

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Gulf Cooperation Council (GCC)

Gulf Cooperation Council Building
King Khaled Road,
Diplomatic Area 7153, Saudi Arabia

Claimant,

v.

**Internet Corporation for
Assigned Names and Numbers
(ICANN)**

12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Respondent.

ICDR Case No. 01-14-0002-1065

**CLAIMANT THE GULF COOPERATION COUNCIL'S SUPPLEMENTARY REQUEST
FOR INDEPENDENT REVIEW PROCESS**

Akin Gump Strauss Hauer & Feld LLP

Counsel for Claimant the GCC

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	3
I. IN ASSESSING THE ICANN BOARD’S DECISION TO APPROVE THE .PERSIANGULF gTLD, THIS PANEL SHOULD EMPLOY A <i>DE</i> <i>NOVO</i> , NOT DEFERENTIAL, STANDARD OF REVIEW.....	3
II. WHEN THE BOARD APPROVED THE .PERSIANGULF gTLD APPLICATION, IT VIOLATED ICANN’S ARTICLES AND BYLAWS.	4
A. ICANN did not simply follow GAC’s advice and the principles in the Guidebook.....	4
B. Regardless of whether ICANN followed the Guidebook, ICANN still violated its Articles and Bylaws.....	7
1. The ICANN Board cannot simply rely on GAC to justify its decision to approve the .PERSIANGULF gTLD.	7
C. The GCC’s IRP is timely.....	11
1. ICANN, through its words and conduct, extended the GCC’s deadline to file its IRP.	11
2. ICANN is estopped from and waived its ability to assert that the GCC’s IRP is not timely.	13
D. The GCC has been harmed by the ICANN Board’s decision.....	14
1. ICANN’s reliance on the IO’s and the IE’s determinations is misplaced.....	15
III. THE COST-ALLOCATION PROVISION IN ICANN’S SUPPLEMENTARY PROCEDURES, NOT ICANN’S BYLAWS, SHOULD APPLY.....	16
A. ICANN’s Supplementary Rules and the ICDR’s Procedures are the only procedural rules that control this IRP.....	16
B. The GCC is entitled to its costs under ICANN’s Supplementary Procedures.....	17
REQUESTED RELIEF	19
CONCLUSION	19

INTRODUCTION

1. It is only a name. That is the common thought of an outsider. But in the Middle East, the Gulf naming dispute is not about nomenclature. It is far more profound. It is rooted in the deep seeded hostility and rivalry among certain countries in the Middle East. It is a tremendous source of friction emanating from historical, cultural, political and religious differences. And it has been for the last 50 years.¹

2. The Gulf naming dispute permeates Middle Eastern culture. Iran has threatened to ban commercial airlines that use the term “Arabian Gulf” and has even banned publications that attempt to stay neutral on the naming dispute.² The UAE barred the use of “Persian Gulf” across its country.³ The dispute extends so far that Iran refuses to let its soccer players participate in the Arabian Gulf League,⁴ and the GCC refused to participate in the Islamic Solidarity Games to be held in Iran because the Games’ medals and logos referred to the “Persian Gulf.”⁵ The Gulf naming dispute is emblematic of the political, national, and cultural disputes that shroud the region.

3. So when ICANN’s Board made the decision to approve the .PERSIANGULF gTLD, it decided much more than that. The Board decided that it can fail to: (i) follow the procedures in the gTLD Applicant Guidebook (“Guidebook”); (ii) conduct an independent investigation before simply following the Governmental Advisory Committee’s (GAC) advice; and (iii) provide a well-reasoned and supported rationale for its decision to approve the .PERSIANGULF gTLD. These ICANN decisions gave rise to the GCC’s December 5, 2014 IRP.

¹ Annex S-1 [“Persian (or Arabian) Gulf Is Caught in the Middle of Regional Rivalries,” New York Times, (Jan. 12, 2016)].

² See The GCC’s December 5, 2014 Request for Independent Review Process [“The GCC’s IRP”] at Annex Nos. 15 [News story on Iran’s airline ban threat]; 16 [News story on Iran’s anger over a new map]; and 18 [News story on Iran’s ban of *The Economist*].

³ *Id.* at Annex No. 20 [Essay on Persian Gulf naming dispute].

⁴ *Id.* at Annex No. 33 [News story on Gulf rivalry’s transfer to football pitch].

⁵ *Id.* at Annex No. 17 [News story on Gulf dispute’s halting of Islamic games].

4. A little over one year has passed since the GCC's IRP filing. And in that time, there have been several developments. ICANN filed its Response to the GCC's IRP; the Emergency IRP Panelist issued his Interim Declaration granting the GCC's Request for Emergency Relief; and three separate IRP panels issued declarations.

