

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

GCCIX, W.L.L.,)
)
 Claimant,)
)
 vs.)
)
 INTERNET CORPORATION for)
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)
 _____)

**CLAIMANT'S [EXCISED]
REQUEST FOR
INDEPENDENT REVIEW**

GLOSSARY

AGB	ICANN's gTLD Applicant Guidebook
BAMC formerly known as BGC	ICANN's Board Accountability Mechanisms Committee, f/k/a Board Governance Committee
CCASG	Cooperation Council for the Arab States of the Gulf, colloquially referenced as the Gulf Cooperation Council or GCC
CEP	ICANN's Cooperative Engagement Process
GAC	ICANN's Government Advisory Committee
GCCIX	Complainant, GCCIX W.L.L., a company organized under the laws of Bahrain
gTLD	Generic Top-Level Domain, such as .com, .org, .arab, .google or .gcc
ICANN	Respondent, Internet Corporation for Assigned Names and Numbers, a public benefit corporation organized under the laws of California, USA
ICDR	International Center for Dispute Resolution
IRP	ICANN's Independent Review Process, detailed in ICANN's Bylaws
NGPC	ICANN's New gTLD Program Committee, a subset of the ICANN Board

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I. FACTUAL BACKGROUND

Claimant GCCIX is a company organized under the laws of Bahrain, which is the sole applicant to ICANN to operate the .GCC generic top-level domain (“gTLD”). Claimant hereby requests Independent Review, pursuant to Respondent’s Bylaws, of ICANN’s decision to reject Claimant’s application, of ICANN’s failure to reasonably investigate or to provide any rationale whether such decision is in the public interest, and of related actions and inaction of ICANN.

A. ICANN and the New TLD Program Applicant Guidebook

Respondent ICANN is a California “public benefit corporation” responsible for governing the global domain name system (“DNS”). ICANN is chartered to “pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet,” including the development of “policies for determining the circumstances under which new top-level domains are added to the DNS root system.” For example, ICANN purports to determine whether, through whom, and on what terms to allow “.gcc” domain names such as visit.gcc, hotels.gcc, peace.gcc, etc., to be registered and used on the internet for commerce, comment or any other legitimate purpose.

From 2005 to 2011 — over six years — the ICANN Board tasked its Generic Names Supporting Organization (“GNSO”) to develop a program to introduce new top-level domains (TLDs) into the domain name system. The purpose of the New gTLD Program (the “Program”) was to “open up the top level of the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the DNS.” Via its lengthy community deliberations, the GNSO developed and the ICANN Board approved seven “Guiding Principles” and nineteen “Recommendations” for the Program. Among the Guiding Principles, the GNSO stated that the new gTLDs “must be introduced in an orderly, timely and

predictable way.” Recommendations supported this important Guiding Principle, including

Recommendation 1:

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Accordingly, ICANN developed a New gTLD Applicant Guidebook (“AGB”) over many years, including input from specialized, community Working Groups (each with its own iterative rounds of public comment and stakeholder comment), and four iterative rounds of formal public comment, government comment and stakeholder comment before it was approved by ICANN as formal policy.

The 400+ page AGB is incorporated into GCCIX’s application contract with ICANN, and provides clear criteria for all applications in accord with Recommendation 1, to account for all possible application types and conflict scenarios. Applications consist of several hundred pages of text and attachments, providing detailed responses to 50 pointed questions designed to glean the applicant’s foundational, technical, operational and financial wherewithal to operate a TLD registry. The application cost Claimant at least four hundred thousand dollars (\$400,000) in fees paid to ICANN and to consultants and service providers required to meet ICANN’s burdensome application requirements.

Claimant’s application underwent thorough evaluation by experts appointed and trained by ICANN, as documented in great detail in the AGB. More than 1900 applications were submitted from across the world, for more than 1000 unique TLD strings, including the single application filed by Claimant for the .GCC TLD. Claimant’s application for .GCC passed ICANN’s onerous technical, operational and financial tests, yet nevertheless was rejected – for reasons that have never been divulged by ICANN and remain unknown to Claimant.

B. GCCIX — the Sole Applicant to Operate .GCC; Initially Approved by ICANN.

Claimant is a Bahrain company that specializes in information and communication technology solutions. Claimant’s application to ICANN was submitted in early 2012,¹ its “Mission and Purpose” stating:

GCCIX intends to position the .GCC TLD as a broadly distributed alternative to .COM, .NET and .BIZ and other widely used TLDs and ccTLDs such as the existing regional ccTLD offerings. Our goal is bring to the region a top-level domain that operates to the highest international standards of registry practices and services. We are committed to providing exemplary functional utility as well as an opportunity for Internet users with a connection to the Gulf and Middle East to secure a domain name in a new, innovative and competitive TLD.GCC will create a region-specific new TLD that allows previously excluded and disadvantaged users to take a stake in a meaningful cultural and economic tool that is specifically designed to respond to their linguistic, cultural and specific business needs.

