

15 May 2014

Dr. Bruce Tonkin  
Chair, ICANN Board Governance Committee

Re: Reconsideration Request 14-10 (Dot Sport Limited)

Dear Dr. Tonkin,

I am the Director General of SportAccord, and I am writing in response to Reconsideration Request (14-10) filed by Famous Four Media's subsidiary Dot Sport Limited (hereinafter FFM). It is my duty to respond on the behalf of the Sport community and explain why this latest FFM Reconsideration Request should be summarily dismissed along the same lines that the ICANN Board Governance Committee (BGC) properly dismissed FFM's first Reconsideration Request.

The present filing is nothing more than misstatements of facts mixed with veiled innuendos seeking to undermine the credibility of an international recognized jurist and ICC Expert panelist Dr. Guido Tawil. SportAccord will seek to shed light on some of the veiled innuendoes which FFM has made by citing to public facts.<sup>1</sup> SportAccord would also like to address a number of troubling procedural issues in connection with FFM's recent actions, e.g. multiple Reconsideration Request filings; failure of FFM to allow the Ombudsman to issue his final report before filing this second Reconsideration Request; there being no legal/procedural basis for the relief FFM is seeking; and the lengthy delay between bring this second Reconsideration Request and the underlying allegations at issue.

## **BACKGROUND**

Based on its charter and in coordination with 108 members and other international Sport Governing Bodies, SportAccord decided to proactively apply for a .SPORT TLD on behalf of the global Sport community. One of the key aspects of this initiative was a recognition that the operation of the TLD had to be based on a solid framework with built in community-based accountability mechanisms to advance the values and ideals of Sport.

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<sup>1</sup> Since SportAccord has not engaged in any ex-parte communications with Dr. Tawil, we are unaware if any of these allegations have been communicated to him. In the interest of openness and transparency, we have copied Dr. Tawil on this communication as we believe he should have the opportunity to defend himself against the serious allegations made against him.

On this basis, SportAccord issued a public call for proposals among potential registry operators interested in operating the .SPORT TLD in collaboration with SportAccord. One of the participants in this RFP was FFM who was represented by Mr. Geir Rasmussen. FFM was included in a short list of candidates to provide an in person presentation at SportAccord's offices at the Maison du Sport International in Lausanne, Switzerland. In the end, SportAccord selected another candidate from the shortlist and FFM was immediately informed of the outcome. FFM did not communicate with SportAccord or make any public announcement before submitting an ICANN TLD application for .SPORT in May 2012.

SportAccord was surprised to learn of FFM's pursuit of the .SPORT string as well as several other sport themed TLDs in its portfolio of applications: .RUGBY, .BASKETBALL, .FOOTBALL, .CRICKET, .HOCKEY, and .SOCCER. This behavior is hard to reconcile with FFM's claims of it being "an innocent party" having "lost large amounts of money" as a result of its "good faith" when it knew about the Sport community's commitment to the .SPORT string since as early as 2011.

SportAccord objected to FFM's ".SPORT" application and Donuts' ".SPORTS" application on behalf of the global Sport community. The objections were supported by explicit letters of opposition by 50 international sport federations, the IOC and other global sport bodies. Both .SPORT(S) community objections prevailed, as did SportAccord's "' .SPORT/.SPORTS" string confusion objection.

Following these adverse decisions, FFM has engaged in a pattern of vexatious and dilatory tactics with the sole purpose of delaying SportAccord from moving forward with its single community application.<sup>2</sup> All the while, FFM has moved forward with multiple generic strings from its portfolio of applications. The ICANN Board needs to do the right thing and summarily dismiss FFM's Reconsideration Request *again*, and then direct ICANN staff to issue a CIR to SportAccord.

#### **FFM'S SECOND BITE AT THE RECONSIDERATION REQUEST APPLE**

In FFM's first Reconsideration Request (13-16) filed last year, FFM previously challenged the impartiality of Dr. Tawil based upon him co-chairing a panel on the use of dispute resolution in sport hosting events. The BGC in rejecting FFM's allegations stated "the Requester provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality. Rather, the Requester is challenging the merits of the Expert's disclosure. Such challenges should be brought to the ICC under the ICC Rules of Expertise, not through the Reconsideration process."