5. Amidst these new developments, some things *have not* changed, like ICANN's attempts to evade accountability. In its Response, ICANN continues to claim that it followed GAC's advice and the GAC-related procedures outlined in the Guidebook, and that alone absolves ICANN from complying with its Articles or Bylaws.⁶

6. But some things *have* changed; namely ICANN's ability to get away with hiding behind GAC's non-binding advice. Even if ICANN did follow the Guidebook's procedures, (it did not), ICANN still cannot use GAC's advice as a shield to protect itself from accountability.⁷ As both the Emergency IRP Panelist and the DCA IRP Panel⁸ have stated—both of which ICANN's Board has reviewed and adopted—ICANN's Articles and Bylaws require its Board to conduct an independent assessment before reaching a decision and explain why it reached that decision. By ICANN's own admission, the ICANN Board failed to do either—it simply followed GAC's advice. The GCC's IRP should therefore be granted.

⁶ ICANN's January 20, 2015 Response to GCC's Request for Independent Review Process ["ICANN's Response"] at ¶ 51; *see also* February 12, 2015 Interim Declaration on Emergency Request for Interim Measures of Protection ["Emergency Interim Declaration"] at ¶ 90.

⁷ In addition to arguing that it followed GAC's advice and the GAC-related procedures in the Guidebook, ICANN argues that the GCC's IRP is not timely and that the GCC has not been harmed. The GCC addresses each of the unmeritorious arguments in §§ II. C. and D., below.

⁸ "DCA IRP Panel" refers to the IRP panel that presided over DotConnectAfrica Trust v. ICANN, IRP [ICDR Case No. 50-2013-0000-1083].

ARGUMENT

I. IN ASSESSING THE ICANN BOARD'S DECISION TO APPROVE THE .PERSIANGULF gTLD, THIS PANEL SHOULD EMPLOY A *DE NOVO*, NOT DEFERENTIAL, STANDARD OF REVIEW.

7. Before delving into the central issue before this Panel—whether the ICANN Board's decision to approve the .PERSIANGULF gTLD violated ICANN's Articles or Bylaws and harmed the GCC as a result—there is a fundamental procedural matter over which the parties disagree. How this procedural issue is resolved ultimately will impact how this Panel assesses the process ICANN's Board undertook (if any) before making the decision to approve the .PERSIANGULF gTLD application.

8. The parties disagree over the correct standard of review;⁹ specifically, whether this Panel should give deference to the ICANN Board's decision or whether it should make an independent assessment of it.¹⁰ The GCC advances that the standard of review is not deferential; it is *de novo*. Several reasons support the GCC's position.

9. *First*, neither ICANN's Supplementary Procedures nor the ICDR's Procedures imply, let alone delineate, a deferential standard of review.¹¹

10. *Second*, by its very name, an IRP requires an *independent* review; it is an *independent third-party review* of a decision by ICANN's Board.¹²

⁹ Also, on the subject of standard of review, ICANN's Supplementary Procedures prescribe a standard of review that identifies three questions for this Panel to consider when deciding whether the ICANN Board's decision violated ICANN's Articles or Bylaws. ICANN implies that this Panel can consider only these three inquiries. See ICANN's Response at ¶ 36. Of course, this Panel is not limited to these three questions. See Annex S-2 [October 9, 2015 Final Declaration, Vistaprint Limited v, ICANN, ICDR Case No. 01-14-0000-6505 ["Vistaprint Declaration"]] at ¶ 123 ("Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work.").

¹⁰ ICANN's Response at ¶ 36.

¹¹ ICANN's Supplementary Procedures at ¶ 8 [Standard of Review]; see generally ICDR's Procedures.

¹² *Id.* at ¶ 1 [Definitions].

11. *Third*, the prior Panels that have considered this issue all agree that the standard of review is *de novo*:

- a. “In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially,”¹³
- b. “[T]he IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness;”¹⁴
- c. “The Panel therefore concludes that the ‘standard of review’ in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness;”¹⁵ and
- d. “[T]he Board’s conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard, without any presumption of correctness.”¹⁶

12. When assessing whether the Board violated ICANN’s Articles or Bylaws, this Panel should judge the Board’s decision independently and without deference to the ICANN Board.

II. WHEN THE BOARD APPROVED THE .PERSIANGULF gTLD APPLICATION, IT VIOLATED ICANN’S ARTICLES AND BYLAWS.

A. ICANN did not simply follow GAC’s advice and the principles in the Guidebook.¹⁷

13. ICANN defends its decision to approve the .PERSIANGULF gTLD application by claiming it followed properly the procedures contemplated in the Guidebook. Therefore, as

¹³ See Annex S-3 [February 19, 2010 Final Declaration, ICM Registry, LLC v. ICANN, ICDR Case No. 50-117-00224-08 [“ICM Declaration”]] at ¶ 136.

