

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal
ICANN Independent Review Process

ICDR Case No. 01-21-0004-1048

GCCIX, W.L.L.,

Claimant

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

PROCEDURAL ORDER NO. 2
(Stay)

Tribunal

Gary L. Benton, Chair
Amb. (r.) David Huebner
Prof. Catherine Kessedjian

Date

21 April 2022

A. Introduction

1. This Order addresses the application of Respondent Internet Corporation For Assigned Names And Numbers (“Respondent” or “ICANN”) for a stay of this proceeding. Claimant GCCIX, W.L.L. (“Claimant” or “GCCIX”) opposes the application.
3. This IPR involves ICANN’s 2013 denial of GCCIX’s application to operate the .GCC generic top-level domain (“gTLD”) and various related claims. On 19 January 2022, prior to confirmation of the appointment of the Tribunal, ICANN informed the Tribunal that it intends to file a stay application in accordance with an ICANN Board resolution to open an informal dialogue with the ICANN Government Advisory Committee (“GAC”) regarding the rationale for its 11 April 2013 GAC consensus advice to the ICANN Board to not proceed with GCCIX’s application (“the GAC Advice”).
4. The parties were informed that the Tribunal would address matters relating to the stay application at the upcoming Preparatory Conference. Upon request of the Tribunal, the parties agreed to various dates and provisions for a briefing schedule.
5. The Preparatory Conference was held on 3 February 2021. The Tribunal agreed to consider the stay application and accepted the briefing schedule agreed to by the parties. The Tribunal addressed additional requests as to submissions and page limits and set a tentative hearing date for 20 April 2022, as confirmed in Procedural Order No. 1 (Procedures and Schedule) (“PO1”).
6. ICANN’s Opening Brief on the stay application was timely submitted on 10 February 2022; GCCIX’s Opposition Brief was timely submitted on 3 March 2022; ICANN’s Reply Brief was timely submitted on 10 March 2022; and GCCIX’s Sur-Reply Brief was timely submitted on 17 March 2022.
7. No request for oral argument was made by the parties and, on 21 March 2022, the Tribunal informed the parties that it determined a hearing on the application would not be necessary and the Tribunal proceeded with deliberations on the application.
8. The ruling of the Tribunal on this application follows.

B. Background

3. In 2012, GCCIX submitted to ICANN the sole application for operation of the .GCC gTLD. “GCC” is the well-known acronym for the Gulf Cooperation Council, formally known as the Cooperation Council for the Arab States of the Gulf, an intergovernmental organization (“IGO”) whose membership is six Gulf states. Claimant’s application encountered opposition purportedly because it was not affiliated with or supported by the GCC or its member states. In 2013, the ICANN Board accepted the consensus advice of the GAC that GCCIX’s application should not proceed.
4. The parties engaged in an ICANN Cooperative Engagement Process (“CEP”) and, thereafter, GCCIX initiated this ICANN Independent Review Process (“IRP”) in June 2021.
5. Following initiation of this IRP, an ICDR Emergency Measures request was made by ICANN and an Emergency Arbitrator was appointed. The Emergency Measures proceeding related principally to the confidentiality of the CEP conducted between the parties. Following the Emergency Measures proceeding, an Excised [IRP] Request dated 10 December 2021 was submitted by GCCIX.¹

¹ The Emergency Measures proceeding and the Excised Request are the subject of a separate pending