As the BGC noted in its 13-16 decision, FFM is familiar with the ICC rules regarding challenges to the appointment of a panelist as they successfully exercised them in connection with the initial appointment of Mr. Taylor. However, FFM did not exercise these rights at the time Dr. Tawil was appointed probably because there was no real basis then, as there is none today, to block his selection.

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<sup>2</sup> FFM's vexatious and dilatory tactics include but are not limited to: (i) FFM's original challenge to Mr. Taylor as a panelist; (ii) FFM's first Reconsideration Request (13-16); (iii) FFM's complaint to the Ombudsman during the Singapore ICANN meeting; and (iv) Failing to allow the Ombudsman to complete his investigation prior to filing this second Reconsideration Request (14-10).

SportAccord respectfully submits that FFM's second Reconsideration Request should be summarily denied by the BGC, once again, for being **procedurally inadmissible** on the following grounds:

- (i) This new Reconsideration Request is clearly untimely under ICANN's Bylaws; and
- (ii) FFM's claim that Dr. Tawil may have had a conflict of interest is not a basis for reconsideration; and any challenge to Dr. Tawil's impartiality should have been brought to the ICC under the ICC Rules of Expertise, not through a reconsideration process.

### *FFM's Reconsideration Request Is Untimely*

The Bylaws make clear that Reconsideration Requests must be submitted within fifteen (15) days after "the date on which information about the challenged Board action is first published in a resolution with an accompanying rationale." (Bylaws, Art. IV, § 2.5.) The specific actions that FFM requests to be reconsidered are:

Board's Rejection<sup>3</sup> of Reconsideration Request 13-16 on \_\_\_\_\_ ;  
Community Objection Determination by expert Dr. Tawil on **23 October 2013**; and/or  
Decision of International Chamber of Commerce ("ICC") of **29 July 2013** to appoint Dr. Tawil as expert.

The Reconsideration Request was received on **2 April 2014**, significantly later than the maximum fifteen (15) days from the date upon which the challenged resolutions were first published, thereby rendering this filing untimely under the ICANN Bylaws. Aware of this deficiency, FFM's conveniently claims that they discovered the existence of such conflict on 25 March 2014.

This appears to a patently false assertion as all relevant information was publicly known and available long before Dr. Tawil's appointment, and any new information cited by FFM (namely the latest round of adjudications of Olympic broadcasting rights) simply match the previously known fact that some clients of M.&M. Bomchil Abogados need to negotiate sport broadcasting rights in the normal course of their business.

FFM's argument about possible expert bias is extremely attenuated and based on information that was in the public domain long before the Expert's appointment. It is therefore impossible to argue that there is any reasonably likelihood of Dr. Tawil providing a false declaration or any information of sufficient weight to justify an exceptional extension of the time frames allowable under the ICANN bylaws. In conclusion, FFM's Reconsideration Request is untimely and should be denied on this basis alone. Notwithstanding this, next we will discuss that even if exceptional allowances were made to accept FFM's Request as timely, the stated ground for the Request do not support reconsideration.

### *Dr. Tawil's Allegedly Conflict Of Interest Is Not a Basis for Reconsideration*

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<sup>3</sup> <https://www.icann.org/en/groups/board/governance/reconsideration/13-16/determination-sport-08jan14-en>

Under Art. 13 (c) of Attachment to Module 3 of the ICANN Applicant Guidebook, “[a]ll Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence.” Paragraph (d) of the same Article states that “[t]he applicable DRSP Rules stipulate the procedures for challenging an Expert and replacing an Expert.” According to Art. 4 (b) (iv) of Attachment to Module 3 of the ICANN Applicant Guidebook, “[f]or a Community Objection, the applicable DRSP Rules are the Rules for Expertise of the International Chamber of Commerce (ICC), as supplemented by the ICC as needed.” Thus, any challenge to Dr. Tawil’s impartiality should have been brought to the ICC under the ICC Rules of Expertise, not through a reconsideration process.