¹⁴ See Annex S-4 [March 3, 2015 Final Declaration, Booking.com v. ICANN, ICDR Case No. 50-20-1400-0247 [“Booking Declaration”]] at ¶ 111.

¹⁵ See Annex S-5 [July 9, 2015 Final Declaration, DotConnectAfrica Trust v. ICANN, ICDR Case No. 50-2013-0000-1083 [“DCA Declaration”]] at ¶ 76.

¹⁶ Vistaprint Declaration at ¶ 125, n.182.

¹⁷ See Annex S-6 [ICANN’s October 12, 2015 letter to Dot Registry IRP Panel (without exhibits)] [“The ‘rules’ at issue when assessing the Board’s conduct with respect to the New gTLD Program include relevant provisions of the Guidebook.”] at p. 6 ¶ (d).

ICANN claims, it did everything it was required to do under its Articles and Bylaws.¹⁸ This defense is unavailing, however.

14. ICANN did not comply with the Guidebook's procedures. Therefore, ICANN cannot now claim that compliance with the Guidebook's procedures absolves ICANN from liability.

15. ICANN's Bylaws authorize ICANN to create Advisory Committees that provide recommendations to the ICANN Board.¹⁹ One such ICANN Advisory Committee is ICANN's GAC.²⁰ GAC's role in the gTLD process is to address gTLD applications, such as .PERSIANGULF that governments have identified as problematic and to advise ICANN about these governmental concerns and the sensitivities these gTLDs raise.²¹ As their names suggest, ICANN advisory committees, including GAC, have no authority to act for and cannot bind ICANN.²²

16. Under the Guidebook, GAC's advice to ICANN can take only one of three specific forms. GAC can advise ICANN that: (1) it is the GAC's *consensus* that a gTLD application *should not* proceed; (2) there are concerns about a particular gTLD application; or (3) a gTLD application *should not* proceed unless it is remediated.²³

17. During the April 11, 2013 GAC meeting in Beijing, GAC advised ICANN that it did not reach a decision on the .PERSIANGULF gTLD application and that it would need more

¹⁸ ICANN's Response at ¶ 51.

¹⁹ ICANN's Bylaws, Art. XI, § 1 [General] [(“The Board may create one or more Advisory Committees in addition to those set forth in this Article.”)].

²⁰ *Id.* at Art. XI, § 2(1) [Specific Advisory Committees]; Guidebook at § 3.1 [GAC Advice on New gTLDs].

²¹ *Id.*

²² ICANN's Bylaws, Art. XI, § 1 [General].

²³ Guidebook at § 3.1 [GAC Advice on New gTLDs].

time to reach one.²⁴ In June 2013, ICANN’s Board considered and accepted this advice from GAC.²⁵ When accepting this advice, ICANN was aware of GAC’s concerns about the .PERSIANGULF gTLD application, including that the GCC filed on March 13, 2013 a Community Objection against the .PERSIANGULF gTLD application.²⁶

18. Just one month later, during GAC’s July 2013 meetings in Durban, GAC once again considered the .PERSIANGULF gTLD application. To further highlight the internal concerns over .PERSIANGULF, GAC acknowledged *a lack of consensus* amongst GAC members. GAC also identified the specific concerns GAC members from UAE, Oman, Bahrain and Qatar:

- a. “The GAC finalized its consideration of .persiangulf after hearing *opposing* views, the GAC determined that it was clear that there would *not be consensus* on 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.”²⁷

19. Having already identified in the meeting minutes the specific concerns surrounding the .PERSIANGULF gTLD application, GAC’s Durban Communiqué states simply that it “does not object to [.PERSIANGULF] proceeding.”²⁸

20. Of the three possible forms that GAC’s advice can take, two of the three forms—when GAC advises that an application *should not* proceed—do not apply. The only available form that GAC’s advice can therefore take is the one where, such as here, GAC advises ICANN about its concerns about a particular application. Under that scenario, “... [T]he ICANN Board is *expected* to enter into dialogue with the GAC to understand the scope of concerns. The

²⁴ GCC’s IRP at Annex 23 [GAC Communiqué—Beijing, China].

²⁵ See ICANN’s Response at Ex. R-14 and Ex. R-15 [NGPC Resolution No. 2013.06.04.NG01, and Annex 1 to NGPC Resolution No. 2013.06.04.NG01].

²⁶ *Id.*

²⁷ GCC’s IRP at Annex 34 [GAC Meeting Minutes—Durban, South Africa]. [Emphasis Added].

