

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GULF COOPERATION COUNCIL,)	ICDR CASE NO. 01-14-0002-1065
)	
Claimant,)	
)	
and)	
)	
INTERNET CORPORATION FOR ASSIGNED)	
NAMES AND NUMBERS,)	
)	
Respondent.)	
_____)	

**ICANN'S RESPONSE TO GULF COOPERATION COUNCIL'S
REQUEST FOR EMERGENCY RELIEF**

Jeffrey A. LeVee
Eric P. Enson
Rachel Zernik
JONES DAY
Contact Information Redacted

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

TABLE OF CONTENTS

	Page
INTRODUCTION	1
FACTUAL AND PROCEDURAL BACKGROUND	2
STANDARD OF REVIEW	14
ARGUMENT.....	17
I. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE THE GCC IS NOT REASONABLY LIKELY TO SUCCEED ON THE MERITS OF ITS IRP	17
A. The GCC’s IRP Request Is Time-Barred	18
B. The GCC Fails To Identify an ICANN Board Action That Violated ICANN’s Articles or Bylaws.....	18
II. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE THE GCC UNREASONABLY DELAYED IN SEEKING SUCH RELIEF	23
III. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE GCC HAS NOT DEMONSTRATED THAT THE HARM IT WOULD SUFFER IN THE ABSENCE OF SUCH RELIEF OUTWEIGHS THE HARM TO OTHERS.....	23
CONCLUSION	25

INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Emergency Independent Review Process Relief (“Emergency Request”) submitted by claimant Gulf Cooperation Council (“the GCC”) on 5 December 2014.

1. The GCC objects to the application for a .PERSIANGULF generic top level domain (“gTLD”) because the “Arab nations that border the Gulf prefer the name ‘Arabian Gulf.’”¹ The GCC, and certain of its member States, first raised these concerns in 2012. Since then, in December 2012, ICANN’s Independent Objector (“IO”) reviewed GCC’s concerns and found that he had no basis to object to the .PERSIANGULF application (“Application”). Thereafter, in July 2013, the Governmental Advisory Committee (“GAC”), an independent body that provides advice to ICANN on behalf of governments, completed its review of the application and informed ICANN that it “d[id] not object” to the .PERSIANGULF application proceeding. Following that, an independent expert appointed by the International Chamber of Commerce (“ICC”) to assess the GCC’s community objection to the Application determined, in a report issued on 30 October 2013, that the GCC’s community objection should be rejected. Since then, rather than timely pursuing ICANN accountability mechanisms or other processes to challenge these findings and determinations, the GCC waited for *over one year* to file its Emergency Request.

2. There is no question that the GCC believes strongly in its position in this naming dispute. There are, however, significant questions about the merits of the GCC’s Request for Independent Review (“IRP Request”) and even more questions about the GCC’s Emergency Request to stay ICANN’s processing of the .PERSIANGULF Application pending resolution of this independent

¹ Emergency Request, ¶ 8.

Review process (“IRP”).

3. Specifically, the GCC has failed to demonstrate a reasonable possibility that it will succeed on the merits of this IRP for at least two reasons. First, the GCC filed its IRP Request *over a year too late* and its request is therefore time barred pursuant to ICANN’s Bylaws. Second, the GCC has not identified any ICANN Board action or decision that was inconsistent with ICANN’s Articles of Incorporation (“Articles”) or Bylaws, which is the only question at issue in IRP proceedings such as this.

4. Emergency relief is even more unwarranted here because the GCC unreasonably delayed in bringing this IRP, which belies the GCC’s claims of urgency, necessity, and harm. Moreover, as both the IO and the ICC expert found previously, the GCC has not demonstrated any real, legally-recognized detriment were the Application to proceed.

5. ICANN’s Board has complied with its Articles and Bylaws at every step with respect to the Application. The GCC’s Emergency Request, as well as its IRP Request, present no evidence to the contrary. The GCC’s Emergency Request should therefore be denied.

FACTUAL AND PROCEDURAL BACKGROUND

ICANN

6. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. 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 (“DNS”).²

7. ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Directors, over 300 staff members, and an

² ICANN Bylaws (“Bylaws”), Art. I, § 1 (Ex. R-ER-1).

Ombudsman. ICANN is much more than just the corporation—it is a community of participants. In addition to the Board, the staff, and the Ombudsman,³ the ICANN community includes a Nominating Committee,⁴ three Supporting Organizations,⁵ four Advisory Committees,⁶ a group of technical expert advisors,⁷ and a large, globally distributed group of community members who participate in ICANN’s processes.

8. ICANN’s Governmental Advisory Committee (“GAC”), which consists of members appointed by and representing governments, 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.”⁸ Membership in the GAC is open to all national governments and distinct economies as recognized in international fora. The importance of the GAC’s advice to ICANN is built into ICANN’s Bylaws:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.⁹

ICANN’s Unique Accountability Mechanisms

9. ICANN has a proven commitment to accountability and transparency in all of its practices. ICANN considers these principles to be fundamental safeguards in ensuring that its bottom-up, multi-stakeholder model remains effective. The mechanisms through which ICANN

³ *Id.*, Art. V.

⁴ *Id.*, Art. VII.

⁵ *Id.*, Arts. VIII-X.

⁶ *Id.*, Art. XI.

⁷ *Id.*, Art. XI-A, § 2.