As of May 31, 2013, Claimant’s application was approved by ICANN’s expert evaluation panels.² Indeed, ICANN congratulated GCCIX for meeting all of ICANN’s voluminous, documented criteria, exclaiming: “Congratulations! Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.”

The AGB specifically states that when an application passes Initial Evaluation and also prevails in an Objection proceeding (if any Objections are filed), and does not face contention for the same string from any other applicant — it should proceed to contracting and delegation of the applied-for TLD. Section 1.1.5 states (emphasis added):

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the

¹ Annex 1, Claimant’s gTLD Application to ICANN (public portions).

² Annex 2, ICANN’s Initial Evaluation Report re .GCC.

applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD.

Claimant passed Initial Evaluation and faced no contention from any other applicant. However, there were objections, and objection proceedings – until ICANN terminated them without reason.

C. ICANN’s Independent Objector – Does Not File Objection; Rationale.

ICANN’s New gTLD Program was carefully designed to protect the public interest by providing a path for parties to file formal objections to gTLD applications on certain grounds defined in the AGB. A formal objection would trigger a documented dispute resolution proceeding by an expert panel retained and trained by ICANN. One fundamental component of the objection process was the ICANN-appointed expert, the Independent Objector (“IO”). As contemplated by AGB Sec. 3.2.5, ICANN commissioned a renowned international legal practitioner and scholar, Professor Allain Pellet, to object to any application which he deemed either: 1) “contrary to generally accepted legal norms of morality and public order that are recognized under fundamental principles of international law” (“Limited Public Interest Objection”); or 2) there exists “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted” (“Community Objection”).

In the Independent Objector’s formal report,³ Professor Pellet summarized the opposition:

Opponents to the launch of the gTLD underline that the acronym “GCC” stands for Gulf Cooperation Council and directly refers to the intergovernmental organization of the same name. The applicant did not receive support from the Gulf Cooperation Council to submit this application on its behalf and did not consult the targeted community. Therefore, ICANN should not authorize the launch of a gTLD which targets an intergovernmental Organization and its community without its prior approval and should, on the contrary, protect the interests, goals and mission of the Gulf Cooperation Council.

³ Annex 3, Independent Objector’s Report re .GCC; *see also*, GAC Early Warning re .GCC <https://gac.icann.org/work-products/public/gcc-ae-21010-2012-11-20.pdf>.

But, in light of Claimant’s written position and evidence presented to him,⁴ Dr. Pellet decided not to file any objection against Claimant’s application. Instead, ICANN’s appointed expert expressly found that the CCASG was aware and in position to file an objection described in the AGB (“Legal Rights Objection”) -- and this was the proper method to decide the dispute:

[H]aving closely examined the applicant guidebook for ICANN New gTLDs Program, the IO still notes the particular relevance of the “Legal Rights Objection”. As described in Section 3.5.2 of the guidebook, “In interpreting and giving meaning to GNSO Recommendation 3 (“Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law”), a DRSP panel of experts presiding over a legal rights objection will determine whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s registered or unregistered trademark or service mark (“mark”) or IGO name or acronym (as identified in the treaty establishing the organization), or unjustifiably impairs the distinctive character or the reputation of the objector’s mark or IGO name or acronym, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector’s mark or IGO name or acronym”. ...

It therefore seems that the above procedure is a significant opportunity given to the Gulf Cooperation Council to file an objection, if deemed appropriate, against the application.
...

In the present case, the IO is of the opinion that the Gulf Cooperation Council is an established institution representing and associated with a significant part of the targeted community. The Gulf Cooperation Council is already fully aware of the controversial issues and is better placed than the IO to file an objection, if it deems it appropriate.

D. The Legal Rights Objection Terminated by ICANN – No Rationale.

Next, indeed, one of the CCASG and GAC member states (the UAE) filed a Legal Rights Objection with WIPO.⁵ As the IO had described, the AGB documented a detailed arbitration process developed by the ICANN community, approved by all of ICANN’s Constituent Bodies (including the Government Advisory Committee (“GAC”)), and enshrined as formal policy by the ICANN Board incorporated into Claimant’s TLD application. The UAE lawyers presented their argument and

⁴ Annex 4, GCCIX Response to Independent Objector (without annexes).

⁵ Annex 5, UAE Legal Rights Objection (without annexes).

evidence, and Applicant fully responded.⁶ Applicant provided voluminous evidence, including an expensive expert survey, which refuted the CCASG's assertion of legal rights to the acronym, or of any harm likely to accrue from Claimant's operation of .GCC. The matter was fully briefed, pending disposition by an expert WIPO panel trained by ICANN specifically to hear this sort of dispute.