²⁸ *Id.* at Annex 24 [GAC Communiqué—Durban, South Africa].

ICANN Board is also expected to provide a *rationale* for its decision.”²⁹ ICANN did neither.³⁰ Because ICANN did not follow the Guidebook’s procedures, it cannot rely on this defense to evade accountability.

B. Regardless of whether ICANN followed the Guidebook, ICANN still violated its Articles and Bylaws.³¹

1. The ICANN Board cannot simply rely on GAC to justify its decision to approve the .PERSIANGULF gTLD.

21. Even if ICANN did comply with the Guidebook’s procedures by following GAC’s advice, (it did not), ICANN cannot stand behind that fact alone to evade accountability for its decision to grant the .PERSIANGULF gTLD application. ICANN already tried, unsuccessfully, to persuade the Emergency IRP Panelist with this argument. He, however, was not persuaded. When pondering whether ICANN’s Board could in fact bypass its obligations under the Bylaws by simply relying on GAC, the Emergency IRP Panelist responded that “the circumstances suggest an answer in the negative.”³²

22. ICANN’s Bylaws require the ICANN Board to operate transparently. “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner....”³³ To achieve transparency, ICANN commits to provide a *thorough and reasoned explanation* of decisions taken, the *rationale thereof* and the *sources of data and*

²⁹Guidebook at § 3.1. [(“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.”)]. [Emphasis Added].

³⁰ ICANN’s Response at R-18 [Annex 1 to NGPC Resolution No. 2013.09.10.NGO3].

³¹ In its IRP and Emergency Relief briefing, the GCC argued, among other things, ICANN violated Core Value Nos. 4 (seeking and supporting broad, informed participation at all levels of decision making); 8 (making decisions by applying documented policies neutrally and fairly); and 11 (taking into account governments’ recommendations). Because this is a supplemental brief, the GCC does not re-state those arguments again here, and instead focuses on how the Emergency IRP Panelist’s Interim Declaration and the three IRP declarations that issued in 2015 undermine ICANN’s defenses.

³² Emergency Interim Declaration at ¶ 90.

³³ ICANN’s Bylaws, Art. III, § 1 [Transparency].

information on which ICANN relied.³⁴ An ICANN Board decision must be justified and supported by a well-reasoned analysis.³⁵ “Any ICANN body making a recommendation or decision shall 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.”³⁶ Put simply, the ICANN Board must assess independently the facts before making a decision, and must explain the rationale behind its decision.³⁷

23. The ICANN Board failed to assess independently the facts before deciding to approve the .PERSIANGULF gTLD. ICANN was well-aware of the GCC’s objections and its constituent governments to the .PERSIANGULF gTLD application both before and after approving it. There is no evidence to suggest that ICANN took this governmental opposition into account.³⁸ Nor is there evidence to suggest that the Board’s decision reflected any assessment or application of the competing core values, or a statement of a defensible balance of the competing core values.³⁹

24. The ICANN Board did not explain the rationale behind its decision either. The Board did not explain why it chose to ignore the scores of the GCC’s objections, why it chose to ignore the Guidebook’s guidelines, or why it chose to not enter into a dialogue with GAC to understand GAC’s concerns about the .PERSIANGULF gTLD. The Board offered no explanation how it arrived at the decision to approve the .PERSIANGULF gTLD, or how that decision complied with its Articles and Bylaws.

³⁴ See Annex S-7 [Affirmation of Commitments] at ¶ 7. [Emphasis Added].

³⁵ Emergency Interim Declaration at ¶ 76.

³⁶ ICANN’s Bylaws, Art. I, § 2 (“Core Values”); Articles of Incorporation at ¶ 4.

³⁷ DCA Declaration at ¶ 74.

³⁸ Emergency Interim Declaration at ¶ 89.

³⁹ *Id.*

25. As the Emergency IRP Panelist noted: the GCC's IRP raises serious questions about the decision making process of the ICANN Board:

- a. Did the Board exercise its own independent judgment in deciding to proceed with .PERSIANGULF;
- b. Did ICANN identify, consider, and take guidance from the relevant Core Values?
- c. Did ICANN identify competing Core Values?
- d. Did ICANN conduct a balance of which Core Values were most important and why?
- e. Is that balance defensible?
- f. Did ICANN consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or
- g. Can ICANN avoid accountability by arguing compliance with the Guidebook procedures?⁴⁰

26. The GCC asserts that the answers to these questions are a resounding no. Regardless of the answers, however, the ICANN Board violated its transparency obligations rooted in the Bylaws. Either the Board failed to conduct a reasoned analysis before deciding to approve the .PERSIANGULF gTLD or it did and failed to explain its analysis. Either way the Board violated its transparency obligations, among its other violations of the Articles and Bylaws already discussed in the GCC's IRP.

