

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)**

**Independent Review Panel**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS**  
**Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process***

_____	)	
<b>Gulf Cooperation Council (GCC)</b>	)	
	)	
Claimant	)	
	)	
and	)	<b>ICDR Case</b>
	)	<b>No. 01-14-0002-1065</b>
<b>Internet Corporation for Assigned Names and Numbers (ICANN)</b>	)	
	)	
Respondent	)	
_____	)	

**PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS  
PANEL**

Independent Review Panel

Lucy Reed, Chair  
Anibal Sabater  
Albert Jan van den Berg

## I. INTRODUCTION

1. This case concerns the dispute between the Gulf Cooperation Council (“GCC”), and the Internet Corporation for Assigned Names and Numbers (“ICANN”) over the generic Top-Level-Domain name (“gTLD”) “.persiangulf”.
2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran (“Iran”), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name “Arabian Gulf”, while Iran uses the name “Persian Gulf”. The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either “Arabian Gulf” or “Persian Gulf”. (For purposes of neutrality, we will use the simple term “Gulf” in this Declaration.)
3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti (“**Asia Green**”), for registration of the “.persiangulf” gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that “.persiangulf” targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.
4. The GCC initiated this Independent Review Process (“IRP”) in December 2015 to challenge the ICANN Board’s taking any further steps to approve registration of “.persiangulf” gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.
5. Based on the IRP Panel’s review and assessment of the Parties’ submissions and evidence, our Partial Declaration is in the GCC’s favor. At the Parties’ joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

## II. THE PARTIES AND COUNSEL

6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates (“UAE”), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted
7. The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21<sup>st</sup> Floor, P.O. Box 55069, Abu Dhabi, UAE.
8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN’s mission is “*to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems*”, including the domain name system.<sup>1</sup> ICANN’s address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.
9. ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50<sup>th</sup> Floor, Los Angeles, CA 90071, USA.

## III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

### A. ICANN’s New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

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<sup>1</sup> ICANN’s Response to Gulf Cooperation Council’s Request for Emergency Relief (“**Response to Emergency Request**”), ¶ 6.

June 2011, ICANN launched a significant expansion with the “New gTLD Program”. According to ICANN, this Program is its “most ambitious expansion of the Internet’s naming system”. To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005<sup>2</sup> and then received almost 2000 applications in response to the New gTLD Program.<sup>3</sup>

12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 (“**Guidebook**”) being relevant here.<sup>4</sup> The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN’s evaluation of applications, and procedures for objections to applications. In line with ICANN’s policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.
13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board (“**NGPC**”).

#### **B. The “.persiangulf” New gTLD Application**

14. On 8 July 2012, Asia Green applied for the “.persiangulf” gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

*There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.<sup>5</sup>*

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<sup>2</sup> Response to Emergency Request, ¶¶ 12-13.

<sup>3</sup> <https://newgtlds.icann.org/en/about/program>.

<sup>4</sup> Response to Emergency Request, Exh. R-ER-3/R-2 (“**Guidebook**”).

<sup>5</sup> Request for Independent Review Process (“**Request for IRP**”), ¶¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for “.pars” (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as “.persiangulf” to unite the Persian community, was successful and led to a registry agreement in 2014.<sup>6</sup> Its applications for “.islam” and “.halal”, however, were not accepted by ICANN.<sup>7</sup>

### C. The GCC’s Objections to Asia Green’s “.persiangulf” gTLD Application

16. The GCC objected to Asia Green’s application within the mechanisms provided by ICANN.

#### 1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN (“GAC”) consists of members appointed by and representing governments. The GAC was created to:

*consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements, or where they may affect public policy issues.*<sup>8</sup>

18. Module 3.1 of the Guidebook, which is entitled “GAC Advice on New gTLDs”, allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an “Early Warning Notice”, is discussed below.)
19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:
  - a. A “Consensus GAC Advice”, in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

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<sup>6</sup> Request for IRP, ¶ 65.

<sup>7</sup> Ibid., ¶ 61.

<sup>8</sup> Guidebook, Module 3.1, p. 1.

- presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;
- b. The expression of **concerns** in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or
  - c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.
20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green’s “.persiangulf” application.<sup>9</sup> Similar letters from Oman, Qatar and Bahrain followed.<sup>10</sup> As members of the GCC and GAC, these governments objected to registration of “.persiangulf” as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

## 2. Early Warning Process

21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an “Early Warning Notice” to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN’s rejection of the application.
22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green’s “.persiangulf” application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: “*The applied for*

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<sup>9</sup> Request for IRP, Annex 6.

<sup>10</sup> Ibid., Annexes 7-9.

*new gTLD is problematic and refers to a geographical place with disputed name”; and “Lack of community involvement and support”.*<sup>11</sup>

### 3. Independent Objector Review

23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an “Independent Objector” process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a “Limited Public Interest Objection” or a “Community Objection” to the application.
24. In December 2012, the Independent Objector for the “.persiangulf” gTLD application, Professor Alain Pellet, issued his comments aimed at “*informing the public of the reasons why the [Independent Objector] does not consider filing an objection*” in relation to the “.persiangulf” application.<sup>12</sup> Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be “*unadvisable*”.<sup>13</sup> Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green’s application and that a significant portion of that community opposed delegation of “.persiangulf”, he considered it “*most debateable*” that the gTLD would “*create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community*” (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.<sup>14</sup> He stated in this regard that:

*it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation[s] [i.e. Persian Gulf and Arabian Gulf] are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the [Independent Objector] deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a “.Arabiangulf” gTLD.*<sup>15</sup>

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<sup>11</sup> Ibid., Annex 10.

<sup>12</sup> Independent Objector’s Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.

<sup>13</sup> Ibid., p. 6.

<sup>14</sup> Ibid., p. 5.

<sup>15</sup> Ibid., pp. 5-6.

#### 4. Formal Community Objection by the GCC

25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a “Community Objection” is one.
26. A Community Objection is made on the basis that “[t]here 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*” (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce (“ICC”) administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).
27. On 13 March 2013, the GCC filed a Community Objection to the “.persiangulf” application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel’s determination, which he issued on 30 October 2013, is discussed below.)

#### D. GAC Advice to the ICANN Board

28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC’s concerns in the course of its regular meetings.
29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including “.persiangulf”, the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green’s application.<sup>16</sup>

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<sup>16</sup> Request for IRP, Annex 23, p. 3.



30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed “Scorecard” setting out its response to each item in the GAC’s Beijing Communiqué.<sup>17</sup>
31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for “.persiangulf”: Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:

*5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC’s opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because “Persian Gulf” is a disputed name. A substantial amount of GAC members in attendance shared these concerns.*

*6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the “Persian Gulf” name, and Iran’s GAC representative obviously does not share the other GAC members’ concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus.<sup>18</sup>*

32. The Minutes of the Durban meeting (“**Durban Minutes**”), on which the GCC relies in these IRP proceedings, reported:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was **clear that there would not be consensus of an objection regarding this string** and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name.<sup>19</sup> (Emphasis added.)*

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

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<sup>17</sup> Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.

<sup>18</sup> Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) (“**Al Marzouqi Statement**”), paras. 5-6.

<sup>19</sup> Request for IRP, Annex 34.

*The GAC has finalised its consideration of the following strings, and does not object to them proceeding:*

...

ii. *.persiangulf* (application number 1-2128-55439).<sup>20</sup> (Emphasis added.)

34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the “.persiangulf” gTLD application, with a notation that there was a Community Objection:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.*<sup>21</sup> (Emphasis added.)

35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.
36. It is the ICANN Board’s decision on 10 September 2013 to continue to process Asia Green’s “.persiangulf” gTLD application that the Claimant GCC challenges in these IRP proceedings.

#### **E. Expert Determination of the Community Objection**

37. On 30 October 2013, one month after ICANN’s posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC’s Community Objection.<sup>22</sup>
38. Judge Schwebel first found that the GCC had standing to object to the “.persiangulf” application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC’s favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

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<sup>20</sup> Ibid., Annex 24.

<sup>21</sup> Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.

<sup>22</sup> Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.

39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would “*suffer the likelihood of material detriment to their rights or legitimate interests*”. In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, “*it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute*”.<sup>23</sup> Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own “.arabiangulf” string.
40. This Independent Review Process followed.

#### IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.
42. Paragraph 2 of Article IV, Section 3, provides:

*Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws of the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.*

43. Paragraph 7 of Article IV, Section 3, provides that “[a]ll IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN”. As stated in the Supplementary Procedures for ICANN Independent Review Process (“**Supplementary Procedures**”), the ICANN Board has designated and approved

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<sup>23</sup> Ibid., p. 11.

the International Centre for Dispute Resolution (“ICDR”) as the Independent Review Panel Provider.<sup>24</sup>

44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules (“ICDR Rules”). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.
45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)
46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

*Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

## V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR (“**Request for IRP**”). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

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<sup>24</sup> The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant’s Supplementary Request for Independent Review Process (“**Supplementary IRP Request**”), Annex S-8.

49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.
50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("**Emergency Request**"). In the Emergency Request, the GCC sought:
  - a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and
  - b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.
51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist. Mr. John A.M. Judge was appointed on the same day to fulfil that role.
52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.
53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("**Al Marzouqi Statement**").
54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.
55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.
56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"). The Conclusion of the Emergency Declaration provided as follows:

*96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:*

- a. *ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;*
- b. *This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;*
- c. *This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and*
- d. *The costs of this Request for Interim Measures shall be reserved to the IRP panel.*<sup>25</sup>

57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.
58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.
59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("**Supplementary IRP Request**") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("**Supplementary Marzouqi Statement**"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.
60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"). As was the case in the emergency proceedings, ICANN did not file any witness statements.
61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("**Rejoinder to IRP Request**"), again with no witness statements.

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<sup>25</sup> Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"), ¶ 96.

62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.
63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.
64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

## **VI. THE RELIEF SOUGHT**

65. The Claimant GCC seeks a Declaration:
  - a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;
  - b. recommending to the Board that ICANN take no further action on the ".persiangulf" gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;
  - c. awarding the GCC its costs in this proceeding; and
  - d. awarding such other relief as the Panel may find appropriate or that the GCC may request.<sup>26</sup>
66. The Respondent ICANN seeks a Declaration:
  - a. denying the GCC's IRP Request;
  - b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.<sup>27</sup>

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<sup>26</sup> Supplementary IRP Request, ¶ 63.

<sup>27</sup> Response to Supplementary IRP Request, ¶¶ 30 and 32.

## VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

### A. The Issue and Legal Framework

67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.
68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("**IRP Deadline**"), which provides in relevant part:

*A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.*

69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process – Requests for Independent Review" dated 11 April 2013 ("**CEP-IRP Document**"),<sup>28</sup> codify two exceptions to the IRP Deadline.
- a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("**CEP**"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

*Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.*

Pursuant to the CEP-IRP Document (pp. 1-2):

*If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.*

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<sup>28</sup> Response to Claimant's Request for Independent Review Process ("**Response to IRP Request**"), Exh. R-5; Supplementary IRP Request, Exh. S-10.



b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.

70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.
71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.
72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

#### **B. The Respondent's Position**

73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.
74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

#### **C. The Claimant's Position**

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process. The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

76. The GCC asserts that *“following the Board’s September 2013 Board Action, ICANN represented repeatedly – through its words and actions – to the GCC that the deadline to file the IRP had not yet passed”*.<sup>29</sup>
77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:
  - a. He and other GAC members expected that ICANN would treat the “.persiangulf” gTLD application in the same way it had treated the “.islam” and “.halal” applications, because all three applications *“lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because ‘Persian Gulf’ is a disputed name”*.<sup>30</sup>
  - b. After the posting of the ICANN Board decision to proceed with the “.persiangulf” application on 30 September 2013, he *“reached out to [his] ICANN counterparts to initiate an attempt at resolution”* and they *“instructed [him] to wait until the Independent Expert issued a declaration on the GCC’s Community Objection”*, which he did.<sup>31</sup>
  - c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his *“ICANN counterparts advised they would get back to [him]”*.<sup>32</sup>

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<sup>29</sup> Supplementary IRP Request, ¶ 35.

<sup>30</sup> Al Marzouqi Statement, ¶ 7.

<sup>31</sup> Ibid., ¶¶ 8-10.

<sup>32</sup> Ibid., ¶ 11.

