

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GCCIX, W.L.L.,)	ICDR CASE NO. 01-21-0004-1048
)	
Claimant,)	
)	
and)	
)	
THE INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS,)	
)	
Respondent.)	

**CLAIMANT’S OPPOSITION TO
ICANN’S APPLICATION TO STAY THE IRP**

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INTRODUCTION

Having already effectively stayed this IRP for more than eight months, ICANN now seeks a further six-month stay until August 11, 2022, “to complete its dialogue with the GAC... regarding the GAC’s consensus advice on Claimant’s .GCC application.” (App., #1, 25.) But ICANN already requested a six-month stay of this IRP, almost six months ago. (Exhibit A.) ICANN offers no specific explanation why this proceeding, filed in June 2021, should be even further delayed now.

It has been nine months since the IRP was filed, after ICANN stalled eight years in the CEP without ever communicating anything of substance to Claimant, or the GAC. Since 2013, Claimant has written ICANN four separate times, Redacted - Confidential Information

. ICANN

offers no explanation whatsoever as to why ICANN did not initiate this GAC discussion many years ago, at any of the four times that Claimant raised this issue, or otherwise.

ICANN offers no authority for the Panel to stay this IRP, as there is none. There is no precedent, nor any semblance of any procedural rule, which would allow ICANN a “do-over” after an IRP is filed. Such a precedent would effectively eviscerate the IRP, as ICANN will learn that it can ignore a claimant for almost a decade, until the exasperated claimant files an IRP. And only then need ICANN decide to do anything at all about the complaint, or communicate in any manner with the complainant. ICANN had ample opportunity over eight years to engage the GAC in further discussion, or to do whatever it felt necessary to address Claimant’s complaint. Redacted - Confidential Information

Redacted - Confidential Information . But ICANN did nothing then, at any of those times -- and it is far too late now.

ICANN claims it is “attempting to engage” with Claimant now (App., p.13), but offers no rationale for waiting so long to do so, despite Redacted - Confidential Information

Moreover, ICANN has not engaged with Claimant at all, about any of this, ever. ICANN has done what it decided to do (and not do), without seeking any input from Claimant whatsoever; in fact, ignoring Claimant’s many serious attempts to engage.

Instead, ICANN now just wants to obliterate and rewrite the history of this matter, forever concealing Claimant’s allegations and evidence of ICANN’s bad faith from public view, and indeed even from this Panel. ICANN cannot be allowed to evade accountability under its Bylaws, merely because it now admits that it should have done more. ICANN’s effort now is far too little, and far too late. It provides no justification to further delay this proceeding.

ARGUMENT

I. ICANN Provides No Legal Authority for a Stay

Neither the Bylaws, the Interim Supplementary Procedures, nor the ICDR Rules offer a procedure that would permit ICANN to delay this IRP simply for its own convenience.

ICANN provides no legal authority for its position, as there is none. Under the Bylaws, the purpose of an IRP is to “Ensure that ICANN is accountable to the global Internet community and Claimants; ... (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just

resolution of Disputes.”¹ Furthermore, ICANN’s Bylaws call for IRP proceedings to be concluded within six months.² Yet this IRP is already nine months old, and has hardly begun.

ICANN’s own Interim Supplementary Procedures (Sec. 10) limit grantable interim relief as follows:

Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN.

Thus, ICANN’s own rules indicate that interim relief shall be designed only to maintain the *status quo*, not to alter it as ICANN wants to do now. ICANN cites a more general provision (Sec. 5) about expeditious resolution and efficiency, which is nothing but Orwellian given ICANN’s bad faith obstinance and delay over the past nine years. The Bylaws suggests that “expeditiously” in this context means “no later than six months” from filing to the issuance of an IRP decision. ICANN has made no effort to explain why it refused to take this step for eight years, nor why it needs six more months for this “Discussion” -- when it has already had six months since the Board resolution seeking a stay.

II. ICANN Offers No Equitable Justification for a Stay

Claimant seeks to hold ICANN accountable for its past misconduct, which cannot be cured now by further discussion with the GAC. ICANN focuses on one claim in Claimant’s IRP complaint, suggesting that the “GAC’s consensus advice” is the “central issue of the IRP.” (App., #1.) That wildly mischaracterizes the IRP Complaint, which lists **fifteen** separate

¹ ICANN Bylaws, Art. 4.3(a).

² ICANN Bylaws, Art. 4.3(s): “An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.”

“actions and inactions” to be reviewed by this Panel. (Complaint, p. 18-19.) Only the first three of those items relate in any way to the GAC advice, and they all focus on the ICANN Board’s actions and inaction -- not on the GAC. ICANN offers no argument that any of the other twelve issues will be affected by its latest delay tactic.