6. As described in the Excised Request, the dispute giving rise to this IRP relates, principally, to ICANN's decision to deny GCCIX's application to operate the .GCC gTLD. As well, GCCIX seeks review with respect to policy and practices concerning the GAC, the GNSO Council, the CEP and the IRP rules and procedures. GCCIX requests that the Tribunal finds that ICANN violated the ICANN Bylaws and recommends that ICANN follow prior IRP precedent, disregard the GAC advice to reject Claimant's application and return the application to processing. In its' Response, ICANN denies any wrongdoing, contends that it complied with its Articles and Bylaws, and requests that GCCIX's Excised Request be denied.
7. On 12 September 2021, the ICANN Board discussed this IRP and concluded that it could be beneficial to seek further information from the GAC regarding its rationale for the 2013 GAC Advice. Accordingly, the Board authorized ICANN to seek a stay of this IRP.
8. As addressed in the Preparatory Conference and confirmed in PO1, this IRP is conducted in accordance with the ICANN Articles of Incorporation dated October 2016 and the ICANN Bylaws dated 28 November 2019, in particular, Section 4.3 of the Bylaws. As provided in the ICANN Bylaws and as stipulated, the ICDR International Arbitration Rules ("ICDR Rules"), contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 March 2021, and as supplemented by the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018, apply to this proceeding.
9. ICANN makes this stay application pursuant to Article 27 of the ICDR Rules." ICANN seeks a six-month stay to allow ICANN further time to engage in dialogue with the GAC regarding GAC's consensus advice on GCCIX' application and take any further action as a result of that dialogue.

C. The Parties' Contentions

(1) ICANN's Opening Brief

10. In its Application ("Opening Brief"), ICANN contends that a six-month stay is the most efficient way to proceed because the GAC consultation process is already underway and it will likely change the facts, claims and arguments in this IRP and could even obviate the need for the IRP. It contends that both parties would benefit from a stay of this IRP to allow this process to play out and allow the parties to reassess the scope of the claims and defenses and the need for this IRP.
11. ICANN contends that GCCIX has refused to agree to a stay even though ICANN's decision to conduct dialogue with the GAC provides GCCIX with much of the relief it has requested.
12. As to the relevant facts, ICANN contends that under the 2012 New gTLD program any interested entity could apply for the opportunity to operate new gTLDs that were not already in use. The evaluation of all new gTLD applications were governed by the processes set out in the Applicant Guidebook ("Guidebook") and, given the importance of government involvement in ICANN's governance model, the GAC was provided a specified role in providing advice to ICANN on new gTLD applications, particularly applications that potentially violate national laws or raise sensitivities. RE Ex. R, Guidebook (4 June 2012) § 1.1.2.4.
13. ICANN contends that GCCIX's 2012 application acknowledged that GCC refers generally but not exclusively to the Gulf Cooperation Council and the application was not connected with or sponsored by the Council. RE Annex 1., p. 7.

14. ICANN contends that, given the lack of connection and support from the GCC, several objections were raised regarding the application, including (1) numerous public comments, (2) a GAC Early Warning expressing “serious concerns” with the application because the applied for gTLD matches the name of an IGO and lacks community involvement and support, (3) an ICANN Independent Objector review identifying public concerns, and (4) a Legal Rights Objection (LRO) filed by the GCC with WIPO against GCCIX’s application.
15. ICANN contends that, finally, on 11 April 2013, the GAC issued its “Beijing Communiqué” to ICANN which provided consensus advice, without rationale, that the .GCC application should not proceed. RE Ex. 11. ICANN contends that GCCIX responded to the GAC Advice acknowledging being informed by the Chair of the Board’s New gTLD Program Committee (“NGPC”) that the rationale for the GAC Advice was contained in the GAC Early Warning.
16. ICANN observes that the Guidebook expressly stated that GAC consensus advice against an application creates a strong presumption for the ICANN Board that an application should not be approved and, accordingly, the ICANN Board halted processing of the application in June 2013.
17. In February 2014, GCCIX initiated the CEP. ICANN contends that the parties continued to discuss the issues for several years, did not come to a resolution and GCCIX thereafter initiated this IRP. The IRP challenges ICANN’s decision to reject the application and ICANN’s failure to reasonably investigate or provide any rationale whether such decision is in the public interest.
18. ICANN contends that the Board reviewed, at its regularly scheduled 12 September 2021 Board meeting, the facts underlying this IRP along with two prior IRP final decisions cited, DCA v. ICANN (July 2015) regarding .AFRICA and Amazon v. ICANN (July 2017) regarding .AMAZON. ICANN acknowledges that, in those IRP decisions, the Tribunals held that ICANN’s acceptance of GAC consensus advice that lacked rationale was inconsistent with ICANN’s Articles and Bylaws. ICANN contends the Board passed its resolution to seek a stay and open an informal dialogue with GAC on its rationale despite GCCIX being aware of the GAC’s rationale.
19. ICANN contends that it initiated the dialogue with the GAC by letter dated 9 November 2021. It contends that, on 25 January 2022, the GAC issued a letter stating that the GAC had reviewed the GAC discussions from 2013 and the rationale was, as expressed in the GAC Early Warning, that the applied for string is an exact match of the known acronym of the GCC and, as such warrants special protection and the application clearly targets the GCC community without any support from the GCC, its six member states or its community. ICANN contends that it is in the process of determining next steps which could involve additional interactions with the GAC before the Board makes any further determination.
20. ICANN contends that ICDR Rule 27(1) allows the Tribunal to order or award any interim or conservatory measures it deems necessary and a stay of this IRP is necessary to serve the purposes of the IRP and aid in the ultimate resolution of this IRP and is the most efficient way to proceed.
21. ICANN contends that the core purpose of an IRP is to reduce disputes, a stay may obviate the need for this IRP and the dialogue will make a stay the most efficient way to proceed. It contends the ICANN Board is taking proactive steps to address Claimant’s stated concerns and a stay will permit ICANN to respond and address the allegations and ask the GAC for any new or additional information.
22. ICANN anticipates that GCCIX will argue that the IRP relates to past conduct and is not remediated by ICANN’s present decision to open a dialogue with the GAC but contends this argument contradicts the claims and requests to do just that. ICANN contends that limiting this IRP to past