Then, ICANN suddenly instructed WIPO to terminate this Objection proceeding, without rendering a decision. ICANN offered no rationale for that action, despite Claimant's repeated written protests. The response to the Objection cost Claimant at least USD \$40,000 to prepare. Claimant wrote two letters specifically requesting that ICANN instruct the WIPO panel to proceed with the expert determination, as the AGB expressly provides, or to provide rationale for the refusal to do so. ICANN never substantively responded to those requests. There were about seventy Legal Rights Objections filed in the entire new gTLD Program, and it appears this was the only one terminated by ICANN.

ICANN has refused to provide any rationale for terminating the Legal Rights Objection process even though the Objection was fully briefed by the Objector and the Applicant, and fees were paid to WIPO for a decision. The AGB, §3.1 re GAC Advice, specifically suggests: "The ICANN Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures." Indeed, ICANN should have wanted the WIPO expert opinion in front of it when deciding whether to reject Claimant's application, since ICANN designed the Legal Rights Objection process for precisely this situation involving IGO trademark claims.

⁶ Annex 6, GCCIX Response to Legal Rights Objection (without annexes).

Instead of even receiving the decision, ICANN suddenly terminated the process. ICANN had no reason nor justification to forbid the independent expert, which it had appointed, to hear the Legal Rights Objection. It defies common sense that the ICANN Board would refuse to allow an independent expert to provide its opinion on the matter; particularly when the government pushing the GAC advice filed the Objection, and Claimant had invested heavily in its Response. The ICANN Board refused to consider an expert determination on an issue which ICANN specifically contemplated, retained and trained such experts to decide. Therefore, the Board could not reasonably address whether it should accept GAC advice, it did not have a reasonable amount of facts and evidence in front of it – intentionally.

E. GNSO Policy – No Protection of IGO Acronyms at the Top Level; Rationale.

During this time, the ICANN Board requested that the GNSO conduct another Policy Development Process, to again focus specifically on IGO Names. That GNSO Working Group then issued a Final Report on the Protection of IGO and INGO Identifiers.⁷ The Final Report, Section 3.5, documents the formal “Consensus Against” any recommendation to protect IGO acronym identifiers at the top level. The GNSO Council resolved as follows (Section 3, emphasis in original): “At the top-level, acronyms of the RCRC, IOC, IGOs and INGOs under consideration in this PDP shall not be considered as ‘Strings Ineligible for Delegation.’” The related rationale included reference (at Section 5.1) to the availability of the Legal Rights Objection to resolve any conflicts with IGO names or trademarks, if any. These recommendations were approved by a unanimous GNSO Council,⁸ and sent to the Board for approval.

⁷ Annex 7, GNSO IGO Names Working Group, Final Report, Nov. 10, 2013 at n.26 (*see also*, Sec. 5, Background).

⁸ <https://gns0.icann.org/en/council/resolutions#20131120-2>

In other words, purported acronyms of any IGO were considered by a Supermajority of the GNSO Council to be openly eligible for delegation to any qualified party as contemplated in the AGB, unless a Legal Rights Objection resulted otherwise. Indeed, this merely reaffirmed the guidance of several working groups and advisory committees who had examined the topic during the six-year community process to develop the AGB and the Legal Rights Objection, and who each had come to the same conclusion. IGOs do not own global, exclusive rights to use “their” acronym as a top-level domain name on the internet. In making its investment to apply to ICANN, Claimant had relied on that work, and on the implicit permission offered by the AGB to apply for the .GCC string -- as it was not a prohibited geographic or otherwise reserved term.

ICANN Bylaws⁹ have always provided that the GNSO shall be “responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.” Section X of the Bylaws is entirely devoted to detailing how the GNSO should be comprised of various stakeholders and operate through various constituencies within those stakeholder groups. They also describe how the GNSO shall appoint two members to the ICANN Board, and how it shall develop policy which effectively binds the Board. Annex A details the GNSO Policy Development Process, including the binding effect of its outcomes (Section 9):

- a. Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN.
- b. In the event that the Board determines, in accordance with paragraph a above, [then] the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

⁹ Archived, eff. Apr. 11, 2013: <https://www.icann.org/resources/pages/bylaws-2014-04-04-en>

In April 2014, the ICANN Board adopted¹⁰ those PDP recommendations that were "not inconsistent" with GAC advice received on the topic, and requested more time to consider the remaining inconsistent recommendations. The adopted recommendations related to full names -- not acronyms. Thus, the Board violated Bylaws by failing to approve the recommendation related to acronyms, or else reject it by 2/3 voter with articulation of the reasons for doing so. It did neither, it just ignored the recommendation.