⁸ *Id.*, Art. XI, § 2.1.

⁹ *Id.*, Art. XI, § 2.1.j.

achieves accountability and transparency are built into every level of its organization and mandate. In order to reinforce its transparency and accountability, ICANN has established specific accountability mechanisms for review of ICANN actions.¹⁰

10. For instance, ICANN's Bylaws permit an entity that has been adversely and materially affected by an ICANN staff or Board action or inaction to request that the Board reconsider that action or inaction ("Reconsideration Request").¹¹ Reconsideration Requests are reviewed and considered by ICANN's Board Governance Committee, which can either make a final determination if evaluating staff conduct, or make a recommendation to the Board if evaluating Board conduct.

11. Similarly, and in addition to Reconsideration Requests, ICANN has also established a separate independent review process of Board actions alleged by an affected party to be inconsistent with ICANN's Articles or Bylaws, which the GCC has invoked in this matter.¹²

The New gTLD Program

12. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers ("registrars"). ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs ("registries"). In 2000, ICANN approved seven gTLDs in a "proof of concept" phase that was designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. In 2004 and 2005, ICANN approved a handful of additional TLDs.

¹⁰ *Id.*, Art. IV; *see also* ICANN Accountability Mechanisms Available to the ICANN Community (Ex. R-ER-2), *also available at* <https://www.icann.org/sites/default/files/assets/accountability-mechanisms-5100x3300-19mar14-en.png>.

¹¹ Bylaws, Art. IV, § 2.2.

¹² *Id.*, Art. IV, § 3.

13. The New gTLD Program (“Program”) constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII gTLDs and new non-ASCII, internationalized domain name (“IDN”), gTLDs.¹³ In developing the Program with the ICANN community, numerous versions of the Applicant Guidebook (“Guidebook”) were prepared and publicly distributed. Ultimately, ICANN went forward with the Program based on the version of the Guidebook published on 4 June 2012, which provides detailed instructions to gTLD applicants and sets forth the procedures for ICANN’s evaluation of new gTLD applications, and objections thereto.

14. Pursuant to the Guidebook, all applications for new gTLDs are made available for review and public comment.¹⁴ Concurrent with the public comment period, the GAC is able to issue “Early Warning” notices concerning particular applications.¹⁵ An Early Warning notice is not an official GAC statement against an application, but is intended to provide the applicant with an indication that one or more governments view the application as potentially sensitive or problematic.¹⁶ Applicants are advised that a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC advice against it at a later stage in the process.¹⁷

15. The Guidebook also sets out a process whereby the GAC may issue advice to ICANN concerning any application for a new gTLD. As set forth in Section 3.1 of the Guidebook, GAC

¹³ IDN gTLDs are gTLDs that include characters not within the US-ASCII (American Standard Code for Information Exchange) or Latin alphabets.

¹⁴ New gTLD Applicant Guidebook (“Guidebook”), § 1.1.2.3 (Ex. R-ER-3).

¹⁵ *Id.*, § 1.1.2.4.

¹⁶ *Id.*

¹⁷ *Id.*

advice regarding a new gTLD application may take one of three forms. First, pursuant to Section 3.1 of the Guidebook, the GAC may issue “consensus advice” as follows:

The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.¹⁸

16. Second, the GAC may issue non-consensus advice indicating “that there are concerns about a particular application.”¹⁹ If the GAC issues non-consensus advice against an application, the ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.²⁰

17. Third, pursuant to Module 3.1, Part III of the Guidebook, the GAC may issue advice to ICANN “that an application should not proceed unless remediated.”²¹ This type of advice “will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.”²²

18. With respect to gTLD applications, the GAC has generally provided its advice to ICANN in the form of communiqués associated with one of ICANN’s Public meetings, such as the “London Communiqué,” which is advice from the GAC borne out of the GAC’s meeting at the ICANN Public meeting in London.

19. The New gTLD Program Committee (“NGPC”) of the ICANN Board, which has the full authority of the Board with respect to the New gTLD program and is comprised of all Board members that have no actual, potential or perceived conflict of interest in pending New gTLD

¹⁸ *Id.*, § 3.1.

¹⁹ *Id.*, § 3.1(II)

²⁰ *Id.*

²¹ *Id.*, § 3.1(III).

²² *Id.*

applications, is tasked with evaluating and responding to GAC advice on gTLD applications as well as communicating with the GAC regarding its advice.²³ Throughout the Program, the NGPC has publicly issued “scorecards” relating to GAC advice, which are statements that track the GAC’s advice on certain issues and ICANN’s response to that advice.²⁴

The Public Objection and Dispute Resolution Process

20. In addition to the accountability mechanisms mentioned above and advice from the GAC, governments, as well as other entities and individuals, can formally object to a gTLD application through the Objection and Dispute Resolution Process.²⁵ The Guidebook enumerates several grounds on which an objection may be filed. As is relevant here, an established institution associated with a clearly delineated community may file a “Community Objection” claiming that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”²⁶ All Community Objections are heard by independent, expert panels selected by the ICC.²⁷

21. In order to succeed on a Community Objection, an objector must establish the following: (i) the community invoked by the objector is a clearly delineated community; (ii) community opposition to the application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string; and (iv) the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the

²³ See Board Resolution 2012.04 10.02 (Ex. R-ER-4), also available at <https://features.icann.org/2012-04-10-establishment-new-gtld-program-committee>. Accordingly, any advice to the ICANN Board is advice to the NGPC, and if Board action is required, action by the NGPC may be considered Board action for purposes of these proceedings.

