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 SECOND AMENDED REQUEST FOR INDEPENDENT REVIEW

December 22, 2023

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**
ICC	**International Chamber of Commerce**
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**

TABLE OF CONTENTS

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 and timely investigate and provide 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"). Per its Articles of Incorporation, 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 example.gcc) 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 generic top-level domains (TLDs) into the domain name system. The ICANN Bylaws, Sec. 11.1, specifically mandate that the GNSO "shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains." The purpose of the New gTLD Program (the "Program") is to "open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS."[1] Via its lengthy community deliberations, the GNSO developed and the ICANN Board approved

[1] ICANN Applicant Guidebook ("AGB"), Preamble, https://www.icann.org/en/topics/new-gtlds/rfp-clean-19sep11-en.pdf

seven "Guiding Principles" and nineteen "Recommendations" for the Program.[2] The very first Guiding Principle is that the new gTLDs "must be introduced in an orderly, timely and predictable way."[3] The GNSO 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 many specialized, community Working Groups (each with its own iterative rounds of public comment and stakeholder comment), and at least four iterative rounds of formal public comment, government comment and stakeholder comment before it was approved by ICANN as formal policy.

The 350+ page AGB is incorporated into GCCIX's application contract with ICANN, and provides thoroughly detailed criteria for evaluation of all application types in accordance with Recommendation 1. Applications consisted 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. Where statements in an application may have been unclear, evaluators of the application (under ICANN's supervision) asked "Clarifying Questions" to applicants. Applicants had to answer those questions satisfactorily to pass the evaluation. 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 -- including a $185,000 application fee to ICANN.

[2] ICANN GNSO Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm).
[3] *Id.*, Principle A.

Claimant's application underwent thorough evaluation by the various technical and financial 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 has been rejected after a lengthy process further described *infra*.

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

Claimant specializes in information and communication technology solutions. Claimant's application to ICANN was submitted in early 2012,[4] 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 all of ICANN's expert evaluation panels.[5] 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

[4] Annex 1, Claimant's gTLD Application to ICANN (public portions).
[5] Annex 2, ICANN's Initial Evaluation Report re .GCC.

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 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. Although there were objection proceedings, ICANN did not allow those objection proceedings to complete and *sua sponte* terminated them without precedent and without reason, as discussed *infra*.

C. ICANN AGB Objection Processes – Legal Rights And Community Objections

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. ICANN's Applicant Guidebook, Module 3, exhaustively defined the available Objection processes available to challenge any New gTLD application. These include the Legal Rights Objection and the Community Objection processes:[6]

- Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.
- Community Objection – 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.

[6] AGB, Sec. 3.2.1 ("The rationales for these objection grounds ffe discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta08aug07.htm").

Section 3.2.2.2 explicitly provided standing for IGOs like the CCASG to file a Legal Rights Objection. Section 3.2.2.4 provided that "Established institutions associated with clearly delineated communities are eligible to file a community objection."

Section 3.2.3 discussed the Dispute Resolution Service Providers:

> To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date, directly with the appropriate DRSP for each objection ground.
> …
> • The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed in principle to administer disputes brought pursuant to legal rights objections.
>
> • The International Center of Expertise of the International Chamber of Commerce has agreed in principle to administer disputes brought pursuant to … Community Objections.
>
> ICANN selected DRSPs on the basis of their relevant experience and expertise, as well as their willingness and ability to administer dispute proceedings in the new gTLD Program.

There was no process in the Guidebook or otherwise by which the ICANN Board was intended to resolve any sort of dispute relating to any sort of New gTLD application.

D. ICANN's Independent Objector – Does Not File Objection; Rationale

A fundamental component of the objection processes 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,[7] Professor Pellet summarized the opposition expressed in public comments to the Claimant's application:

> 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.

But, in light of Claimant's written position and evidence presented to him,[8] Dr. Pellet decided **not** to file any objection against Claimant's application. Instead, ICANN's appointed expert expressly found that the Council was aware of 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 [dispute provider] 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.

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[7] 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.

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

Thus, the IO clearly flagged for the Council that it likely could assert either or both a Legal Rights Objection, or a Community Objection against Claimant's application. But the Council decided to do neither.