To this day, despite the clear Bylaws requiring the Board to accept it, ICANN still has never addressed the GNSO Supermajority consensus policy that IGO acronyms are not to be protected at the top-level. That policy was developed at request of the Board, with widespread community (and IGO) input both in development of the AGB and in the subsequent PDP. The Board has simply ignored it for seven years, even though the Bylaws require it to be accepted. The Board has offered no rationale whatsoever for that inaction, and apparently has never even discussed – much less has 2/3 of the Board formally resolved – whether the recommendation is contrary to the public interest.

F. Rejection of GCCIX Application by GAC and NGPC – In Secret; No Rationale.

Applicant's TLD application was rejected by ICANN's "Government Advisory Committee" ("GAC") in its infamous Beijing Communique,¹¹ without any rationale whatsoever. All GAC deliberations leading to the Beijing Communique were held in closed session, with only ICANN Staff, executives and Board members allowed in the room where government representatives discussed and resolved the GAC's advice. Unlike any other GAC meeting prior or since, no minutes, transcripts or rationale from those meetings have ever been released; only the sparse Communique stands to represent the GAC deliberations and decision as to the .GCC application. The GAC made no effort to explain its decision. The GAC rejection then was

¹⁰ <https://www.icann.org/resources/board-material/resolutions-2014-04-30-en#2.a>

¹¹ <https://gac.icann.org/contentMigrated/icann46-beijing-communique>

accepted by the NGPC, also without any rationale whatsoever, except to refer to the AGB provisions with respect to GAC advice.¹² Applicant then tried twice to initiate discussion with ICANN staff, and specifically requested rationale both times -- but it was never provided.

In response to the NGPC action of June 4, 2013, accepting the GAC Advice to reject the .GCC application, Applicant submitted a letter¹³ to ICANN on June 19, 2013 – within fifteen days of the action – seeking rationale for the decision since absolutely none had, nor ever has, been provided. The letter further requested the chance to request Reconsideration once such rationale was provided. The letter further described the ICANN Board’s instruction to the GNSO with respect to protection of IGO names, and the emerging consensus in the GNSO against any top-level protection for IGO acronyms. And the letter further requested that the NGPC allow the WIPO Legal Rights Objection to be heard.

On September 5, 2013, purportedly in response to the June 19 letter, Ms. Christine Willett of ICANN responded.¹⁴ But, she did not meaningfully address GCCIX’ direct questions about ICANN’s purported rejection of the .GCC new gTLD application. Instead, she merely quoted the NGPC Resolution and the accompanying Briefing Materials, neither of which provide any rationale for the decision. The letter ignored Applicant’s request to consider the GNSO PDP, and Applicant’s request that the Legal Rights Objection be heard.

Therefore, on September 25, 2013, Applicant wrote¹⁵ again to explain that no rationale had yet been provided, to reiterate its request about the Legal Rights Objection and to request

¹² <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en>

¹³ Annex 8, GCCIX Response to NGPC Resolution, dated June 19, 2013.

¹⁴ Annex 9, ICANN Response dated Sept. 5, 2013.

¹⁵ Annex 10, GCCIX letter to ICANN, dated Sept. 25, 2013.

rationale for the apparent refusal to grant such request, and to update Ms. Willett with respect to the GNSO PDP consensus. It then became clear that no rationale would be provided.

G. ICANN’s Sham Reconsideration Process; Still No Rationale.

Applicant next filed a timely Request for Reconsideration¹⁶ pursuant to ICANN Bylaws, on Nov. 14, 2013. Applicant carefully reviewed the two documents¹⁷ linked within the September 5 letter, which Ms. Willett claimed to provide rationale for ICANN’s purported rejection of the application. However, the NGPC resolution makes no mention of the .GCC application whatsoever, nor any effort to explain its rejection. And, the Briefing Materials provide no rationale from the GAC or ICANN Board, but only include GCCIX’ response to the GAC Advice. The NGPC resolution adopts the "NGPC Scorecard Regarding Non-Safeguard Advice in the GAC Beijing Communiqué" (4 June 2013), attached as Annex 1 to the Resolution. That document, in turn, states only the following with respect to .GCC:

Summary of GAC Advice: The GAC Advises the ICANN Board that it has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following application: .gcc (application number 1-1936-2101).

NGPC Response: The NGPC accepts this advice. The AGB provides that if “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.” (AGB § 3.1) The NGPC directs staff that pursuant to the GAC Advice and Section 3.1, of the Applicant Guidebook, Application number 1-1936-2101 for .gcc will not be approved. In accordance with the AGB the applicant may withdraw ... or seek relief according to ICANN’s accountability mechanisms

Similarly, the GAC Advice within the Beijing Communiqué had only stated that the GAC had reached consensus to reject the .GCC application, without any explanation whatsoever.