²⁴ See <http://newgtlds.icann.org/en/applicants/gac-advice>.

²⁵ Guidebook, §§ 3.2, 3.2.3. (Ex. R-ER-3).

²⁶ *Id.*, § 3.2.1.

²⁷ *Id.*, § 3.2.2.

community to which the string may be explicitly or implicitly targeted.²⁸ The Guidebook makes clear that “[i]f opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant’s operation of the applied-for gTLD, the objection will fail.”²⁹

22. The Guidebook does not provide any procedure by which ICANN (or anyone else) is to conduct a substantive review of an expert panel’s determination on a Community Objection.³⁰ Notably, the decision not to have an appellate mechanism for objection proceedings was not an ICANN Board decision. Rather, it was a community-driven decision, which, among other things, was intended to help reduce the time and expense associated with the objection process and to ensure that those with the requisite expertise were making the ultimate determinations.

The Independent Objector

23. Another check on the Program is found in ICANN’s creation of an Independent Objector.³¹ The IO is tasked with filing certain objections against “highly objectionable” gTLD applications to which no formal objection has been filed.³² Pursuant to the Guidebook and ICANN’s practices and policies, “[n]either ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not to file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.”³³

24. The IO’s standing to file a Community Objection is triggered when there is at least one

²⁸ *Id.*, § 3.5.4.

²⁹ *Id.*

³⁰ *Id.*, § 3.4.6.

³¹ *Id.*, § 3.2.5.

³² *Id.*

³³ *Id.*

comment in opposition to the application made in the public sphere.³⁴

The .PERSIANGULF Application and Evaluation Thereof

25. On 8 July 2012, Asia Green IT System Ltd. (“Asian Green”) submitted an application for the .PERSIANGULF gTLD. Subsequently, the governments of the United Arab Emirates, Oman, Baharain and Qatar sent virtually identical letters to the GAC and ICANN seeking to invoke the GAC’s Early Warning system regarding the Application and requesting that the GAC issue advice regarding whether a .PERSIANGULF gTLD is appropriate.³⁵

26. On 20 November 2012, as set forth in the Guidebook, these four countries caused the GAC to issue an Early Warning on the Application claiming that “[t]he applied for new gTLD is problematic and refers to a geographical place with [a] disputed name” and “[l]ack[s] [...] community involvement and support.”³⁶

27. As required by the Guidebook, ICANN informed Asia Green of the GAC Early Warning, and publicly posted the Early Warning on ICANN’s website. However, as is clear in the Guidebook, this Early Warning was “not a formal objection, nor [did] it lead to a process that can result in rejection of the application.”³⁷ Rather, the GAC Early Warning served as notice to Asia Green “that the application [was] seen as potentially sensitive or problematic by one or more governments.”³⁸

28. In December 2012, the IO, Professor Alain Pellet, expressed his view regarding the

³⁴ *Id.*

³⁵ *See* GAC Early Warnings (CI’s ER Annexes 6-9). Citations to “CI’s ER Annexes” refer to Annexes to the GCC’s Emergency Request. Citations to “CI’s Annexes” refer to annexes to the GCC’s IRP Request.

³⁶ CI’s ER Annex 12.

³⁷ Guidebook, § 1.1.2.4 (Ex. R-ER-3).

³⁸ *Id.*

Application.³⁹ The IO reviewed the history of this naming dispute, noted public comments against and in favor of a .PERSIANGULF gTLD, and described several, recognized authorities that utilize the name Persian Gulf for the sea area located between the Arabian Peninsula and the Islamic Republic of Iran.⁴⁰ Based upon this, the IO concluded that the Application was not contrary to generally accepted legal norms of morality and public order.⁴¹ The IO also concluded that there was no basis for him to file a Community Objection because “it is most debatable” whether a .PERSIANGULF gTLD creates a likelihood of material detriment to members of the Arabian Gulf community.⁴² Finally, the IO noted that the Arabian Gulf community could file its own objection to the application.⁴³

29. On 13 March 2013, the GCC filed a Community Objection to the Application.⁴⁴ The ICC appointed Stephen M. Schwebel to serve as the Expert Panelist to hear the GCC’s Community Objection.⁴⁵

30. While the GCC’s Community Objection was pending, the GAC met during ICANN’s Beijing, China meeting in April 2013, and reviewed a number of gTLD applications. In what is known as the “Beijing Communiqué,” the GAC issued several different types of advice on numerous gTLD applications.⁴⁶ First, the GAC provided consensus advice to ICANN that two applications, .AFRICA and .GCC, should not proceed,⁴⁷ which under Section 3.1 of the

³⁹ The IO’s Comments on Controversial Applications (Ex. R-ER-5), *also available at* <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persianguf-general-comment/>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See* Expert Determination on the GCC’s Expert Determination, ¶ 1 (Cl.’s ER Annex 2).

⁴⁵ *See id.*, ¶ 5.

⁴⁶ Beijing Communiqué, ¶ IV.1.a.i.i.1-2 & n.3 (Cl.’s ER Annex 13).

⁴⁷ Those two applications were DotConnect Africa’s application for .AFRICA and the GCCIX WILL’s application for .the GCC.