Even as to the first three claims that ICANN mentions, ICANN fails to explain how a stay of this IRP could possibly resolve or even narrow issues relating to them. Claimant can and will still assert the exact same claims, regardless of what ICANN or the GAC do or say now. Claimant might add into each of those claims the phrase “for more than eight years, without any substantive communication to Claimant or the community.” For example:

1) to accept GAC advice to reject the .GCC application, despite lack of any rationale provided by GAC for its advice, for more than eight years, without any substantive communication to Claimant or the community.

But that addition would be superfluous, as Claimant’s 13th claim (currently redacted), states that ICANN must be held accountable because it: Redacted - Confidential Information

Nothing that ICANN does now can change either the material facts or the claims asserted in this IRP.

III. ICANN Ignored Claimant’s Four Previous Attempts Redacted - Confidential Information,

ICANN justifies its request for delay in order to consult with the GAC; however, ICANN does not attempt to explain why it did not take this action in 2013, 2014, 2016 or 2019,

Redacted - Confidential Information

To wit, in

April 2013, Claimant wrote to ICANN about these precise issues (Exhibit 2.), stating in part:

Redacted - Confidential Information

Redacted - Confidential Information

ICANN never substantively responded.

Subsequently, Claimant wrote ICANN three more times, Redacted - Confidential Information

Thus far, ICANN has succeeded in having those letters stricken from the record of this IRP, even though each is directly relevant not only to Claimant's (currently stricken) claim that ICANN participated in the CEP in bad faith, but also to Claimant's opposition to ICANN's instant motion for stay of the IRP. Claimant urges the Panel to review those Annexes in their entirety, as we will only briefly summarize them here. ICANN never responded substantively to any of those letters, either.

Stricken Annex 11 is Claimant's formal Request for Cooperative Engagement sent to ICANN via 3-page letter from GCCIX' counsel dated February 15, 2014. In accordance with the CEP Rules, Redacted - Confidential Information

Stricken Annex 12 is an 8-page letter from GCCIX counsel to ICANN, dated May 6, 2016, which was written in response to Redacted - Confidential Information

Claimant requested Redacted - Confidential Information

The letter also contained eight document requests and closed by identifying

Redacted - Confidential Information

Stricken Annex 13 is a 4-page letter from GCCIX's counsel to ICANN dated August 19, 2019. Claimant's stricken letter initially noted that Redacted - Confidential Information

The last three pages of the letter

Redacted - Confidential Information

Those three letters each

Redacted - Confidential Information

But ICANN never substantively responded to any of Claimant's attempts to engage ICANN, and never reached out to the GAC nor took any other action to address Claimant's concerns or otherwise narrow the issues in this IRP. ICANN's failure to substantively communicate with Claimant over an eight-year period, or otherwise work cooperatively to narrow the issues, constitutes bad faith. ICANN's delay of this IRP already for eight-plus months, asking now for six months more, is in still further bad faith.

IV. ICANN Has Ignored the .Africa IRP Precedent, and GAC Chair Testimony

ICANN only now purports to engage the GAC regarding rationale for the GAC and Board decision, in 2013, to reject Claimant's TLD application.³ But, in 2015, the *DCA Trust* IRP panel found ICANN had violated its Bylaws by not investigating the GAC's unsubstantiated

³ ICANN Exh. R-26 (ICANN Board Resolution 2021.09.12.08 (September 12, 2021)).

rejection of the .Africa TLD application, which was rendered at the same meeting and stated in the same Beijing Communique as the .GCC rejection.⁴

That unanimous IRP panel relied upon sworn, contemporaneous GAC Chair testimony proving there was **no GAC rationale** for those GAC decisions, and there would be none, despite prior issuance of Early Warnings (upon which ICANN so heavily relies now). Ms. Dryden explained back then:

the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons [or] rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, *that's not a GAC view*. (Emphasis added.)

Therefore, that IRP panel forcefully recommended that ICANN disregard the unsubstantiated GAC advice, and return that application to processing. ICANN complied with that directive as to the .Africa application (which also had received an Early Warning about alleged lack of community support).

Redacted - Confidential Information

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That is what ICANN should have done with the Claimant's application then, or at any time since. But instead, ICANN acted in bad faith by outright ignoring Claimant's correspondence throughout the CEP, keeping Claimant's application in unjustified purgatory for some eight years before Claimant gave up and filed the IRP – and since then for nine months more, and counting.

⁴ Cl. Annex 14, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. #50-2013-001083 (9 Jul 2015), pp.49-62 (“DotConnectAfrica Final Decision”).