conduct would be inconsistent with the purpose of the IRP, hinder the Board's independent decision making, as guided by applicable IRP precedent, and increase the parties' costs.

23. Accordingly, ICANN asks that a six-month stay be granted.

(2) GCCIX's Opposition Brief

24. In its Opposition Brief, GCCIX contends that ICANN has already effectively stayed this IRP for eight years in the CEP and an additional eight months through the Emergency Measures proceeding. GCCIX contends that ICANN already requested a six-month stay from the Emergency Arbitrator and ICANN offers no specific explanation as to why there should be further delay now.
25. GCCIX contends that ICANN offers no authority to stay this IRP and ICANN is not entitled to a "do-over" after an IRP is filed. It observes that the Bylaws call for IRP proceedings to be concluded within six months and the Interim Supplementary Procedures, Section 10, limit interim relief to maintain the status quo, not alter it. It contends that ICANN had ample opportunity over eight years to engage the GAC in further discussion or take other action but it failed to do so despite repeated requests by GCCIX.
26. GCCIX contends that ICANN focuses on one claim in the IRP and, in so doing, mischaracterizes the IRP which lists fifteen separate actions and inactions to be reviewed. It contends that even as to the first three items relating to GAC advice, ICANN fails to explain how a stay could possibly resolve or narrow issues.
27. GCCIX contends that there is no equitable justification for a stay as ICANN has ignored four previous attempts at dialogue on GAC advice and has ignored the .AFRICA IRP precedent from 2015. It contends GAC testimony shows the Early Warnings were country warnings not a GAC view. It contends that ICANN should have reviewed the analogous .GCC application at that time. It contends that the current GAC view obtained by ICANN contradicts the prior testimony of the GAC Chair in the .AFRICA IRP. It contends that ICANN could either follow the .AFRICA IRP precedent and return the application to processing or it could follow the .AMAZON IRP precedent by approving the application in principle and facilitating dialogue with the objectors.
28. GCCIX contends that ICANN summarily terminated the WIPO proceeding thereby avoiding the opinion of an expert as to whether the GCC acronym warrants special protection and, more fundamentally, cannot escape the fact that there is no policy rationale for, nor any public interest in, protecting the acronym. It contends the latest GAC letter is contrary to the longstanding GNSO Supermajority Advice which states that acronym TLDs shall not be reserved for IGOs.
29. Finally, GCCIX contends that ICANN has brought this application in bad faith for no other reason than to delay the IRP and cause GCCIX undue expense. Therefore, GCCIX asks that the application be denied, be ruled to be frivolous and ICANN be ordered to pay GCCIX's reasonable attorneys' fees.