- d. “After several months of dialogue with [his] ICANN counterparts proved unsuccessful”, he arranged for “high-level” meetings “in hopes of facilitating a resolution”, which arrangements took substantial time due to schedules.<sup>33</sup>
- e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.<sup>34</sup> According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the “.persiangulf” application in that meeting.
- f. Mr. Al Marzouqi’s testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade.<sup>35</sup> Mr. Al Ghanim reiterated the GCC’s concerns about lack of community involvement and support for the gTLD, which is “*problematic and refers to a geographical place with disputed name*”, and added:

*While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are part [sic] of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.*

*.... The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.<sup>36</sup>*

- g. Thereafter, Mr. Al Marzouqi’s “ICANN counterparts again advised [him] that they had taken the GCC’s position under advisement and would get back to the GCC with an answer”.<sup>37</sup> That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi’s “ICANN counterparts ... suggested to

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<sup>33</sup> Ibid., ¶¶ 12-13.

<sup>34</sup> Ibid., ¶ 14.

<sup>35</sup> Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 (“Al Ghanim Letter”).

<sup>36</sup> Al Ghanim Letter, p. 2.

<sup>37</sup> Al Marzouqi Statement, ¶ 15.

[him] *that the GCC's only recourse toward resolution may be to file a request for independent review of ICANN's Board action*" (emphasis in original).<sup>38</sup>

- h. Mr. Al Marzouqi spoke again with his "*ICANN counterparts*" in October 2014 at ICANN meetings in Los Angeles. As "*ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings*", he "*remained hopeful that the GCC and ICANN could finally resolve the dispute*".<sup>39</sup>
- i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process.<sup>40</sup> He learned only in December 2014 that ICANN intended to sign the registry agreement for ".persiangulf", after which he advised the GCC to file the Emergency Request "*to ensure that the independent review process would not be rendered meaningless*".<sup>41</sup>
- j. According to Mr. Al Marzouqi: "*At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action*".<sup>42</sup>

78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request.<sup>43</sup> These attempts proved unsuccessful.

79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("**ICANN Counsel Email**").<sup>44</sup> The relevant language is as follows:

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<sup>38</sup> Ibid., ¶16.

<sup>39</sup> Ibid., ¶ 17.

<sup>40</sup> Ibid., ¶ 18.

<sup>41</sup> Ibid., ¶ 22.

<sup>42</sup> Ibid., ¶ 19.

<sup>43</sup> Supplementary Marzouqi Statement, Exh. S-9, ¶¶ 2-16.

<sup>44</sup> Supplementary Request for IRP, Exh. S-11.

*Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process (“CEP”), as set forth in ICANN’s Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative[s], on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.*

80. The GCC considers this email to evidence ICANN’s earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC’s initiation of the IRP process on 5 December 2014.<sup>45</sup>

#### **D. The IRP Panel’s Analysis and Decision**

81. Turning first to the Parties’ general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed “to blow hot and cold” and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN’s “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”.
82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

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<sup>45</sup> Claimant’s Reply in Support of its Supplementary Request for IRP, ¶ 26.

83. We have carefully examined the GCC’s evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his “*ICANN counterparts*” who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of “.persiangulf” as a new gTLD.
84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi’s testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist’s decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi’s account.
85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:
- a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings – which by definition encompass an IRP process – until the Expert Panelist had resolved the GCC’s Community Objection to the “.persiangulf” gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.
  - b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.

- c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome – if not actively encourage – a series of communications and meetings to discuss the GCC's objections to registration of “.persiangulf”. Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable – indeed, necessary – to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.
- d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the “.persiangulf” gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to “.persiangulf” remained under active consideration by the ICANN Board through July 2014.
- e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.
- f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.

- g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.
  - h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.
86. Exchanges thereafter – in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process – support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the “.persiangulf” gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson’s email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.
87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.
88. In coming to this conclusion, we have not been swayed by the GCC’s umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN’s mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN’s conduct. It is because neither Party took such formal action that this



dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names “Persian Gulf” and “Arabian Gulf” cannot **excuse** ICANN’s ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps **explain** ICANN’s reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.
90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that “*the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable*”.<sup>46</sup> The Emergency Panelist cautioned that “*the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself*”,<sup>47</sup> but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.
91. To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to ICANN’s registration of the “.persiangulf” gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

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<sup>46</sup> Emergency Declaration, ¶ 83.

<sup>47</sup> Ibid., ¶¶ 83 and 86.

## VIII. THE MERITS

### A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

*charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. . . . [and] must apply a defined standard of review to the IRP request, focusing on:*

- a. did the Board act without conflict of interest in taking its decision?*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

(Emphasis added.)