FFM is perfectly familiar with the ICC rules regarding challenges to the appointment of a panelist. It challenged the initial appointment of Mr. Taylor, arguing that “the panelist must not be a sport lawyer” - hardly a convincing argument for the choice of an expert about the Sport community. The ICC nevertheless went along and appointed Dr. Tawil.

FFM did not challenge the appointment of Dr. Tawil. Now, after losing the objection, FFM falsely alleges for the second time that its new Reconsideration Request is based on “new” information. There is no relevant new information. It was sufficiently clear at the time from readily available public information<sup>4</sup> that M.&M. Bomchil Abogados has a TMT (Technology, Media and Telecoms) practice and that Mr. Marcelo Bombau is President of TyC, that TyC is partly owned by DirectTV, etc.

FFM itself mentions “M.&M. Bomchil Attorneys Firm Brochure from 2008” on page 7 of the Request. The long-term relationship between M.&M. Bomchil Abogados, Mr. Marcelo Bombau, TyC and DirectTV have been advertised so prominently and so for so long that nobody can reasonably argue to have just recently “discovered” them. These are companies with a necessary and obvious interest in sport broadcasting. Olympic live broadcasting occurs every two years, so it is not “new information” that they negotiate the required rights ahead of the respective games.

The fact that some customers of M.&M. Bomchil Abogados are strongly dependent on broadcasting rights has been public information long before Dr. Tawil was appointed. Bomchil customers have been assigned sport broadcasting rights before, not only for the Olympics, but also for other sports represented by many of the 50 international sport federations who explicitly opposed FFM’s bid for the .SPORT TLD.

The most pressing suspicion in this context is that FFM was keenly aware of M.&M. Bomchil Abogados’ sports-broadcasting-related client relationships at the time it decided not to challenge Dr. Tawil’s appointment. FFM’s previous challenge of Mr. Taylor<sup>5</sup> on the grounds of him being a “sports

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<sup>4</sup> The ready availability of the information at the time is evidenced among other things by relevant Wikipedia articles’ version history prior to July 2013, such as [http://en.wikipedia.org/w/index.php?title=Torneos\\_y\\_Competiciones&oldid=524791765](http://en.wikipedia.org/w/index.php?title=Torneos_y_Competiciones&oldid=524791765) from December 2012. M.&M. Bomchil Abogados’ own web site not only described TMD as one of its the areas of specialization, but carried links to external reviews, such as <http://www.chambersandpartners.com> or <http://www.legal500.com/c/argentina> .

<sup>5</sup> Mr Taylor’s response in the ICC questionnaire was identical to that of Dr. Tawil. When challenging Mr. Taylor’s appointment, FFM did not argue that Mr. Taylor failed to make a declaration. Now FFM pretends that

lawyer” was indeed at odds with FFM’s objection response arguments about the purported non-existence of a sport community.

## **MISSTATEMENTS OF FACTS**

There are several misstatements of facts in FFM’s filing including but not limited to:

- (i) SportAccord is NOT controlled by the IOC.
- (ii) There is no direct relationship between DirecTV and the IOC.
- (iii) There are no irregularities in Dr. Tawil’s decision.

### *SportAccord Is a Separate and Independent Entity from the International Olympic Committee*

One of the more egregious misstatement of fact in FFM’s Reconsideration Request is that the SportAccord is effectively controlled by the International Olympic Committee (IOC). SportAccord is a separate legal entity with its own offices, staff and budget. Although SportAccord and the IOC offices are both located in Lausanne, Lausanne is touted as the home of international sport and is home to over 30 International and European sports Federations. Unlike the IOC which represents a total 35 Olympic federations (28 summer and 7 winter), SportAccord has a much wider remit and obligation to the global sport community and its 108 members (92 federations and 16 organizations).