(3) ICANN's Reply Brief

30. In its Reply, ICANN reiterates the reasoning for its application, contends the legal authority for the application is ICDR Rules, Article 27(1), and contends the equitable justification for the stay, to accomplish the purposes of the IRP, is clearly set forth in its application.
31. ICANN contends that its application is not an attempt to re-write history as GCCIX claims but rather an effort to address the concerns and provide additional critical information to the parties and the Tribunal. It contends that GCCIX is refusing to give ICANN the time necessary to evaluate the approaches GCCIX proposes.

32. ICANN contends that almost all the claims in the IRP stem from ICANN's acceptance of the GAC Advice and the decision to halt processing of the application. It contends that its action in consulting the GAC is similar to the proactive steps proposed, that it is not seeking a "do-over" and, instead, it is addressing GCCIX's concerns. It contends that additional time is needed to determine next steps and a six-month stay will save the parties and the Panel countless hours of discovery, litigation and associated costs. It reiterates that proceeding is inconsistent with the purpose of an IRP, will hinder the Board's independent decision making, and will increase costs.

(4) GCCIX's Sur-Reply Brief

34. In its Sur-Reply Brief, GCCIX contends that ICANN offers no explanation why it did not initiate this GAC discussion years ago nor explain satisfactorily why it is necessary now. It reiterates that the request is frivolous.
35. GCCIX contends that ICANN does not quote the second half of ICDR Rules, Article 27(1), which it contends restricts interim relief to maintaining the status quo. It reiterates there is no rule allowing ICANN to remediate its failings after an IRP is filed and the time for remediation was during the CEP. It also reiterates that ICANN has not explained why it failed to act sooner or how any GAC discussion could change any material issue in this case. It contends that ICANN can continue discussions with the GAC and take further actions but it cannot be allowed to suspend the proceeding for that reason.
36. GCCIX contends that the GAC only meets three times a year and it issued a 52-page Communique on 14 March 2022 without any mention of this matter. See Sur-Reply Ex. A. GCCIX contends this proves there is no additional GAC advice and that ICANN offers no indication there will be.
37. GCCIX concludes with the legal maxim that "justice delayed is justice denied." It reiterates that it has been nearly a decade since 2013 when GCCIX asked ICANN to substantiate its decision, and this IRP, which should be concluded in six months, is already nine months old and has hardly begun. It reiterates the relief requested.

D. Discussion

38. The Tribunal appreciates that ICANN is working to reach a proper resolution of this dispute; however, the circumstances do not justify granting a unilateral request for delay.
39. ICDR Rule, Article 27, provides broad power to a Tribunal to order any interim or conservatory measures it deems necessary. Those measures include but are not limited to measures to maintain the status quo.
40. ICANN has not argued that interim relief is appropriate because it is likely to succeed on the merits and that it risks irreparable harm if relief is not granted. Nor can it argue that that interim relief is necessary to preserve the status quo. Here, the status quo is the continuation of the IRP.
41. Rather, ICANN argues that interim relief is appropriate because it may narrow or better define the issues and save costs for the parties. Without more, this argument is merely speculative, particularly given that ICANN has had ample opportunity to act earlier.
42. This IRP arises from a gTLD application denied in 2013. The parties dispute whether the CEP that had been ongoing since 2014 was conducted in good faith. Regardless, ICANN has had ample opportunity and cause, particularly since the 2015 .AFRICA IRP decision, to review this matter with the GAC or otherwise re-evaluate its decision to deny GCCIX's gTLD application.