2. The DCA Panel already rejected the ICANN Board's attempt to evade accountability by simply relying on GAC's non-binding advice.

27. The DCA Panel declared that the ICANN Board breached its transparency obligations when it simply adopted GAC's advice without more.⁴¹

⁴⁰ Emergency Interim Declaration at ¶¶ 73 and 88.

⁴¹ DCA Declaration at ¶ 113.

28. DCA Trust applied for the .AFRICA gTLD.⁴² During the Beijing Communique, GAC provided ICANN with *consensus* advice that DCA Trust's application should *not* proceed.⁴³ Under the Guidebook, GAC's consensus advice that a particular application should not proceed creates a "strong presumption for the ICANN Board that the application should not be approved." Moreover, when there is consensus advice, the Guidebook does not expressly obligate the ICANN Board to engage in dialogue with GAC and provide a rationale for its decision.⁴⁴

29. Nonetheless, DCA Trust alleged that the ICANN Board violated its transparency obligations when it accepted GAC's advice without conducting an independent analysis or providing the reason behind its ultimate decision.⁴⁵ ICANN defended its decision-making by arguing that it evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook.⁴⁶

30. In granting DCA Trust's IRP, the panel stated: "In light of the clear 'Transparency' obligation provisions found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a *minimum, investigate the matter further* before rejecting DCA Trust's application."⁴⁷ ICANN must explain or give reasons for its activities and to disclose the results in a transparent manner.⁴⁸

⁴² *Id.* at ¶ 3.

⁴³ *Id.* at ¶ 112.

⁴⁴ Guidebook at § 3.1. [{"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."}].

⁴⁵ DCA Declaration at ¶ 81.

⁴⁶ *Id.* at ¶ 56.

⁴⁷ *Id.* at ¶ 113. [Emphasis Added].

⁴⁸ *Id.* at ¶ 74.

31. The DCA Panel's Declaration supports further the GCC's IRP. Like it did with .AFRICA, the ICANN Board simply adopted GAC's advice and approved the .PERSIANGULF gTLD. Unlike in .AFRICA, GAC did not provide consensus advice. When GAC identifies concerns about a particular gTLD, as it did with .PERSIANGULF, the ICANN Board *must* engage in a dialogue with GAC to identify the concerns and provide a rationale for its ultimate decision.⁴⁹ ICANN did not engage with GAC or provide a rationale for its decision to approve the .PERSIANGULF gTLD. Not only did the ICANN Board violate its Bylaws by not following the Guidebook's procedures but it violated its transparency obligations under its Bylaws too.

32. This failure alone is enough to grant the GCC's IRP. The DCA Panel declared that the ICANN Board's failure to honor its transparency obligation is dispositive of the IRP. The Panel did not even consider the other alleged ICANN Board violations.⁵⁰

C. The GCC's IRP is timely.

1. ICANN, through its words and conduct, extended the GCC's deadline to file its IRP.

33. After first claiming that it did nothing wrong since it followed GAC's non-binding advice, ICANN next argues that it is irrelevant whether its Board violated its Articles or Bylaws because the GCC passed the deadline to file its IRP.⁵¹

34. To make this claim, ICANN ignores its own repeated oral and behavioral representations to the GCC, upon which the GCC relied, that ICANN extended the GCC's deadline to file its IRP. After reviewing this evidence, the Emergency Panelist concluded that

⁴⁹ Guidebook at § 3.1. [“(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.”)]. [Emphasis Added].

⁵⁰ DCA Declaration at ¶¶ 116-117.

⁵¹ ICANN's Response at ¶¶ 2; 47-48.

the GCC provided a number of reasonable examples to support that ICANN extended the IRP filing deadline by its conduct.⁵²

35. For the 15 months 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.⁵³ In response to the GCC’s initial resolution attempts, ICANN instructed the GCC to hold resolution discussions until *after* GCC’s pending Community Objection was decided. In reliance on this representation, the GCC waited to continue resolution talks.⁵⁴ The GCC’s Community Objection was not decided until October 30, 2013, the very day ICANN claims was the GCC’s deadline to file its IRP.⁵⁵

36. Following the IE’s October 30, 2013 Community Objection determination, after the purported deadline to file, the GCC re-initiated resolution talks with ICANN.⁵⁶ ICANN participated in these talks. The GCC relied on ICANN’s post-deadline participation in settlement discussions that its deadline to file its IRP had been extended.