Guidebook creates “a strong presumption for the ICANN Board that the application[s] should not be approved.”⁴⁸ Second, the GAC provided non-consensus advice to ICANN that some GAC members have raised concerns about two applications for religious terms, .ISLAM and .HALAL, and “it is the view of these GAC members that these applications should not proceed,” which under Section 3.1 of the Guidebook means that the “ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.”⁴⁹ Third, the GAC advised ICANN that it wanted to give further consideration at its next meeting in Durban, South Africa to several gTLD applications, including the application for .PERSIANGULF, and requested that ICANN not proceed beyond initial evaluation of these applications until the further consideration was concluded.⁵⁰

31. As required by the Guidebook, in May and June 2013, the NGPC considered the GAC advice provided in the Beijing Communiqué. On 4 June 2013, the NGPC adopted a Scorecard reflecting its response to the GAC advice.⁵¹ First, the NGPC accepted the GAC consensus advice that two applications, .AFRICA and .GCC, should not proceed, noting that both “will not be approved,” pursuant to the Guidebook.⁵² Second, the NGPC accepted the GAC non-consensus advice regarding the two religious terms, .ISLAM and .HALAL, stating that “the NGPC stands ready to enter into a dialogue with the GAC on this matter,” pursuant to the Guidebook.⁵³ Third, the NGPC accepted the GAC’s request for additional time to consider several other applications, including the .PERSIANGULF Application, clarifying that “ICANN

⁴⁸ Beijing Communiqué, ¶ IV.1.a.i.i.1-2 & n.4 (CI’s ER Annex 13).

⁴⁹ *Id.*, ¶ IV.1.a.i.ii.1.

⁵⁰ *Id.*, ¶ IV.1.c.

⁵¹ NGPC Resolution 2013.06.04.NG01 (Ex. R-ER-6), also available at <https://features.icann.org/consideration-non-safeguard-advice-gac%E2%80%99s-beijing-communic%C3%A9?language=fr>.

⁵² Annex 1 to NGPC Resolution 2013.06.04.NG01 at GAC Register #1-2 (Ex. R-ER-7), also available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-04jun13-en.pdf>.

⁵³ *Id.* at GAC Register #3.

will not proceed beyond initial evaluation of these identified strings” until the GAC has had additional time to provide advice on the applications.⁵⁴ The NGPC also noted that Community Objections had been filed regarding several of these applications, including the .PERSIANGULF Application.⁵⁵

32. In July 2013, the United States Government issued a public statement to the GAC regarding gTLD applications with geographic implications, including .PERSIANGULF.⁵⁶ In this statement, the U.S. Government urged all relevant parties and GAC members to attempt to resolve any concerns about these gTLDs.⁵⁷ In addition, the U.S. Government noted that “the current rules for the new gTLD program do not specifically prohibit or condition these strings,” but stated that it was “willing in Durban to abstain and remain neutral on” these applications, “thereby allowing the GAC to present consensus objections on these strings to the [ICANN] Board, if no other government objects.”⁵⁸

33. The GAC next met during the ICANN Public meeting in Durban. In its IRP Request and Emergency Request, the GCC mistakenly cites to the GAC’s publicly posted minutes of its Durban meeting as the “Durban Communiqué.”⁵⁹ In any event, both the minutes from this meeting and the actual Durban Communiqué are significantly different from how the GCC portrays them.

34. The GCC is correct that in the minutes of the GAC’s July 2013 Durban meeting, the GAC noted the opinions of UAE, Oman, Bahrain and Qatar, that the Application should not

⁵⁴ *Id.* at GAC Register #4.

⁵⁵ *Id.*

⁵⁶ U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting (Ex. R-ER-8), *also available at* http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ IRP Request ¶ 41 n.67; Emergency Request ¶ 13 n.26.

proceed.⁶⁰ But the meeting minutes also state that “[t]he 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.**”⁶¹ More importantly, in the Durban Communiqué, which is the official statement from the GAC to ICANN and which the GCC did not attach to its Emergency Request, the GAC informed ICANN that it “finalized its consideration” of the Application and that the GAC “**does not object**” to the application proceeding.⁶²

35. Thereafter, ICANN’s NGPC met to consider the Durban Communiqué and again adopted an NGPC Scorecard reflecting the NGPC’s response to that advice.⁶³ In its Scorecard, which was publicly posted over a year ago, on 12 September 2013, the NGPC noted that the GAC “has finalized its consideration of the following string, and does not object to it proceeding: .persiangulf.”⁶⁴ In addition, the NGPC stated that “ICANN will continue to process that application in accordance with the established procedures in the [Guidebook],” but noted that the GCC’s Community Objection to the Application remained pending.⁶⁵

36. On 30 October 2013, the Expert Panelist in the GCC’s Community Objection, Judge Schwebel, issued his determination.⁶⁶ Judge Schwebel found that the GCC had failed to establish 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

⁶⁰ GAC Meeting Minutes, Durban, South Africa at 2 (CI’s ER Annex 14).

⁶¹ *Id.*

⁶² Durban Communiqué, ¶ IV.1.3 (CI’s Annex 24).

⁶³ NGPC Resolution 2013.09.10.NG03 (R-ER-9), also available at <https://features.icann.org/gac-communicu%C3%A9-durban-scorecard?language=es>.