¹⁶ <https://www.icann.org/resources/pages/13-17-2014-02-13-en>

¹⁷ Specifically, the two documents at these links:

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-04jun13-en.htm>

<http://www.icann.org/en/groups/board/documents/briefing-materials-3-04jun13-en>

The Reconsideration process was a complete sham. A Reconsideration request was made to the BAMC. The BAMC, which routinely denies such requests, was comprised entirely of a subset of NGPC members who had made the underlying decisions of which Claimant sought reconsideration. Then, the BAMC’s decision to deny reconsideration of its earlier decisions was ultimately rubber-stamped again by the NGPC (purportedly for the entire ICANN Board). There was no reconsideration; it was a sham.

Indeed, of the many dozens of Reconsideration Requests heard by the BAMC arising out of the 2012 New gTLD Program, virtually none have been granted. In each case, the same subset of the Board (comprised as the NGPC), made the underlying decisions then appealed and purportedly “reconsidered” by a subset of the NGPC (comprised as the BAMC). And then, in each case, reconsideration was ultimately denied not by the full ICANN Board, but again by the NGPC sitting on behalf of the Board. This same pattern recurred in almost every case. There has been no Reconsideration process provided to new gTLD applicants, even though it is guaranteed by the Bylaws as incorporated into their applications. “Reconsideration” is a sham.

H. [REDACTED]

As contemplated by ICANN’s Bylaws, in 2014 the Claimant requested¹⁸ that ICANN engage in a Cooperative Engagement Process (“CEP”) prior to filing this complaint for Independent Review. [REDACTED]

[REDACTED]

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Claimant still has never been provided reason for rejection of its application, other than the GAC, in essence, “said so.” ICANN has never explained how that decision by either the GAC or the NGPC is in the public interest, despite its Bylaws requiring that. ICANN also has never explained why it terminated the WIPO proceeding, rather than allow its own expert process to be completed. ICANN also has never considered the contrary GNSO policy advice, despite its Bylaws requiring that. Then, ICANN provided only a sham Reconsideration process,

21 [REDACTED]

recommendation to deny the Request for Reconsideration (of NGPC’s prior actions...);

11) to refuse to facilitate discussions between Claimant and the CCASG, with the express view of reaching a “mutually acceptable solution to allow for the use” of .GCC as a top-level domain – the same facilitation it provided to Amazon, Inc. in its dispute with Amazonian governments;

12) to fail to allow Claimant’s application to proceed to contracting, as required by the .Africa IRP panel in highly analogous circumstances -- the GAC and ICANN Board were held to have violated ICANN’s Bylaws by failing to provide rationale for their decisions to reject that IRP claimant’s application;



14) to deny that analogous IRP decisions are precedential and binding, causing expensive and unnecessary re-litigation of settled issues and despite contrary Bylaw provisions;

15) to fail to provide an Independent Review Process that complies with ICANN’s Bylaws, specifically the Bylaw requirement (since 2013) that there be an expert, community-chosen Standing Panel from which panelists would decide all IRP cases, and which *en banc* would review all appeals of IRP decisions – and to fail to develop IRP Rules required by the Bylaws since 2013.

III. ARGUMENT

GCCIX seeks Independent Review of various actions and inaction of the ICANN Board and Staff which violate ICANN’s Articles and/or Bylaws. Specifically, via the NGPC decision rejecting the .GCC application, and other actions and inaction, ICANN has failed to exercise due diligence and care in having a reasonable amount of facts in front of them, and has failed to exercise independent judgment in taking that decision as well as intermediate and subsequent related decisions.

The aforementioned actions and inaction are not in the best interests of ICANN. As to each, ICANN has violated its Articles of Incorporation, Art. 4, which require it to “carry out its activities in conformance with relevant principles of international law and applicable conventions and local law.” To be sure, ICANN cannot be allowed to collect substantial

application fees from Claimant, create reasonable reliance as to fair disposition of Claimant's investment in the application, fail to provide clear evaluation criteria, and usurp Claimant's investment and business opportunity without due process or recourse – or indeed, without even any explanation at all.

Consequently, ICANN has violated its Bylaws Art. I, Sec. 2, (“core values that should guide the decisions and actions of ICANN”) (hereinafter “Core Values”):

Core Value No. 7 — employing open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.

Yet ICANN has employed a closed, secret policy development mechanism as to this application, disallowing an otherwise allowed application without any explanation whatsoever. ICANN refused even to consider the well-informed, expert advice of the Independent Objector and the WIPO panel, or the unanimous recommendation of the GNSO Council. Instead, ICANN held secret meetings with the GAC and the CCASG objectors, obtained no other expert advice nor engaged in any other fact-finding, and baldly rejected the Claimant's application.