Another misstatement by FFM is the claim that the IOC appoints six (6) out of the eight (8) SportAccord Council members. The SportAccord Council is an executive body consisting of eight (8) members: the President which is selected by the General Assembly; two (2) members designated by the Association of Summer Olympic International Federations (ASOIF); one (1) member designated by the Association of International Olympic Winter Sport Federations (AIOWF); two (2) members designated by the Association of IOC - Recognized International Sports Federations (ARISF); one (1) member designated by the Full Members that do not belong to the above groups; and one (1) member designated by the Associate Members. The ASOIF, AIOWF and ARISF are separate legal entities which are independent of the IOC and each which have their own procedure to designate its representatives.

SportAccord does not deny that it has a collaborative working relationship with the IOC and other Sport governing bodies. However, SportAccord respectfully submits that this collaborative working relationship is no different than the common shared interest which many in the ICANN community have with other key internet stakeholders, e.g. IAB, IETF, RIRs, etc.<sup>6</sup> ICANN’s own legal counsel and staff should be able to attest to the separation of SportAccord and the IOC based upon ICANN’s in-

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Dr. Tawil failed to make a declaration although the circumstances are identical with respect to the respective law firms’ customer portfolio.

<sup>6</sup> See for example the preliminary ICANN Board report from 27 March 2014, “the IETF is a good example of collaboration between ICANN and the IETF communities.”

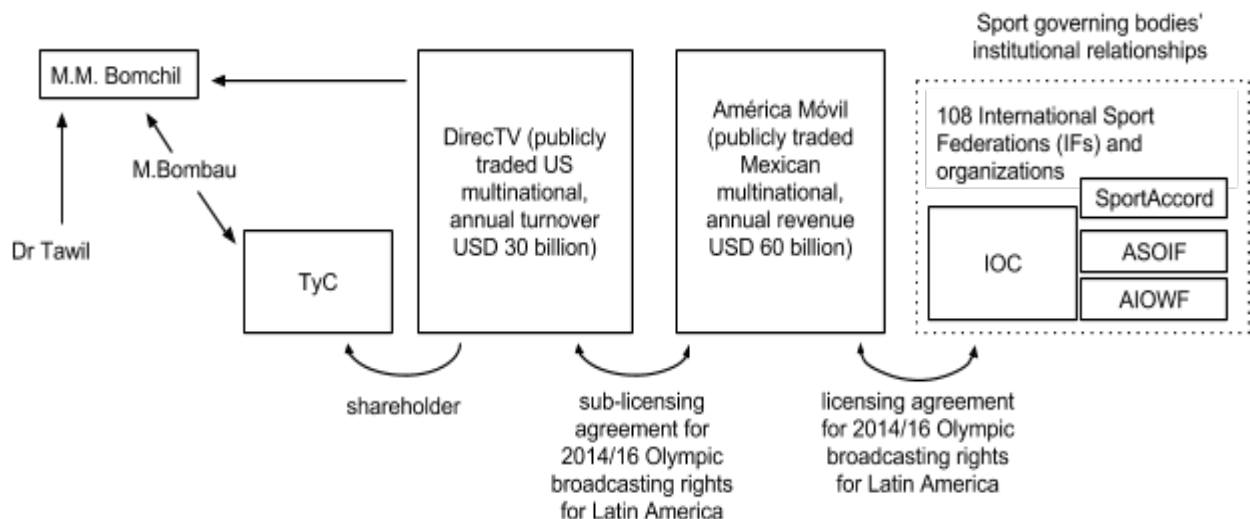
<http://www.icann.org/en/groups/board/documents/prelim-report-27mar14-en.htm>

depth discussion with the IOC in connection with the reservation of the Olympic marks at both the top and second level domain.

In its disparaging choice of words, FFM describes SportAccord as “inextricably linked” to the IOC. This carries a deliberate innuendo designed to instill the suspicion of covert or undesirable ties. The essence of the relationship between the IOC and SportAccord is that both are accountable to the Sport community and have solid institutional governance to guarantee such accountability.