⁶⁴ Annex 1 to NGPC Resolution 2013.09.10.NG03 at GAC Register #9 (R-ER-10), also available at <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

⁶⁵ *Id.*

⁶⁶ Expert Determination on the GCC’s Expert Determination (CI’s ER Annex 2).

explicitly or implicitly targeted.”⁶⁷ Judge Schwebel determined—as the IO had suggested almost a year earlier—that the GCC’s claim that the existence of a .PERSIANGULF string would allow Asia Green to interfere with the core activities of the Arabian gulf community “d[id] not provide or constitute proof that the Application if granted will create a likelihood of material detriment to the community of the Objector.”⁶⁸ Judge Schwebel continued: “Nor is it easy to see what material detriment is likely to occur, which may explain why the Objection is so terse in this regard. In the perception of the Expert, the fact remains that the practical effect of registration of .PERSIANGULF gTLD is difficult to discern and weigh. Hence it follows that a likelihood of material detriment has not been established.”⁶⁹

37. Finally, Judge Schwebel noted that:

The dispute between Arab States and supporters, on the one hand, and the Islamic Republic of Iran, on other hand, over the denomination of the Gulf, has subsisted for more than fifty years. It is far from clear that registration of .PERSIANGULF gTLD would resolve, or exacerbate, or significantly affect, that dispute. In any event, the GCC and other Arab interests are and would remain free to seek registration of a domain such as .ARABIANGULF gTLD.⁷⁰

38. The GCC did not file a Reconsideration Request, or pursue any other ICANN accountability process, with respect to either the NGPC’s statement that ICANN would proceed with the Application or Judge Schwebel’s determination. Instead, the GCC waited for *over one year* after these events to file this IRP.

STANDARD OF REVIEW

39. The IRP is a unique, non-binding process available under ICANN’s Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the

⁶⁷ *Id.*, ¶¶ 38, 40.

⁶⁸ *Id.*, ¶ 40.

⁶⁹ *Id.*

⁷⁰ *Id.*, ¶ 42.

ICANN Board, but only to the extent that Board action was inconsistent with ICANN’s Articles or Bylaws.⁷¹ The IRP Panel, when it is constituted, will be tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Articles or Bylaws.⁷² ICANN’s Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, 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?⁷³

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.⁷⁴

40. Moreover, ICANN’s Bylaws specifically state that 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.”⁷⁵

41. In addition to the Bylaws, IRPs are conducted pursuant to the Supplementary Procedures for ICANN IRPs (“Supplementary Procedures”). Neither ICANN’s Bylaws nor Supplementary Procedures⁷⁶ provide for interim or emergency relief proceedings. ICANN, however, has consented to permitting an IRP Emergency Panelist to consider the GCC’s request that ICANN be enjoined “from executing the .PERSIANGULF registry agreement while the GCC’s IRP

⁷¹ Bylaws, Art. IV, §§ 3.1, 3.2.

⁷² *Id.* Art. IV, § 3.4.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*, Art. IV, § 3.3.

⁷⁶ Supplementary Procedures (Ex. R-ER-11), *also available at*

<https://www.adr.org/cs/groups/international/documents/document/z2uv/mde0/~edisp/adrstage2014403.pdf>.

request is ongoing.”⁷⁷

42. As the GCC’s Emergency Request notes, in order to obtain the emergency relief the GCC seeks, the GCC must demonstrate a reasonable possibility of success on the merits of its IRP.⁷⁸ Indeed, both international and U.S. law recognize this principle. Article 27(A)(1)(b) of the United Nations Commission on International Trade Law’s (“UNCITRAL’s”) Model Law on International Commercial Arbitration states that a party requesting an interim measure must demonstrate that “[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim.”⁷⁹

43. Similarly, tribunals under the International Chamber of Commerce have required a party seeking interim relief to demonstrate a likelihood of success on the merits, noting that the requirement is generally “found both in judicial and arbitral practice.”⁸⁰ Likewise, under U.S. law, a party seeking a preliminary injunction must demonstrate, at a minimum, that “the likelihood of success is such that serious questions going to the merits were raised.”⁸¹ This requirement is appropriate in light of the fact that interim measures are, as one international tribunal has noted, “extraordinary measures not to be granted lightly.”⁸²

44. In addition, under U.S. and international law, a party seeking interim relief must demonstrate that it will suffer “irreparable” or “grave” harm⁸³ in the absence of such relief and that the harm it would incur in the absence of interim relief would “exceed[] greatly the damage

⁷⁷ Emergency Request, ¶ 3.

⁷⁸ *Id.*, ¶ 17.

⁷⁹ UNCITRAL Model Law on International Commercial Arbitration, Art. 17A(1)(b) (Ex. R-ER-12).

⁸⁰ *See, e.g., Distributor A v. Manufacturer B*, ICC Case No. 10596, Interlocutory Award of 2000, Yearbook Commercial Arbitration, Vol. XXX 68 n.3 (2005) (Ex. R-ER-13).

⁸¹ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (internal quotation marks omitted); *see also Winter v. Nat’l Resources Defense Council, Inc.*, 555 U.S. 7, 31 (2008).

⁸² *Paushok v. Mongolia*, Order on Interim Measures of 2 September 2008, ¶ 39 (Ex. R-ER-14).

⁸³ *Winter*, 555 U.S. at 20; Ali Yesilirmak, Interim and Conservatory Measures in ICC Arbitral Practice at 9-10 (Ex. R-ER-15)

caused to the party affected” by the issuance of interim relief.⁸⁴ Moreover, one of the hallmarks of emergency relief is a demonstration that the applicant has diligently pursued such relief.