Core Value No. 8 — making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

ICANN ignored all of its documented policies, and instead has kowtowed to the GAC's unsubstantiated and unfair veto of the application, without even giving Claimant the courtesy of any reason whatsoever for the rejection.

Core Value No. 9 — obtaining informed input from those entities most affected.

ICANN has refused to provide any information about the CCASG's concerns, or any rationale for rejecting GCCIX's stated concerns. ICANN terminated its opportunity to consider an expert determination that was briefed and pending decision, which it had designed for specifically that purpose -- without even asking either of the parties. ICANN has also refused to facilitate any

discussion between GCCIX and CCASG, as it facilitated in the .Amazon matter. ICANN has wholly failed to consider the public interest in having this regional TLD operate.

ICANN also has violated a fundamental principle of the gTLD Program and the AGB, that the new gTLDs “must be introduced in an orderly, timely and predictable way.” The fundamental Recommendations also supported this Principle, and were unanimously adopted by the GNSO Council and almost unanimously by the ICANN Board:

Recommendation No. 1: The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Recommendation No. 9: There must be a clear and pre-published application process using objective and measurable criteria.

Recommendation No. 12: Dispute resolution and challenge processes must be established prior to the start of the process.

To the contrary in this matter, ICANN has unfairly engaged in secret process to discriminate against GCCIX. ICANN ignored its expert Independent Objector’s advice, and terminated the WIPO expert dispute resolution and challenge process that it established for the Program. It ignored unanimous GNSO Council advice. And it flatly rejected Claimant’s application without any rationale whatsoever.

The AGB represents the implementation of these Principles and Recommendations. Yet the NGPC and ICANN Staff flew completely outside the bounds of the detailed rules and processes underlying the New gTLD Program. Instead, ICANN has accepted an unsubstantiated GAC veto of this application, with no consistent input from any ICANN stakeholder group, and indeed contrary to express advice of a unanimous GNSO Council -- for no discernible purpose whatsoever – purportedly terminating Claimant’s investment without any fair process or further

recourse. ICANN cannot act outside the public interest, and its Bylaws require it to explain its decision so that they can be evaluated by the public, and upon Independent Review. For eight years, ICANN has steadfastly refused to even try to justify its decision, leaving that as a prevalent issue for Independent Review now.

A. ICANN created new policy, without community input, which accepts effective government veto of applications for any reason or no reason.

The NGPC Resolution effectively granted to the GAC an absolute veto of Claimant's application. This despite Claimant passing ICANN's thorough evaluations documented in the AGB, despite the complete lack of any rationale whatsoever provided by the GAC, despite the advice of ICANN's Independent Objector, despite the filing of the Legal Rights Objection that was pending decision, and without conducting any additional fact-finding at all. Those AGB processes were carefully designed and documented by the entire ICANN Community, ICANN and its paid consultants, via some six years of policy development and implementation, many thousands of hours, and many millions of dollars of expense.

Those processes were designed so that decisions as to all TLD applications would be made through transparent process, by experts — and not on a one-off basis by ICANN. They were designed specifically to keep ICANN from making such decisions. Indeed, ICANN has decided many dozens of times that it will not revisit decisions made by its expert evaluators, or by experts in the Objection processes. The vast majority of requests for Reconsideration arising from the gTLD Program have involved this issue, and all were denied.

Yet in this matter, neither the GAC nor the NGPC ever requested or allowed community input to their deliberations or resolution, blatantly flouting ICANN's Bylaws requiring transparent, fair and predictable policy decisions. Indeed, the Board terminated an expert proceeding designed and ready to decide the dispute. Also, the Board has refused to consider the

GNSO Council recommendation against reserving IGO acronyms, again blatantly flouting its own Bylaws that require acceptance of that advice, or state strong rationale otherwise.

Consequently, the Board again has violated its Core Values:

Core Value No. 3 — delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of third parties.

Core Value No. 7 — employing open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.

Core Value No. 8 — making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

Specifically, the Board properly delegated the New gTLD Program policy development to the GNSO and Staff, involving hundreds of community volunteers, many thousands of hours of their time, and enormous Staff resources. That lengthy, expensive and exhaustive process created the fundamental principles of the Program, and also the detailed AGB setting forth clear evaluation criteria and ancillary processes for all applications -- reflecting the many various interests of all potentially relevant third parties, including governments and IGOs.

But then ICANN has thrown all of that out the window in evaluating Claimant's application, instead giving the GAC an unforeseen, unsubstantiated and unwarranted veto power. ICANN has ignored all of its carefully developed and documented policies, and instead has kowtowed to unspecified government concerns — devising a secret process to kill Claimant's investment and opportunity, and completely disregarding the public interest in delegating the TLD for use.