37. ICANN’s participation in post-deadline settlement discussions included a June 2014 in-person meeting with ICANN’s then-CEO Mr. Fadi Chehade. During that meeting, the GCC continued to raise its concerns about the .PERSIANGULF gTLD and specifically its impact on the Internet community in the GCC region.⁵⁷ At no point did ICANN indicate that it believed that GCC’s IRP deadline passed. “Such a high level meeting in June 2014 reasonably

⁵² Emergency Interim Declaration at ¶ 83.

⁵³ The GCC’s Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman Al Marzouqi] at ¶¶ 8-19.

⁵⁴ *Id.* at ¶¶ 8-10.

⁵⁵ *Id.* at ¶ 10.

⁵⁶ *Id.* at ¶ 11.

⁵⁷ *Id.* at ¶¶ 12-14.

suggests that the issue of the delegation [of the .PERSIANGULF gTLD] was still under active consideration with no final decision having in fact been made.”⁵⁸

38. The GCC did not rely solely on ICANN’s post-deadline conduct. ICANN made repeated statements that the deadline to file the IRP had *not* passed. In September 2014, 11 months after the purported filing deadline, ICANN advised the GCC that it may have to file an IRP to resolve the issue.⁵⁹ Additionally, over the course of the resolution process—including just one week before the GCC ultimately filed its IRP—ICANN informed the GCC that since resolution talks were not effective, *it could engage in the Cooperative Engagement Process*, a process which occurs *before* filing an IRP Request.⁶⁰

2. ICANN is estopped from and waived its ability to assert that the GCC’s IRP is not timely.

39. The GCC delayed filing its IRP because of ICANN’s representations on which the GCC relied. ICANN cannot ignore those representations and assert now that the GCC’s IRP is not timely. ICANN is estopped from invoking time-bar where ICANN’s conduct, on which the GCC relied, induced the GCC to continue settlement negotiations long after the purported filing deadline.⁶¹ ICANN cannot argue delay when ICANN is the sole cause of that delay.

40. Finally, ICANN waived any argument that the IRP is untimely. According to ICANN, declarations are not binding.⁶² As ICANN conceded during the Preparatory Conference, ICANN’s Board, however, reviewed and adopted the findings of the Emergency Interim Declaration, which included the Emergency Panelist’s finding that it was reasonable to

⁵⁸ Emergency Interim Declaration at ¶ 83.

⁵⁹ The GCC’s Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman Al Marzouqi] at ¶ 16.

⁶⁰ ICANN’s Bylaws, Art. IV, § 3(14).

⁶¹ 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 523, p. 550; *In re Pieper’s Estate*, 224 Cal. App. 2d 670, 690-91 (1964) (one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to a time bar and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought.).

⁶² See Annex S-6 at p. 5, ¶ (c).

conclude that ICANN *extended* the GCC's deadline to file its IRP.⁶³ ICANN *could* have: (1) disputed the Emergency Panelist's finding; (2) decided *not* to adopt the Emergency Panelist's finding; (3) concluded that the GCC's IRP is untimely; and (4) proceeded to sign the registry agreement for the .PERSIANGULF gTLD. Instead, ICANN adopted the Panelist's findings, including the finding that it was reasonable to conclude that the GCC's IRP is timely. ICANN waived its ability to claim otherwise.

D. The GCC has been harmed by the ICANN Board's decision.

41. In its last attempt to evade accountability, ICANN argues that its violation of its Articles and Bylaws is inconsequential since the GCC has not suffered any legally recognizable harm.⁶⁴ ICANN attempts to distract and confuse this Panel by ignoring the only relevant standard of harm for this or any IRP—harm resulting from ICANN's violation of its Articles or Bylaws. Instead, ICANN claims wrongly that the GCC must demonstrate definite harm resulting from the operation of the .PERSIANGULF gTLD, an event that has yet to happen.

42. The GCC has suffered harm as a result of the Board's decision to approve the .PERSIANGULF gTLD. The Board's decision to grant the .PERSIANGULF gTLD: (i) denied the GCC its right to due process because ICANN deprived the GCC of a fair and impartial gTLD process, contrary to the publicly available rules for the evaluation of new gTLD applications; and (ii) discriminated against the GCC by treating it unfairly and differently than other Internet community members and by aligning with Iran in the heated and hotly contested Gulf naming dispute.

⁶³ Emergency Interim Declaration at ¶ 83.

⁶⁴ ICANN's Response at ¶¶ 2 and 55.

1. ICANN's reliance on the IO's and the IE's determinations is misplaced.

43. ICANN ignores the IRP's undisputed "materially affected" standard and instead relies on the IO and the IE to conclude that the GCC cannot state legally cognizable harm.⁶⁵ But the IO and the IE analyzed harm using a different standard. The determinations of the IO and the IE are irrelevant.