ARGUMENT

45. The GCC’s requested emergency relief should be denied for several independent reasons. First, there is no reasonable likelihood that the GCC will succeed on the merits of its IRP because it is time barred – the deadline for the GCC to file its IRP request expired over a year ago when the NGPC publicly stated that it would proceed with the .PERSIANGULF application. Second, the GCC has not identified a single ICANN Board action that violated ICANN’s Articles and Bylaws. Third, the emergency relief the GCC seeks is unwarranted because the GCC’s delay in bringing its IRP undercuts its claims of urgency, necessity and harm. Fourth, the GCC still cannot identify any legally-recognizable harm it will suffer if a .PERSIANGULF new gTLD is approved, as the IO and Judge Schwebel previously found. For all these reasons, or any one of them independently, the GCC’s requested emergency relief should be denied.

I. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE THE GCC IS NOT REASONABLY LIKELY TO SUCCEED ON THE MERITS OF ITS IRP.

46. The GCC is not entitled to emergency relief because it has not demonstrated a reasonable likelihood of success on the merits of its claims in this IRP. First, the GCC’s claims are time-barred. Even if they were not so barred, the GCC’s claims would still not succeed because the GCC has failed to demonstrate that the ICANN Board violated the ICANN Articles or Bylaws with respect to .PERSIANGULF. To the contrary, the evidence demonstrates that ICANN and

⁸⁴ *Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009, ¶ 81 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72) (CI’s ER Annex 16); *see also* UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a) (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”) (emphasis added) (Ex. R-ER-12); *Paushok v. Mongolia*, Order on Interim Measures of 2 September 2008, ¶¶ 68-69 (R-ER-14).

its Board followed the Guidebook at every step of the process.

A. The GCC's IRP Request is Time-Barred.

47. ICANN's Bylaws specifically state that 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."⁸⁵

48. The only ICANN Board action that even arguably could have injured the GCC was the NGPC's decision to "process" the .PERSIANGULF application after the GAC advised that it did not object to the application proceeding. That decision was set forth in the NGPC's Durban Communiqué Scorecard, which was approved by the NGPC on 10 September 2013 and publicly posted on 12 September 2013.⁸⁶ The minutes and Board Briefing Materials related to that decision were posted on 30 September 2013.⁸⁷ Thus, the GCC's deadline to file its IRP Request expired on 30 October 2013, *nearly 14 months ago*.

49. Accordingly, the GCC's IRP Request is time-barred and, as such, there is no likelihood that the GCC will succeed on the merits of its IRP. The GCC's Emergency Request should therefore be denied, as other courts and tribunals have found in similar settings.⁸⁸

B. The GCC Fails To Identify An ICANN Board Action That Violated ICANN's Articles Or Bylaws.

50. As set forth in ICANN's Bylaws, an IRP is available only to persons "materially affected

⁸⁵ Bylaws, Art. IV, § 3.3 (emphasis added).

⁸⁶ NGPC Resolution 2013.09.10NG03 (Ex. R-ER-9; Annex 1 to NGPC Resolution 2013.09.10NG03 (Ex. R-ER-10).

⁸⁷ Minutes of 10 September 2013 Meeting of the NGPC (Ex. R-ER-14), *also available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

⁸⁸ *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1041 (9th Cir. 2010) (affirming denial of a motion for preliminary injunction because the plaintiff's claims were barred by the applicable statute of limitations); *Silvas v. G.E. Money Bank*, 449 F. App'x. 641, 644-45 (9th Cir. 2011) (same); Ali Yesilirmak, 5 PROVISIONAL MEASURES IN INTERNATIONAL CRIMINAL ARBITRATION at 184-185 (noting a case denying a request for interim relief where the claimant had waited an unreasonable amount of time before seeking such relief and therefore did not have "clean hands") (Ex. R-ER-17).

by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”⁸⁹ Yet the GCC fails to identify any Board action or decision that violated ICANN’s Articles or Bylaws. In its Emergency Request, the GCC appears to claim that ICANN violated its “guidelines” by: (i) failing to respect the GCC’s objections to the .PERSIANGULF application; (ii) failing to properly consider the GAC’s advice; and (iii) failing to require that the .PERSIANGULF application obtain support from “relevant governments.”⁹⁰ In its IRP Request, the GCC further claims that it was improper for ICANN to treat the .PERSIANGULF application differently than the applications for .ISLAM and .HALAL,⁹¹ and that Judge Schwebel incorrectly decided the GCC’s Community Objection.⁹²

51. None of these claims demonstrates a violation of the Articles or Bylaws by ICANN’s Board, or supports the GCC’s Emergency Request or its IRP Request. To the contrary, at every step of the process, ICANN’s Board followed the Articles, Bylaws and Guidebook with respect to the .PERSIANGULF application.

52. The GCC’s general claims that ICANN did not respect the GCC’s objections and failed to properly consider the GAC’s advice are incorrect. ICANN properly processed the GCC’s objections and ICANN’s Board (through the NGPC) properly considered the GAC’s advice regarding the .PERSIANGULF gTLD. When the GAC advised the ICANN Board to not proceed beyond initial evaluation of the .PERSIANGULF application so that the GAC would have additional time to consider the GCC’s concerns, the NGPC did just that, stating that “ICANN will allow evaluation and dispute resolution processes to go forward, but will not enter into registry agreements with applicants for the identified strings for now.” Then, when the

⁸⁹ Bylaws, Art. IV., § 3.2 (Ex. R-ER-1).