⁵ Stricken Annex 12, GCCIX May 4, 2016 Letter.

V. *ICANN's Effort Now is Misdirected; IRP Precedents and GNSO Policy Require Processing of Claimant's Application*

ICANN apparently has obtained a current GAC view as to what the GAC was thinking in 2013. (App., #23.). But that directly contradicts the sworn testimony of the GAC Chair at the time, set forth above and in the .Africa Final Declaration. Ms. Dryden made it clear that Early Warnings were not GAC advice. Moreover, the GAC members are completely different now than in 2013, by which time the GAC and its members had spent hundreds if not thousands of hours discussing the New gTLD Program. They had knowledge of the rules and “sensibilities”, and their applicability to Claimant’s application, which have nine years later the current GAC does not have. Ms. Dryden made it clear that Early Warnings were not GAC advice, and that there was no GAC rationale for the decisions it made in secret in Beijing. ICANN cannot rewrite that history now.

Instead, ICANN could follow the .Africa precedent that excoriated ICANN for accepting such unsubstantiated “GAC Advice”, and giving it such a “strong presumption”, without investigating further. That panel ordered ICANN to disregard that unsubstantiated advice, and return the application to processing – because, at that time the .Africa application had already been delayed two years. Redacted - Confidential Information

Or, ICANN could follow the .Amazon IRP precedent by approving Claimant’s application in principle, and facilitating dialogue between Claimant and the government objectors, with the express aim of having Claimant operate the TLD with government input Redacted - Confidential Information. If ICANN wants to talk to the GAC further about the matter, then

that would be an acceptable next step for ICANN to take Redacted - Confidential Information ,⁶ following the binding precedent in the .Amazon case. But this is no reason to stay this IRP, which focuses on ICANN's refusal to do so for so long.

One of the GAC's rationales appears to be that GCC is a purported IGO acronym which "warrants special protection." However, that precise issue was raised before an independent WIPO expert by government objectors. The matter was fully briefed and pending a decision, yet ICANN suddenly and summarily terminated that proceeding immediately upon receipt of the unsubstantiated GAC advice. Thus, ICANN failed to take the opinion of an expert which should have informed its decision on the matter, in further violation of Bylaws. That is the subject of two of Claimant's claims in this IRP. (Complaint, p.18, #4-5.)

More fundamentally, ICANN cannot escape the fact that there is no policy rationale for, nor any public interest in, protecting the purported acronym of an IGO Name at the top level of the domain space. The latest GAC letter again offers no rationale whatsoever. In fact, there is clearly contrary and longstanding GNSO Supermajority advice to the ICANN Board, with specific implications under the Bylaws, which says such acronym TLDs shall not be reserved for IGOs. The Board was absolutely bound by its Bylaws to have considered and adopted that Supermajority advice long ago, but the Board continues to ignore it. That is the focus of three other claims raised by Claimant in this IRP (Complaint, p. 18, #6-8), and is much more of a "central" issue in this IRP than the already settled issue about unsubstantiated GAC advice from Beijing.

If the Board wants to revisit the Claimant's application, then it properly should consider and accept the Supermajority GNSO advice directly addressing IGO acronyms at the top level,

⁶ Stricken Annex 13.

and stating that such TLDs shall not be reserved for such IGOs. It remains unanimous GNSO policy that such acronyms shall not be reserved for IGOs. That was the policy at the time of the Applicant Guidebook, and remains the policy even after reconsideration in more recent years by a dedicated GNSO and GAC working group. That policy has never been formally considered by the ICANN Board, despite Bylaws obligating ICANN to timely consider such advice, and to accept such advice unless it specifically finds it against the public interest. ICANN has never found a Supermajority GNSO policy to be against the public interest, and could not do so here. There is no justification to protect IGO acronyms at the top level, neither in general, nor for just the one particular IGO who so tenaciously wants to control the letters GCC at the top level.

VI. ICANN Has Brought This Application in Bad Faith

Claimant maintains that ICANN has brought this application in bad faith, for no other purpose than to delay the IRP and to cause Claimant undue expense. ICANN has no legal authority nor equitable basis to support its unprecedented and unseemly application to alter the status quo, attempt belated remedial action, and evade accountability for its past misconduct. Therefore, Claimant respectfully requests that ICANN's application be denied, that ICANN's application be ruled to be frivolous and abusive, and that ICANN be ordered to pay the reasonable attorneys' fees incurred by Claimant in response to ICANN's application.

CONCLUSION

For all of the foregoing reasons, ICANN's application must be denied.

Respectfully Submitted,

By: 

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