93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.<sup>48</sup> This is consistent with the very name of the IRP process – an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.<sup>49</sup>
94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.<sup>50</sup> This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

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<sup>48</sup> Supplementary IRP Request, ¶¶ 9-11.

<sup>49</sup> Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

<sup>50</sup> Response to Claimant's Supplementary IRP Request ("Response to Supplementary IRP Request"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

guessing the Board, but rather “*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws*”.

95. To recall, the contested ICANN Board action here is the Board’s decision on 10 September 2013 to proceed with the “.persiangulf” gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?

96. If the answer to any of those questions is “no”, the GCC will prevail in this Request.

#### **B. The Claimant’s Standing to Pursue the IRP**

97. A second preliminary question goes, as we find below, to the GCC’s standing to pursue this IRP proceeding.

98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

*Any person **materially affected** by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws **may submit a request for independent review** of that decision or action. In order to be **materially affected**, the person must suffer **injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation**, and not as a result of third parties acting in line with the Board’s action. (Emphasis added.)*

99. The Parties agree that the term “*materially affected*” must be distinguished from the term “*material detriment*”, which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is 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*” (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

100. ICANN, however, effectively equates the two terms “*materially affected*” and “*material detriment*” by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.<sup>51</sup> In ICANN’s view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if “.persiangulf is registered; the contention that a “.persiangulf” gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognisable harm.<sup>52</sup> To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of “*material detriment*”.<sup>53</sup>
101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN’s alleged action inconsistent with the ICANN Articles or Bylaws.<sup>54</sup> The IRP Panel, according to the GCC, is to examine only whether that action – here, the Board’s 10 September 2013 decision to allow processing of the “.persiangulf” application – did cause harm “*materially affect[ing]*” the GCC and its members.<sup>55</sup> The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested “.persiangulf” gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.<sup>56</sup>
102. The IRP Panel agrees with ICANN that the question of whether the GCC was “*materially affected*” for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

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<sup>51</sup> Rejoinder to ICANN’s Response to Gulf Cooperation Council’s Reply in Support of Supplementary Request for Independent Panel Review (“**Rejoinder to IRP Request**”, ¶ 15.

<sup>52</sup> Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.

<sup>53</sup> Rejoinder to IRP, ¶ 14.

<sup>54</sup> Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN’s in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.

<sup>55</sup> Supplementary IRP Request, ¶ 49.

<sup>56</sup> Ibid., ¶ 42.

of standing.<sup>57</sup> This is the logical meaning of the language in Paragraph 2 that a “*person materially affected*” by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles “*may submit a request for independent review*”; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.<sup>58</sup>

103. However, we cannot agree with ICANN’s effective conflation of the two tests of “*materially affected*” and “*material detriment*”. Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the “*material detriment*” test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have – to examine and offer its views on the merits of the “.persiangulf” gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of “*material detriment*” to the interests of the Gulf community, are therefore irrelevant.<sup>59</sup>
104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an “.arabiangulf” gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.
105. We recognize that the “*materially affected*” test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to “*injury or harm that is directly or causally connected to the Board’s alleged violation of the Bylaws or the Articles*”. As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

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<sup>57</sup> Rejoinder to IRP Request, ¶ 16.

<sup>58</sup> *Ibid.*, ¶ 16.

<sup>59</sup> Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council’s Reply in Support of its Supplementary Request for Independent Review Process (“**Reply to IRP Request**”), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

### C. The Claimant's Position

106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.
107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "*expression of concerns in the GAC*" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board.<sup>60</sup> The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "*opposing views*" on the application; and (iii) concluded that "*it was clear that there would not be consensus on an objection*".<sup>61</sup> In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.
108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué.<sup>62</sup> Further, ICANN's failure to review the Durban Minutes before passing its resolution on the

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<sup>60</sup> Supplementary IRP Request, ¶ 20.

<sup>61</sup> Ibid., ¶ 18; Reply to IRP Request, ¶ 6.

<sup>62</sup> Reply to IRP, ¶ 8.

“.persiangulf” application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws.<sup>63</sup>

109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members’ concerns, and to give reasons for its ultimate decision to allow Asia Green’s application to move forward – which ICANN failed to do.
110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC’s non-compliant advice to allow the “.persiangulf” application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:

- a. Bylaws, Article I, Section 2:

*In performing its mission, the following core values should guide the decisions and actions of ICANN:*

....