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

Next, instead, one of the CCASG and GAC member states (the UAE) filed a Legal Rights Objection with WIPO.[9] 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")), enshrined as formal policy by the ICANN Board, and incorporated into Claimant's TLD application contract with ICANN. The UAE lawyers presented their argument and evidence, and Applicant fully responded.[10] 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, without warning to Claimant or opportunity for Claimant or the public to be heard, 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 has never substantively

[9] Annex 5, UAE Legal Rights Objection (without annexes).
[10] Annex 6, GCCIX Response to Legal Rights Objection (without annexes).

responded to those requests. There were about seventy Legal Rights Objections filed against new gTLD Program applicants, and it appears this was the only one terminated by ICANN.

For ten years now, 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, fees were paid to WIPO for a decision, and ICANN apparently has never terminated any other objection proceeding. 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 and its community designed the Legal Rights Objection process for precisely this situation involving IGO legal rights claims.

Instead of allowing a decision by the independent expert WIPO panel, which it states in the AGB[11] is a process "designed to protect certain interests and rights," ICANN suddenly terminated the process. ICANN had no reason to forbid a decision from the independent qualified expert from WIPO, which ICANN had appointed to hear the Legal Rights Objection. It not only defied the principles expressly set forth in the Applicant Guidebook Section 3.2 for the protection of rights, but it also defied common sense. The ICANN Board refused to allow the independent qualified expert to provide its opinion on the matter; even thought the UAE government pushing the GAC advice filed the Objection, and Claimant had invested heavily in its Response (which included its own qualified expert opinion).

[11] The AGB sets forth: "The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts." Section 3.2.

The ICANN Board refused to follow its own process laid out clearly in the Applicant Guidebook. By terminating the proceeding, ICANN essentially decided the Objection itself, relying only on inputs from the UAE and perhaps other governments – none of whom are qualified experts. There is no precedent for such action by ICANN, before or since. To the contrary, ICANN has defended dozens of Reconsideration Requests and multiple IRPs on the basis that ICANN would not substitute its judgement for that of the independent experts in AGB Objection processes. Therefore, the Board did not reasonably or independently address whether it should accept GAC advice, as it intentionally did not have a reasonable amount of facts and evidence in front of it.

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

The AGB permitted delegation of letter strings that constituted acronyms of IGOs (or of any other organization), unless a Legal Rights Objection ("LRO") successfully defeated any such application. This is why IGO Names were specifically included within the remit of the LRO procedure. After all of the New gTLD applications were submitted in 2012, the ICANN Board requested that the GNSO conduct another Policy Development Process ("PDP"), to again focus specifically on IGO Names. A properly commissioned GNSO Working Group conducted a thorough collaborative examination with inputs from governments and all other ICANN stakeholders, and then issued a Final Report on the Protection of IGO and INGO Identifiers.[12] 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 <u>not</u> be considered as 'Strings

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

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,[13] and sent to the Board for approval.

In other words, purported acronyms of any IGO were considered by a unanimous GNSO Council to be openly eligible for delegation to any qualified party as contemplated in the AGB, unless a Legal Rights Objection resulted otherwise. Thus the GNSO essentially 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 from 2006 to 2012. In other words, the GNSO did not choose to protect IGO names prior to 2012, and expressly rejected protecting them thereafter. The GNSO noted that 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 trademark nor a prohibited geographic or otherwise reserved term. Claimant is confident this would have been the decision by the independent qualified WIPO expert in the LRO proceeding, had ICANN actually allowed that expert to make a decision.

ICANN Bylaws[14] 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." The Bylaws thoroughly detail 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 expressly binds the Board. Annex A details the GNSO PDP, including the binding effect of its outcomes (Section 9):

[13] https://gnso.icann.org/en/council/resolutions#20131120-2
[14] Archived, eff. Apr. 11, 2013: https://www.icann.org/resources/pages/bylaws-2014-04-04-en

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.

In April 2014, the ICANN Board adopted[15] those IGO Names 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 has just ignored that recommendation and these Bylaws, for almost ten years now.

To this day, despite the clear Bylaws requiring the Board to accept it, ICANN still has never addressed the GNSO unanimous 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 almost a decade, even though the Bylaws require it to be accepted unless very specific conditions are met. 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.