44. The IO and the IE analyzed harm under a "material detriment" standard: The 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.⁶⁶

45. When faced with determining whether operation of the .PERSIANGULF gTLD would cause the GCC material detriment, the IO did not make any decision. Instead, the IO determined: "It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute [Gulf naming dispute]; but they probably should adapt to the *status quo* and the IO deems it unsuitable to take any position on the question."⁶⁷

46. When faced with the same question, the IE, like the IO, did not conclude that the GCC would not suffer material detriment. Instead, the IE stated that material harm is "difficult to discern and weigh."⁶⁸

47. To determine whether material detriment exists, the Guidebook instructs the IE's decision to be guided by certain factors, including:

- a. Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's *operation* of the applied-for gTLD string;

⁶⁵ *Id.* at ¶ 56.

⁶⁶ Guidebook at 3.5.4 [Community Objection].

⁶⁷ ICANN's Response at Ex. R-11 [IO's Comments on .PERSIANGULF].

⁶⁸ *Id.* at Ex. R-12 [IE's Determination on Community Objection].

- b. Interference with the core activities of the community that would result from the applicant's *operation* of the applied-for gTLD string; and
- c. Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's *operation* of the applied-for gTLD string.⁶⁹

48. Under this likelihood of material detriment standard, the IE was tasked—unlike with what the Panel is tasked with here, with assessing the effect the operation of the .PERSIANGULF gTLD has on the Arab Community.

49. This Panel is not tasked with assessing harm that may result from the operation of .PERSIANGULF gTLD. The Panel must only ask whether the Board's decision to approve .PERSIANGULF materially affected the GCC. It did. Because of the Board's violation, the GCC has suffered both discrimination and been denied the right to a fair and impartial gTLD process.

III. THE COST-ALLOCATION PROVISION IN ICANN'S SUPPLEMENTARY PROCEDURES, NOT ICANN'S BYLAWS, SHOULD APPLY.

A. ICANN's Supplementary Rules and the ICDR's Procedures are the only procedural rules that control this IRP.

50. At the outset of the Preparatory Conference, the parties disagreed over which rules govern procedurally the IRP. ICANN suggests that the ICDR's Procedures, ICANN's Supplementary Procedures, *and* ICANN's Bylaws govern. The GCC, however, posits that only the ICDR's Procedures and ICANN's Supplementary Procedures control. The GCC's position is supported by: (i) the plain language of ICANN's Supplementary Procedures; (ii) declarations of prior IRP panels; and (iii) ICANN's own admissions.

51. *First*, ICANN's Supplementary Procedures identify which set of rules establish the IRP's procedures: ICANN designated the ICDR as the Independent Review Panel Provider

⁶⁹ Guidebook at 3.5.4 [Community Objection]. [Emphasis Added].

of the IRP process.⁷⁰ As the IRP Provider, the ICDR mandated that the ICDR's procedures *and* ICANN's Supplementary Procedures alone direct procedurally this IRP.⁷¹

52. *Second*, three previous IRP panels have addressed this issue, and each such panel reached the same conclusion: The operating rules and procedures for the conduct of an IRP are the ICDR's Rules and ICANN's Supplementary Procedures.⁷² ICANN's Board has reviewed and adopted each of these IRP panel's declarations.

53. *Third*, ICANN has already conceded that ICANN's Supplementary Procedures and the ICDR's Procedures control this IRP. When it agreed to the appointment of an emergency IRP Panelist in response to the GCC's request for emergency relief, ICANN did so provided that the emergency relief process would be conducted pursuant to both ICANN's Supplementary Procedures and the ICDR's Procedures. "ICANN hereby consents to the appointment of a single emergency IRP panelist to address GCC's request for emergency relief, *assuming the emergency panelist acts in accordance with the Rules contained in Article 6 of the 2014 ICDR Rules as supplemented by the Supplementary Procedures.*"⁷³

54. The only governing procedural rules therefore are the ICDR's Procedures and ICANN's Supplementary Procedures. Determining which procedural rules govern this IRP impacts the issue of cost-allocation.

B. The GCC is entitled to its costs under ICANN's Supplementary Procedures.

55. ICANN's Supplementary Procedures authorize this Panel to award costs.⁷⁴ The GCC is entitled to the costs it incurred in this IRP.

⁷⁰ ICANN's Supplementary Procedures at ¶ 1 [Definitions].

⁷¹ *Id.*

⁷² Booking Declaration at ¶ 1; DCA Declaration at ¶ 101; and Vistaprint Declaration at ¶ 1.

⁷³ See Annex S-8 [December 9, 2014 email from E. Enson email to ICDR]. [Emphasis Added].