⁹⁰ Emergency Request, ¶¶ 22-24.

⁹¹ IRP Request, ¶¶ 60-69.

⁹² *Id.*, ¶¶ 70-74.

GAC advised ICANN that the GAC had completed its consideration of .PERSIANGULF and “does not object” to the application proceeding, the NGPC accepted that advice, stating that ICANN would continue to process that application in accordance with the procedures in the Guidebook. Even at this step, however, the NGPC noted that the GCC’s Community Objection was still pending, and allowed that process to resolve before taking any definitive action on .PERSIANGULF. ICANN’s Board took all the steps required of it when presented with the GCC’s Objections to, and the GAC’s advice regarding, the .PERSIANGULF application, and the GCC has presented no evidence to the contrary.

53. Likewise, the GCC’s argument that ICANN acted inconsistently with the GAC Principles Regarding New gTLDs (“GAC Principles”) by permitting the .PERSIANGULF application to proceed without the support of “relevant governments” is misplaced.⁹³ As an initial matter, the GAC Principles are not part of ICANN’s Articles or Bylaws, which are the only documents relevant in this IRP and Emergency Request. The GAC Principles were presented to ICANN in March 2007 in order to inform the development of the New gTLD Program and eventually the Guidebook.⁹⁴ The GAC’s statement in the GAC Principles that “ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant government or public authorities,”⁹⁵ informed the drafting of Section 2.2.1.4 of the Guidebook regarding “geographic names.”⁹⁶ In this section of the Guidebook, the phrase “geographic names,” is defined to include certain city names, certain sub-national place names listed in the ISO 3166-2 standard, and names listed as a UNESCO region or appearing on the “Composition of macro geographical (continental) regions, geographical sub-

⁹³ Emergency Request, ¶ 24.

⁹⁴ GAC Principles Regarding New gTLDs, ¶ 1.1 (Cl.’s ER Annex 1).

⁹⁵ *Id.*, ¶ 2.2.

⁹⁶ Guidebook, § 2.2.1.4 (Ex. R-ER-3).

regions, and selected economic and other groupings” list.⁹⁷ It is true that any gTLD application that falls within this definition of a “geographic name” must obtain support of the “relevant governments,”⁹⁸ as the GAC Principles suggested. But applications that do not fit within the Guidebook’s definition of a “geographic name” “will not require documentation of government support in the evaluation process.”⁹⁹ Persian Gulf, as the GCC well knows, is not a “geographic name” as that phrase is defined in the Guidebook, and therefore did not (and does not) require the support of relevant governments.

54. Thus, there is no merit to the claims that ICANN did not consider the GCC’s objections, did not properly implement the GAC’s advice, or failed to require government support for .PERSIANGULF. ICANN did precisely what it was supposed to do pursuant to the Guidebook, and the GCC forwarded its complaints through the two appropriate vehicles, the GAC and the Community Objection process. There is no Article, Bylaws provision or “guideline” that requires the ICANN Board to do anything more than follow the processes that it has followed.

55. Nor is there any merit to the GCC’s claim that the ICANN Board improperly treated the .PERSIANGULF application differently than the applications for .ISLAM and .HALAL.¹⁰⁰ In fact, ICANN’s Board *did* treat these applications differently, but the Board did so because these applications were the subject of *different types of advice* from the GAC, which called for different treatment. As set forth above, the GAC’s Beijing Communiqué provided “non-consensus” advice to ICANN, pursuant to Section 3.1 of the Guidebook, that .ISLAM

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ IRP Request ¶¶ 60-69.

and .HALAL should not proceed.¹⁰¹ Pursuant to the Guidebook, “non-consensus” advice from the GAC regarding an application means that the “ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.”¹⁰² This is precisely what ICANN’s Board did.¹⁰³

56. On the other hand, with respect to .PERSIANGULF, the GAC advised that it “does not object” to the application going forward.¹⁰⁴ This is why the .PERSIANGULF application has proceeded, and why .ISLAM and .HALAL have not. The applications were treated differently because the GAC viewed them differently and provided significantly different advice with respect to each.

57. Finally, the issues that the GCC takes with Judge Schwebel’s determination on the GCC’s Community Objection are not a proper basis for an IRP.¹⁰⁵ A determination by an Expert Panelist in connection with the Objection and Dispute Resolution Process is not a **Board** action; it is an action of an independent dispute resolution provider (in this case the ICC) and therefore not subject to an IRP challenge.¹⁰⁶ Moreover, there is nothing in the Articles, Bylaws or Guidebook that requires, or permits, ICANN’s Board to substantively review the determinations of an Expert Panelist.¹⁰⁷ The GCC may disagree with the expert determination, but that disagreement does not support the GCC’s IRP or its Emergency Request.

58. Put simply, the GCC has failed to identify any Board action or decision that violated ICANN’s Articles or Bylaws with respect to the .PERSIANGULF application. Accordingly, the

¹⁰¹ Beijing Communiqué (CI’s ER Annex 13).

¹⁰² Guidebook, § 3.1.

¹⁰³ 7 February 2014 Letter from S. Crocker to M. Abbasnia (CI’s Annex 31).