The AGB specifically indicates that the ICANN Board should consider the advice of experts in making determinations about new gTLD applications which raise sensitive government issues. Guidebook §3.1 re GAC Advice specifically suggests: "The ICANN Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are

pertinent to one of the subject matter areas of the objection procedures.” And of course, the AGB contains specific lengthy provisions about the Independent Objector and the Legal Rights Objection process, and about GAC advice.

The Board refused the advice of experts that it had specifically commissioned to decide whether any “legal rights” would be damaged by any TLD application. The Independent Objector reaffirmed that the WIPO panel was the proper process to decide the dispute. Both Claimant and the UAE spent much money and effort to brief that matter. But then ICANN suddenly terminated the proceeding – and only that proceeding -- without explanation.

No reasonable basis exists for ICANN’s determination to kill Claimant’s application. None. ICANN has violated Bylaws Art. II, Sec. 3, which mandates that ICANN “shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment, unless justified by substantial and reasonable cause.” The Board has not provided any substantial or reasonable cause for killing Claimant’s application. The GAC veto has been granted inequitably without community input or transparency, demonstrating disparate treatment of Claimant.

B. ICANN ignored unanimous advice of the GNSO Council and the Board’s resolution that ICANN, *inter alia*, must provide clear criteria for evaluation of all applications.

ICANN also has violated Bylaws Art. II, Sec. 1, because the Board has not acted “by a majority vote of all members of the Board,” nor followed other procedures set forth in Bylaws Art. III, Sec. 6 pertaining to “Notice and Comment on Policy Actions.” Instead, the policy adopted as to Claimant’s application was secretly, unjustifiably and uniquely developed and resolved only by the GAC and NGPC. The NGPC did not provide notice of any proposed policy, nor reasonable opportunity for comment, nor did it investigate in any way, nor did it consider any GAC rationale (if any), nor did it provide an in-person public forum for

discussion. Instead, it only met secretly with the GAC and the objectors, and devised a secret and unique policy only to bury the Claimant's application.

This effectively overruled unanimous advice of the GNSO Council that the Board, *inter alia*, must provide clear criteria for equal evaluation of all applications, must implement the Legal Rights Objection process, and generally should consider the advice of its retained experts. Moreover, specific to this application, it ignores unanimous and precise advice of the GNSO Council that IGO acronyms shall not be specially protected at the top-level.

The Board also has violated Bylaws Art. X, Annex A, Sec. 9, requiring PDP Recommendations be approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of 2/3 of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN; and, requiring, in the event the Board determines that such a policy is not in the best interests of the ICANN community or ICANN, the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"), and (ii) submit the Board Statement to the Council.

The Board has not decided whether the GNSO-approved policy is in the best interest of the ICANN community or ICANN – nor could it. To the contrary, a subset of the Board has refused to adopt a recommendation that affirms the propriety of this application. Instead, ICANN has resolved a separate and inequitable policy to bury just this application without GNSO or community input. ICANN has not even even attempted to explain how this application, and/or the application of ICANN's documented policies to this application, could possibly fail the public interest. All evidence presented to ICANN proves that Claimant's application is in the public interest and should not be rejected. ICANN's own processes repeatedly came to that conclusion, but yet ICANN persisted to ignore its own experts and the

unanimous GNSO Council, and instead accept the unsubstantiated advice of just one advisory committee. That decision was made in bad faith, without proper investigation.

C. ICANN refuses to provide documents reasonably requested by Claimant, which would illuminate and narrow the scope of IRP, and thus reduce costs and time to decision.

██████████ Claimant requested documents from ICANN which are reasonably related to the parties' dispute.²² Citing its own document disclosure policy ("DIDP"), ICANN withheld all non-public documents on the alleged, vague basis of "confidentiality" and "material prejudice" to its relationships with the objectors and/or to ICANN's own deliberative process.²³

This non-disclosure violates Core Value No. 7 — employing open and transparent policy development mechanisms; Core Value No. 8 — making decisions by applying documented policies neutrally and objectively, with integrity and fairness; and Program Recommendation No. 1 — the evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

ICANN has demonstrated a pattern of unfairly withholding documents despite requests for production from opposing parties and presiding panels. For example, in one IRP, after failing to provide documents in response to numerous requests to produce, ICANN was ordered to turn over such documents to claimant. In another case, ICANN failed to provide documents requested by the IRP panel itself. In other case, the panel found that ICANN had deliberately withheld material documents from the panel. ICANN must provide the requested documents in order to for Claimant to begin to address any substantive reasoning that ICANN may have had, if any. Claimant also will seek discovery relating to ICANN's actions and inaction since.

²² Annex 12, GCCIX letter dated May 4, 2016.

²³ Annex 15, ICANN DIDP Response.