*4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*

....

*8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

....

*11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.*

- b. Bylaws, Article II, Section 3:

*ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.*

- c. Bylaws, Article III, Section 1:

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<sup>63</sup> Reply to IRP Request, ¶ 10.

*ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. ,*

d. Articles of Incorporation, Article 4:

*The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.*

111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that “*New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance*”.
112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the “.persiangulf” gTLD application to proceed. The Board failed to review the GAC’s Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the “.persiangulf” application or any statement as to how the Board balanced core values that it found to be competing.
113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC’s Community Objection and strong government opposition. If registered with Asia Green, the “.persiangulf” string will be discriminatory because “it will falsely create the perception that the GCC accepts the disputed ‘Persian Gulf’ name”.<sup>64</sup> This is particularly egregious because the Persian

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<sup>64</sup> Request for IRP, ¶ 58.



community already has the benefit of the “.pars” string, already registered with Asia Green for purposes overlapping with the “.persiangulf” application.

114. Further, according to the GCC, the Board handled Asia Green’s “.persiangulf” application inconsistently with Asia Green’s “.halal” and “.islam” applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the “.persiangulf” application.
115. Overall, says the GCC, the Board’s NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf.<sup>65</sup> In reviewing the Board’s decision to allow Asia Green’s “.persiangulf” application to go forward, the Panel should follow the path of the IRP Panel in the *DotConnectAfrica Trust v ICANN* case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC’s consensus advice not to proceed with the application for the “.africa” gTLD, stating that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.<sup>66</sup>

#### **D. The Respondent’s Position**

116. ICANN’s defense to the GCC’s argument that the Board failed to follow the GAC’s advice is straightforward: the ICANN Board followed the GAC’s advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the “.persiangulf” gTLD application, and so the proper course was for the Board’s NGPC to allow Asia Green’s application to progress. The Durban Communiqué expressly stated that the GAC had “*finalised its consideration ... and does not object to [the “.persiangulf” application] proceeding*”, without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the “.persiangulf application” based on the

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<sup>65</sup> Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.

<sup>66</sup> *Ibid.*, Exh. S-5; Final Declaration, *DotConnectAfrica Trust v ICANN*, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.<sup>67</sup>

117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.<sup>68</sup> Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the “.persiangulf” application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.<sup>69</sup>
118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the “.persiangulf” gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year.<sup>70</sup> Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

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<sup>67</sup> Response to IRP Request, ¶ 21.

<sup>68</sup> Ibid., ¶ 10, Exh. R-25.

<sup>69</sup> Reply to IRP Request, ¶ 9.

<sup>70</sup> Response to IRP Request, ¶¶ 13-20.

119. ICANN argues that the IRP Panel’s Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green’s applications for “.halal” and “.islam”, ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.
120. In sum, the ICANN Board’s NGPC considered and followed the GAC’s advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.
121. Should the Tribunal find in the GCC’s favor, ICANN contests the GCC’s request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by “*declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws*” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

#### **E. The IRP Panel’s Analysis and Decision**

122. We turn first to the GCC’s main submission that the ICANN Board failed to follow the GAC’s advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the “.persiangulf” gTLD to proceed in the application process.
123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC’s alternative submission concerning ICANN’s overall compliance with its mission and core values under the Bylaws and Articles.
124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board: (a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the “.persiangulf” application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the “.persiangulf” gTLD application. That Communiqué stated no more than this: “*The GAC has finalised its consideration of [the application] and does not object to [it] proceeding*”. This underlies ICANN’s main defense that the ICANN Board followed the GAC’s advice to the letter, by resolving to allow Asia Green’s application to proceed.
126. We find ICANN’s defense to be unduly formalistic and simplistic.
127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC’s statement in the Durban Communiqué that the GAC “*does not object*” to the application reads like consensus GAC advice that the application **should** proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.
128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and “[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board”.<sup>71</sup> The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

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<sup>71</sup> ICANN Response to IRP Request, Exh. R-25.