*There Is No Direct Relationship Between the IOC And DirecTV*

The underpinnings of FFM’s allegation that Dr. Tawil falsified his panelist declaration is an attenuated claim of a conflict of interest based on another lawyer in Dr. Tawil’s firm negotiating a deal on behalf of a firm client (DirecTV) for Olympic broadcast rights. The broadcast rights that DirecTV secured constitute sub-license through América Móvil.<sup>7</sup>



*Diagram of relationships in which FFM purports to see new evidence of a potential conflict of interest linking Dr. Tawil to SportAccord. It is hard to imagine how Dr. Tawil, specialized in arbitration and administrative law, as one of 18 partners in an Argentinian law firm, could have been a factor in negotiations conducted by a Mexican multinational with the IOC over broadcasting rights in Latin America sublicensed to a large US company. FFM does not assert (despite such deliberate innuendo) that the Expert had any part in the broadcasting rights negotiations.*

It is important to note that broadcasting rights licensing agreements are arms-length relationships in which a sports governing body (such as the IOC) acts on behalf of the sport community, or the given

<sup>7</sup> The IOC announced the granting of the 2014 & 2016 Olympic broadcast rights to América Móvil on 22 March 2014, see <http://www.olympic.org/news/ioc-awards-2014-2016-broadcast-rights-in-latin-america/194907> . DirecTV was the *third* sub-license of these broadcast rights in a deal with América Móvil announced on 7 February 2014, see [http://www.sportspromedia.com/news/americamovil\\_sells\\_more\\_olympics\\_rights/](http://www.sportspromedia.com/news/americamovil_sells_more_olympics_rights/)

subset of the Sport community based on an objective process. This is comparable to ICANN entering into a registry agreement with a registry operator, or contracting with a dispute resolution provider. If it was enough to show a chain of unrelated relationships as proof of likely bias, then most of ICANN's panels would be "biased" because ICANN itself has contracts with some parties pleading before those panels.

Give FFM's propensity to manufacture conflicts and controversy out of thin air. SportAccord would like to proactively identify the following issues. First, in the IOC's 30 April 2014 letter to the ICANN BGC, the IOC directly responded to FFM's allegation of the conflict being between DirecTV and the IOC and does not address the existence of América Móvil. Second, in the firm brochure which FFM previously cited, it appears that América Móvil is also a client of M.&M. Bomchil Abogados. Whether América Móvil or DirecTV are still clients of the firm or whether they represented them in the current Olympic broadcast rights deal is unknown. Only Dr. Tawil and his firm can answer these questions. Notwithstanding the status of these relationships, the link to Dr. Tawil being a panelist in a proceeding brought by SportAccord is so remote that there should be no basis for the BGC to grant the relief FFM is seeking.

#### *There Were No Irregularities in Dr. Tawil's Determination*

In a press release issued by FFM just before the filing of this Reconsideration Request, FFM in addition to raising claims about Dr. Tawil's impartiality also claimed that there were a number of irregularities in his decision.<sup>8</sup> SportAccord respectfully submits that if the entire body of Community Objections involving SportAccord and related International Sport Federations is looked at, it will be clearly seen an established body of precedent and no irregularities as alleged by FFM.

#### SportAccord v Steel Edge, LLC<sup>9</sup>

SportAccord prevailed in a related ICC Community Objection filed against portfolio applicant Steel Edge, LLC regarding their .SPORTS application. In this complaint SportAccord raised the same issues to those raised in the FFM complaint. The Expert appointed by the ICC in this case was Jonathan Taylor, a partner in the international law firm Bird & Bird. In addition to co-chairing the firm's sport's law practice group, Mr. Taylor is widely recognized as one of the world's leading sports lawyers, advising nationally and internationally on cutting-edge commercial, regulatory and contentious issues across all major sports.

#### The International Rugby Board

The International Rugby Board (IRB) filed two ICC community objections against dot Rugby Limited<sup>10</sup> (another FFM subsidiary) and Atomic Cross, LLC<sup>11</sup> (another Donuts subsidiary). The ICC in this case

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<sup>8</sup> See <http://www.famousfourmedia.com/2014/03/statement-concerning-sport/>

<sup>9</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/27jan14/determination-1-1-1614-27785-en.pdf>

<sup>10</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1206-66762-en.pdf>

<sup>11</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/10feb14/determination-1-1-1612-2805-en.pdf>

appointed the same expert Mark Kantor for both proceedings. Similar to the Experts in the .SPORT and .SPORTS proceedings, Mr. Kantor ruled in favor of the IRB finding that the rugby community was clearly delineated and that there was a likelihood of material detriment in connection with the respective applications. Mr. Kantor, as a former partner Milbank, Tweed, Hadley & McCloy's Corporate and Project Finance Groups appeared to have no direct or indirect ties to the sport community.