D. ICANN refuses to provide a Standing Panel and IRP Rules as required by its Bylaws, in order to more effectively and efficiently resolve IRP disputes.

The panel in *DCA Trust v. ICANN* stated:

29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:

"There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

Now some eight years since the Bylaws were implemented, and seven years since the decision of that IRP panel, ICANN still has barely begun to create the required Standing Panel. That will make this IRP process more lengthy, cumbersome and expensive, causing further clear harm to Claimant. Indeed, in other pending IRP proceedings, the panel selection process alone has lasted more than a year (and in one case is not yet completed, 18 months after the complaint was filed). ICANN also has failed to implement IRP Rules as required by its Bylaws since 2013. This also leads to lengthy and expensive IRP litigation, with one recently decided case having ten interim Procedural Orders and lasting well over two years.

E. ICANN refuses to acknowledge that IRP decisions are binding and precedential, causing expensive and unnecessary re-litigation of settled issues.

ICANN's Bylaws (Sec. 4.3(a)) provide various "Purposes of the IRP", including:

(vi) Reduce Disputes by creating precedent to guide and inform [ICANN], Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.²⁴

Yet, in this case, ICANN has refused to acknowledge the precedential effect of the *DCA Trust* and *Amazon* decisions. In the *.Africa* case, that TLD application also was subject of bald and unsubstantiated GAC advice to reject it, but ICANN was held to have violated its Bylaws by not further investigating nor requiring any rationale from the GAC. Therefore, the IRP panel unanimously ordered ICANN to disregard the unsupported GAC advice, to reverse the consequent ICANN Board decision to reject DCA's application, and to pay DCA's IRP costs of more than \$300,000. Similarly in the *.Amazon* case, the IRP panel relied upon the *.Africa* decision and made essentially the same holding.²⁵

Those decisions should have substantially resolved this case, or at least drastically narrowed the issues to be considered by this IRP panel. At least, it should have forced ICANN to request transparent, documented rationale from the GAC so that ICANN, the community and Claimant all could evaluate it. Yet ICANN has steadfastly refused to even take that step, or to facilitate focused discussions between Claimant and the government objectors as it decided to do after losing the *.Amazon* IRP case. The facts of the *.Amazon* case are relevantly identical to this case, yet ICANN has never explained why Claimant has been treated differently. Such discussions may have eliminated or at least narrowed the topics for Independent Review.

Similarly, ICANN has not acknowledged the prior IRP panel holdings with respect to its document disclosure policy, or with respect to the standing panel required by Bylaws. Instead, ICANN intentionally drives up Claimant's costs and time to decision in this matter (as it does in

²⁴ *See also*, Sec. 4.3(v): “all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions....”

²⁵ Annex 16, *Amazon v. ICANN*, Final Declaration, ¶89, 96-106, 112-119, 124-126.

all IRP matters), forcing Claimant to relitigate issues that should be deemed settled. These repeated violations of ICANN's Articles and Bylaws have caused Claimant to suffer injury directly caused by these violations.

IV. RELIEF REQUESTED

GCCIX respectfully requests that the IRP panel expedite these proceedings with respect to discovery and panel selection, given ICANN's documented history of ignoring its Bylaws obligations as to such issues in previous IRP proceedings. GCCIX further requests the panel to find that ICANN has violated its Bylaws in all of the aforementioned ways. GCCIX urges the panel to recommend that ICANN follow the precedent of the .Africa decision, disregard the unsubstantiated GAC advice to reject that application, and return the application to processing. Finally, GCCIX urges the panel to name Claimant the prevailing party herein and to require ICANN to pay all ICDR costs and panel fees, as well as Claimant's attorneys' fees in accord with the fee-shifting provisions of the Bylaws and prior IRP precedent.

Respectfully submitted,

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List of Annexes

Annex 1 – Public Portions of Claimant’s gTLD Application to ICANN

Annex 2 – ICANN’s .GCC Initial Evaluation Report from ICANN

Annex 3 – Independent Objector’s Final Report re .GCC

Annex 4 – GCCIX Response to Independent Objector’s Initial Comment (without annexes)

Annex 5 -- UAE Legal Rights Objection (without annexes)

Annex 6 – GCCIX Response to Legal Rights Objection (without annexes)

Annex 7 – GNSO IGO Names Working Group, Final Report, Nov. 10, 2013 (without annexes)

Annex 8 -- GCCIX Response to NGPC Resolution, dated June 19, 2013.

Annex 9 -- ICANN Response to GCCIX dated Sept. 5, 2013.

Annex 10 -- GCCIX letter to ICANN, dated Sept. 25, 2013.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Annex 15 – ICANN DIDP Response

Annex 16 – *Amazon v. ICANN*, Final Declaration