¹⁰⁴ Durban Communiqué, ¶ IV.1.3 (CI’s Annex 24).

¹⁰⁵ IRP Request, ¶¶ 70-74.

¹⁰⁶ Guidebook, § 3.2.3 (Ex. R-ER-3); Bylaws, Art. IV, § 3.2.

¹⁰⁷ Guidebook, § 3.4.6 (Ex. R-ER-3).

GCC is not reasonably likely to succeed on the merits of its IRP, and its Emergency Request should therefore be denied.

II. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE THE GCC UNREASONABLY DELAYED IN SEEKING SUCH RELIEF.

59. A hallmark of proper emergency or interim relief is urgency, as the GCC concedes in its Emergency Request.¹⁰⁸ A long delay in seeking relief, however, implies that there is no urgency, nor any irreparable harm, and a request for interim relief should be denied on this basis.¹⁰⁹

60. In this matter, the GCC waited over a year from the NGPC's announcement that ICANN would proceed with the .PERSIANGULF application to file its IRP and seek emergency relief. This kind of delay undercuts the GCC's claims of urgency and harm. The GCC's claims of urgency and harm are also belied by the fact that the GCC never filed a Reconsideration Request regarding the NGPC's action in September 2013 or Judge Schwebel's determination in October 2013. The GCC's unreasonable delay in filing its IRP, standing alone, is grounds for denying the GCC's Emergency Request.

III. EMERGENCY RELIEF IS NOT WARRANTED BECAUSE GCC HAS NOT DEMONSTRATED THAT THE HARM IT WOULD SUFFER IN THE ABSENCE OF SUCH RELIEF OUTWEIGHS THE HARM TO OTHERS.

61. Another requirement for emergency or interim relief is that the applicant demonstrate that the harm it would incur in the absence of that relief would "exceed[] greatly the damage caused

¹⁰⁸ Emergency Request ¶¶ 17-18.

¹⁰⁹ *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Lydo Enters. v. Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.27 (3rd Cir. 1984) ("The district court may legitimately think it suspicious that the party who asks to preserve the status quo through interim relief has allowed the status quo to change through unexplained delay."); *Bendone-Derossi International v. Iran*, reprinted in 6 Iran US CTR 133, 140 (upon the respondents' application to stay parallel court proceedings initiated in Germany to obtain a provisional measure, Judge Holtzmann concurred with the Tribunal by arguing, inter alia, that the "Respondent has made no showing of urgency justifying the issuance of interim relief: the court order was entered in June 1983, ten months before Respondent sought a stay") (Ex. R-ER-15).

to the party affected” by the issuance of interim relief.¹¹⁰ Indeed, the GCC acknowledges in its Emergency Request that it must demonstrate that the harm it will suffer in the absence of emergency relief “outweighs” that caused by issuance of such relief.¹¹¹

62. Nevertheless, other than a conclusory statement that a .PERSIANGULD gTLD “will promote Iranian beliefs . . . and falsely create the perception that the Arab nations that reside in the Gulf accept the disputed name,” the GCC fails to describe any harm it is likely to suffer if emergency relief is not granted. In fact, as two others—the IO and Judge Schwebel— have previously found, there is a real question about whether the GCC will suffer any legally-recognizable harm at all if the .PERSIANGULF gTLD is approved. Moreover, as Judge Schwebel recognized in his expert determination on the GCC’s Community Objection, any perception that Arab states in the region accept the disputed name could be counteracted by their “registration of a domain such as .ARABIANGULF gTLD.”

63. Although the GCC is dismissive of it, there will be harm to Asia Green if its application is stayed pending the outcome of this IRP. All gTLD applicants, including Asia Green, invested time, money, and energy in preparing and promoting their applications. ICANN is dedicated to processing these applications as quickly and efficiently as possible.

64. There is simply no indication that creation of a .PERSIANGULF gTLD will cause the

¹¹⁰ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”) (citation and internal quotation marks omitted); *Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, 29 June 2009, ¶ 81 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72) (CI’s ER Annex 16); see also UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a) (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, **and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted**”) (emphasis added) (Ex. R-ER-12); *Paushok v. Mongolia*, Order on Interim Measures of 2 September 2008, ¶¶ 68-69 (Ex R-ER-14).

¹¹¹ Emergency Request ¶¶ 17, 19.

GCC any material detriment or legally-recognized injury. What is more, any possible harm to the GCC by a denial of emergency relief is greatly diminished by the scant probability of the GCC succeeding on the merits of IRP Request. The lack of harm to the GCC, taken alone, is another ground for denying the GCC's Emergency Request.

CONCLUSION

65. The ICANN Board's conduct with respect to the .PERSIANGULF application was consistent with ICANN's Articles and Bylaws. ICANN allowed the GCC's objections to work their way through the objection processes set out in the Guidebook, and ICANN's Board (through the NGPC) properly considered the GAC's advice on these issues. Not only has the GCC failed to demonstrate that ICANN's Board violated the Articles and Bylaws, its IRP was submitted more than a year after the deadline to do so and does not identify any legally-recognized injury to the GCC if the .PERSIANGULF application proceeds. Accordingly, the GCC's Emergency Request should be denied.

Respectfully submitted,

JONES DAY

Dated: December 17, 2014

By: Eric P. Enson / PHZ
Eric P. Enson

Counsel for Respondent ICANN