5. *I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.*

6. *Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.*

129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

*The GAC advises ICANN that there are concerns about a particular application "dot.example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.*

130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.
131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"- "Arabian Gulf" naming dispute, the Durban Communiqué itself – on which ICANN relies so heavily here – contained an express recommendation that "ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with

*regard to the protection of terms with national, cultural, geographic and religious significance*".<sup>72</sup> These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair", while Principle 51 speaks only of the Chair's authority to "issue a communiqué to the Media" following a meeting.
133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)*

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "*does not object to [the application] proceeding*", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

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<sup>72</sup> Request for IRP, Annex 24, Durban Communiqué, para. 7.

asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.

135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF. (Emphasis added.)*

136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist – some three weeks later – dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the “.persiangulf” application to proceed.

137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment – but it contained only the one-line conclusion that the GAC had “*finalised its consideration of the [“.persiangulf”] string, and does not object to its proceeding*”. The Board did meet on 13 August 2013 – but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the “.persiangulf” application – but the relevant entry on the Scorecard merely repeated the one-line Durban Communiqué reporting that the GAC “*does not object*” to the “.persiangulf” application proceeding. The Minutes of the Board meetings were publicly posted.

138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns before resolving to allow the “.persiangulf” application to proceed. ICANN’s willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC’s serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the “.persiangulf” application. The GCC may be right or wrong in submitting that it was Iran’s solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC’s position on this point is irrelevant in this IRP. The relevant issue is whether the Board’s decision to allow the “.persiangulf” application to proceed was consistent with the Bylaws and Articles.
140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the “.africa” string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC’s Consensus Advice not to proceed with that application. The Panel stated that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.<sup>73</sup> Contrary to ICANN’s attempt to distinguish the DotConnectAfrica case, we find that ICANN’s transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.
141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

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<sup>73</sup> Note 66, *supra*.



and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "*exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values*".
143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board **did** assess in taking its decision. Our role is to review the **decision-making process** of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.
144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of “.halal” and “.islam” on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about “.persiangulf”. This is despite the glaring fact that the Independent Expert reviewing the GCC’s Community Objections against all three strings dismissed them all on the same grounds.

145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to “*exercise due diligence and care in having a reasonable amount of facts in front of them*” before deciding, on 10 September 2013, to allow the “.persiangulf” application to proceed. We find, on the balance of probabilities on the basis of the Parties’ submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC “*does not object*” to the application proceeding. Under the circumstances, and by definition, the Board members could not have “*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*”, as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.
146. As a final matter, we do not accept ICANN’s position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us “*the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act*” inconsistently with its Articles of Incorporation and Bylaws.<sup>74</sup> That Bylaw bears repeating:

*The IRP Panel shall have the authority to .... recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the **opinion** of the IRP. (Emphasis added.)*

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person “*materially affected*” by suffering injury or harm causally connected to the relevant Board violation, we agree with the

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<sup>74</sup> Ibid, ¶ 126.

*DotConnectAfrica Trust* IRP Panel that the “*language and spirit*” of Paragraph 11(d) empowers us to recommend redress for such injury or harm.<sup>75</sup> The words “*shall*” and “*opinion*” reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC’s due process rights by the Board’s decision – taken without even basic due diligence despite known controversy – to allow Asia Green’s “.persiangulf” gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green’s application but the termination of any consideration of “.persiangulf” as a gTLD. The basic flaws underlying the Board’s decision cannot be undone with future dialogue. In recognition of ICANN’s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green’s application open despite the history. If the issues surrounding “.persiangulf” were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

## **IX. FIXING OF COSTS**

148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.

149. Article 9 of the ICANN Supplementary Procedures provides:

*The IRP shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties’ positions and their contribution to the public interest.*

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<sup>75</sup> Ibid, ¶ 128.

150. Article IV, Section 3, of the ICANN Bylaws provides:

*16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.*

*18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.

152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.

153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

## **X. DECLARATION**

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. The action of the ICANN Board with respect to the application of Asia Green relating to the “.persiangulf” gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.
2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD.

3. The GCC is the prevailing Party in this IRP.
4. The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

<u>19 OCTOBER 2016</u>	<u>Lucy Reed</u>
Date	Lucy Reed, Panelist - Chair
<u>19 October 2016</u>	<u>[Signature]</u>
Date	Anibal Sabater, Panelist
<u>19 OCTOBER 2016</u>	<u>[Signature]</u>
Date	Albert Jan van den Berg, Panelist