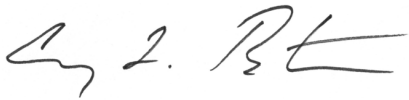
43. GCCIX initiated this IRP in June 2021 and is entitled to expeditious resolution as called for by the Bylaws. To date this IRP has been delayed by the Emergency Measures proceeding initiated by ICANN and, since the appointment of the Tribunal, the interim applications submitted by both parties. These are reasonable delays. But to further delay the IRP merely because ICANN contends that it may help clarify and narrow issues cannot be justified. Contrary to ICANN's contention, ICANN's consultation with the GAC and its request for a stay do not necessarily provide any of the relief GCCIX is requesting.
44. These circumstances are unlike those where both sides agree to an IRP delay to pursue settlement discussions. Here, GCCIX is not agreeing to delay and there is no basis under the Rules to impose further delay on GCCIX. To the contrary, the Rules compel the Tribunal to proceed with a view to expediting the resolution of the dispute. ICDR Rules, Article 22(1).
45. Additionally, ICANN reports that it raised matters with the GAC in November 2021 and received a response from the GAC in January 2022. The response from the GAC, and ICANN's arguments in support of this application, offer no assurance that a mutually agreeable resolution is forthcoming.
46. ICANN provides no definitive explanation as to what a stay will accomplish in terms of the parties reaching a resolution. If, as GCCIX contends, the GAC will not be meeting again until the summer, there may be no further guidance from the GAC until then. Regardless, based on the facts presented, there is no cause to expect any change in the GAC position. Nor is there any basis to conclude that a delay of six months will provide the ICANN Board an opportunity to take any action that it could not have taken to date or cannot take now. ICANN has not justified why it could not have acted in the last few months, let alone the last many years, if it intends to reconsider its denial of the application.
47. ICANN contends that its ongoing activity may change the facts, claims and arguments in this IRP. But GCCIX is correct that any ongoing activity will not change the history of what has occurred. To the extent ICANN takes action that limits the claims, GCCIX is free to agree to dismissal of claims or the Tribunal may properly deem matters to be mooted. The most expeditious means to reach that end is for ICANN to act rather than seek further delay.
48. ICANN is undoubtedly correct that proceeding with the IPR will result in more immediate costs. That is a matter for both sides to consider, particularly as costs may be allocated in the final Decision. Nonetheless, the parties should expect the Tribunal to have the parties proceed with the IRP in a reasonable and efficient manner, taking proportionality into account. The parties and the Tribunal have the opportunity to consider any new developments as they arise.
49. GCCIX is correct that its claims go beyond the mere denial of the application. While the denial of the .GCC application may have instigated this dispute, GCCIX has now raised an array of alleged wrongs relating to the handling of CEP, the IRP and other procedures that are of public concern and will not necessarily be advanced by delay.
50. There is no showing that a denial of the stay is inconsistent with the purpose of an IRP or would hinder the Board's independent decision making. The Board remains free to pursue appropriate actions as it sees fit.
51. If the parties decide to pursue further negotiations they are free to do so concurrent with this IRP or to jointly ask the Tribunal to adjust scheduling to accommodate their discussions, which the Tribunal will readily do.

52. Accordingly, for the reasons set forth above, ICANN's request for a stay is denied.
53. In reaching this ruling, the Tribunal makes no determinations as to the merits of the underlying dispute.
54. Although the Tribunal denies ICANN's application, it declines GCCIX's invitation to rule that the application is frivolous. ICANN appears to have made the request in good faith to reach a sound resolution of the matter and potentially reduce costs for both sides. It appears to the Tribunal that the process would benefit from GCCIX focusing on core issues and jointly working toward solutions rather than falling back on what it perceives to be past wrongs.
55. In accordance with the Rules, Article 27(4), determinations as to cost allocations are reserved for the final Decision.

E. Conclusions

56. ICANN's application for a stay is denied. Determinations as to cost allocations are reserved for the final Decision.
57. The parties are to confer on further pre-hearing and hearing procedures. The ICDR is requested to assist in scheduling a date and time for a Further Preparatory Conference.

Date: 21 April 2022



Gary L. Benton, Chair
By and for the Tribunal