⁷⁴ ICANN's Supplementary Procedures at ¶ 11 [Costs].

56. ICANN, however, is not entitled to its costs or fees. Under ICANN's Supplementary Procedures, (which governs this dispute), ICANN is not entitled to its costs or fees so long as the party requesting the independent review [the GCC] participates in good faith in ***either*** the **cooperative engagement or the conciliation processes**.⁷⁵

57. There is no dispute that the GCC has participated in conciliation in good faith.⁷⁶ ICANN therefore is not entitled to its costs or fees.

58. ICANN, however, will likely rely on its Bylaws to argue that it is entitled to its costs and fees. Under ICANN's Bylaws, ICANN is entitled to its costs and fees if the party requesting the independent review [the GCC] does not participate in good faith in ***both*** the **cooperative engagement and the conciliation processes**.⁷⁷ To accept ICANN's position that the Bylaws' cost-allocation provision controls requires several logistical leaps.

59. ***First***, this Panel must accept that the Bylaws' cost-allocation provision applies, even though ICANN's Supplementary Procedures control.⁷⁸ Cost-allocation is a procedural issue; ICANN's *Supplementary* Procedures designate it as such. The ICDR must apply on procedural issues ICANN's Supplementary Procedures and the ICDR's Procedures, not the Bylaws.

60. ***Second***, to the extent that the Bylaws are somehow not supplemented by the Supplementary Procedures, then two ambiguous cost-allocation provisions are at play. Any ambiguity must be construed against ICANN, not the GCC.⁷⁹

⁷⁵ ICANN's Supplementary Procedures at ¶ 11 [Costs].

⁷⁶ See Annex S-9 [Supp. Witness Statement of Abdulrahman Al Marzouqi].

⁷⁷ ICANN's Bylaws, Art. IV § 3(16). [Emphasis Added].

⁷⁸ See Section III. § 1, above.

⁷⁹ Cal. Civ. Code § 1654 ("In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."); *Cathay Bank v. Lee*, 14 Cal. App. 4th 1533, 1541 (1993); *Fed. Nat'l Mortg. Ass'n. v. Bugna*, 57 Cal. App. 4th 529, 535 (1997) (when ambiguities exist they are construed against the drafter of the instrument.).

61. Ultimately, the GCC did engage in cooperative engagement. The purpose of cooperative engagement is to resolve or narrow the issues that are contemplated to be raised in an IRP. The GCC spent more than 15 months trying to resolve the dispute with ICANN before filing this IRP.⁸⁰ Because the GCC participated in both cooperative engagement and conciliation, ICANN is not entitled to its costs or fees under either ICANN's Supplementary Procedures or Bylaws.

62. In the interest of efficiency, in the event that ICANN or this Panel questions whether the GCC participated in good faith in cooperation engagement or conciliation, and the GCC is not the prevailing party, the GCC requests and reserves its right to brief more fully this issue, if and when this issue is ripe for review.

REQUESTED RELIEF

63. In light of ICANN's violations, and the harm the GCC has suffered as a result, the GCC seeks a declaration: (1) stating that the ICANN Board violated the aforementioned Articles, Bylaws and provisions of the Guidebook; (2) recommending to the Board that ICANN take no further action on the .PERSIANGULF gTLD, including enjoining ICANN from signing the registry agreement with Asia Green, or any other entity; (3) awarding the GCC its costs in this proceeding; and (4) awarding such other relief as this Panel may find appropriate or that the GCC may request.

CONCLUSION

64. In the end, this IRP presents two questions that the GCC requests this Panel to answer: (i) did the Board's decision to approve the .PERSIANGULF gTLD application violate

⁸⁰ The GCC's Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman Al Marzouqi] at ¶¶ 8-18.

ICANN's Articles or Bylaws; and, (ii) if so, did the GCC suffer harm as a result? The GCC asserts that the answers to both of these questions are yes.

65. ICANN's decision to approve the .PERSIANGULF gTLD application violated its Articles and Bylaws. ICANN's Board obligates itself to make an independent assessment of the facts to make well-reasoned decisions and to explain the rationale behind those decisions. ICANN failed to make a well-reasoned decision or to explain the rationale behind its decision to approve the .PERSIANGULF gTLD application. As ICANN concedes, it decided to approve the .PERSIANGULF gTLD because GAC said so. The Board cannot hide behind GAC to evade accountability.

66. The GCC suffered harm. It has been discriminated against and denied the right to a fair and transparent gTLD process.

67. Because the ICANN Board violated its Articles and Bylaws and caused harm to the GCC as a result, this Panel should grant the GCC's IRP.

February 12, 2016

Respectfully submitted,



Natasha Kohne

Counsel for Claimant, the GCC