to have the gTLD <.SPORTS> delegated to it (only <.SPORT>). (Objection p.10). And in any event, the sorts of protections that the Objector says would be required in connection with the exploitation of the <.SPORTS> gTLD (i.e., a sports-specific acceptable use policy and a mechanism for making the operator of the gTLD accountable to the Organised Sports Movement for enforcing that policy) seem to the Expert to be measures that could be put in place by any entity, not only an entity that was part of the Organised Sports Movement. As the Expert reads the Objection, the Objector does not suggest otherwise.
44. Balancing all of these factors, the Expert considers that the factors of detriment to the rights and legitimate interests of the Organised Sports Movement that have been established by the Objector outweigh the contrary factors cited by the Applicant, and therefore the Objector has met its burden of proof on this issue as well.

**E. DETERMINATION**

45. For the reasons set out above, and in accordance with Article 21(d) of the Procedure, the Expert renders the following Expert Determination:

- i. The objection is successful and therefore the Objector is the prevailing party.
- ii. The Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.



Jonathan Taylor

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Jonathan Taylor, Expert

Dated: 21 January 2014