United States Polo Association v. Ralph Lauren Corporation<sup>12</sup>

The United States Polo Association (USPA) filed an ICC community objections against Ralph Lauren Corporation's .POLO application. The ICC appointed Professor Burkhard Hess as the Expert in this proceeding, who ruled that the USPA had successfully established the four necessary elements set forth in the Community Objection standard. Unlike the other sport related community objections in which the Objector was either directly or indirectly associated with a competing application, USPA appeared to have no association with any competing application. Similar to Mr. Kantor and Dr. Tawil, Professor Hess appears to have no direct relationship with the sports community.

Fédération Internationale de Ski v Wild Lake, LLC<sup>13</sup>

The Fédération Internationale de Ski (FIS) filed and prevailed in a Community Objection filed against Wild Lake, LLC (another subsidiary of Donuts). The Expert appointed by the ICC, Mr. Taylor, ruled in favor of FIS consistent with the principles cited in the other referenced ICC Community decisions.

Fédération Internationale de Basketball

The only sports International Federation to file an ICC Community Objection and lose was the Fédération Internationale de Basketball (FIBA). Similar to the .SPORT/.SPORTS and .RUGBY proceedings, FIBA filed objections against portfolio applicants Donuts (Little Hollow, LCC)<sup>14</sup> and FFM (dot Basketball Limited)<sup>15</sup>. The ICC appointed a single Expert, Jennifer Kirby, for these two proceedings. Although Ms. Kirby appeared to have no direct association with the sport community, upon information and belief she had served as an Ad Hoc Clerk in The Court of Arbitration of Sport.

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<sup>12</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-1125-1032-en.pdf>

<sup>13</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/27jan14/determination-1-1-1636-27531-en.pdf>

<sup>14</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1355-53565-en.pdf>

<sup>15</sup> See <http://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1199-43437-en.pdf>



## Summary of ICC Community Objections

There have been a total of seventy (70) ICC Community Objections decisions rendered by ICC Experts, of which only fifteen (15) Objectors prevailed.<sup>16</sup> Out of these fifteen successful objectors, forty percent (40%) of these successful Community Objections involving four separate ICC Experts were associated with members of the global sport community. Therefore FFM's claims of irregularities in Dr. Tawil's decision is unfounded as the clear majority of Panelists have found in favor of global sport community members based on similar arguments regarding delineation and a material likelihood of detriment.

The entire underpinning of FFM's arguments is that the only explanation for the irregularities in Dr. Tawil decision is FFM's alleged conflict of interest. However, given that there are no irregularities with Dr. Tawil's finding, FFM's allegations of a conflict of interest are simply a Red Herring.

## CONCLUSION

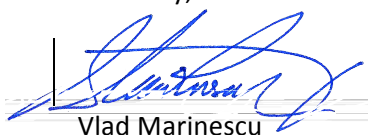
FFM's second Reconsideration Request should be summarily denied by the BGC, once again, on the basis of it being **procedurally inadmissible** as well as **baseless** and **frivolous**. It represents the latest strategy in a pattern of vexatious and abusive delaying actions by FFM.

SportAccord respectfully requests that the BGC, and or the New gTLD Program Committee, dismiss this Reconsideration Request.

Based on the foregoing, FFM's Application for .SPORT should not proceed. The same is true for the third application in the contention set, .SPORTS. Therefore, the contention set should be deemed resolved that the remaining community-based application for .SPORT should immediately proceed to the next relevant stage (Section 1.1.2.9 Guidebook).

Should any of the parties copied on this communication have any questions or comments please do not hesitate to contact me.

Sincerely,



Vlad Marinescu

CC: Ombudsman  
ICC  
Dr. Tawil

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<sup>16</sup> See <http://newgtlds.icann.org/en/program-status/odr/determination>