G. Rejection of .GCC Application by GAC and NGPC – In Secret; No Rationale

Claimant's .GCC TLD application was the subject of an Objection by ICANN's "Government Advisory Committee" ("GAC") in its infamous Beijing Communique of April 11,

[15] https://www.icann.org/resources/board-material/resolutions-2014-04-30-en#2.a

2013,[16] without any rationale provided 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 involving new TLD applications since the 2012 round, no minutes, transcripts or rationale from those meetings were been released, until after this IRP and pursuant to Claimant's discovery requests. Only the sparse Communique stated the GAC Advice to reject the .GCC application. The GAC made no effort whatsoever to explain its decision, That decision then was accepted by the NGPC, also without any rationale whatsoever, except to refer to the AGB provisions with respect to GAC advice.[17] The AGB provides that a GAC consensus objection creates a presumption that the Board will agree that the application will not proceed.

In response, Applicant submitted a letter[18] to ICANN on June 19, 2013, seeking rationale for the decision since absolutely none had been provided. The letter further described the ICANN Board's instruction to the GNSO with respect to protection of IGO Names at the top-level, and the consensus emerging at that time in the GNSO Working Group, against any top-level protection for IGO acronyms. And the letter further requested that the NGPC allow the then-pending 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.[19] But, she did not meaningfully address GCCIX' direct questions about ICANN's purported rejection of the .GCC application. Instead, she merely quoted the

[16] https://gac.icann.org/contentMigrated/icann46-beijing-communique
[17] https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en
[18] Annex 8, GCCIX Response to NGPC Resolution, dated June 19, 2013.
[19] Annex 9, ICANN Response dated Sept. 5, 2013.

NGPC Resolution and the accompanying Briefing Materials, neither of which provided 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 wrote[20] again to explain that no rationale had yet been provided, to reiterate Applicant's request about the Legal Rights Objection and to request 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.

H. ICANN's Sham Reconsideration Process; Still No Rationale

Applicant next filed a timely Request for Reconsideration[21] pursuant to ICANN Bylaws, on Nov. 14, 2013. Applicant carefully reviewed the two documents[22] linked within ICANN's September 5 letter, which Ms. Willett claimed to provide rationale for ICANN's purported rejection of the application. However, the NGPC resolution made no mention of the .GCC application whatsoever, nor any effort to explain its rejection. And, the Briefing Materials provided no rationale from the GAC or ICANN Board, but only included GCCIX' response to the GAC Advice. The NGPC resolution adopted 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, stated 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

[20] Annex 10, GCCIX letter to ICANN, dated Sept. 25, 2013.
[21] https://www.icann.org/resources/pages/13-17-2014-02-13-en
[22] 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

> 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 Communique had only stated that the GAC had reached consensus to reject the .GCC application, without any explanation whatsoever.

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. In other words, the same few people were tasked to reconsider their own decisions relating to the .GCC TLD – indeed all decisions arising from the New TLD Program. 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). No materials were posted to show any of the inputs into the BAMC's analysis, despite clear Bylaws requiring ICANN to publish all such materials.[23] 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 were 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 only by the NGPC sitting on behalf of the full Board. This same pattern recurred in almost every case. There has been no Reconsideration process provided to new gTLD applicants, even though it is

[23] *See, e.g., Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-00015004, Declaration of the IRP (29 July 2016) ¶ 149 (panel held that the Bylaws entitled the Board Governance Committee to ask the ICANN staff for its views, but required staff comments to "*be made publicly available on the Website*").

guaranteed by the Bylaws as incorporated into their applications. "Reconsideration" in the context of the New gTLD program has been nothing but a complete sham.

I. Cooperative Engagement? – No Cooperation, Engagement or Rationale

As strongly encouraged by ICANN's Bylaws, on February 5, 2014, the Claimant requested that ICANN engage in a Cooperative Engagement Process ("CEP") prior to filing this complaint for Independent Review. As stated in the preamble to the CEP Rules,[24] "the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP." In other words, the CEP is intended to cause **both** parties to "cooperatively engage" in settlement discussions, at least to narrow the issues in a subsequent IRP. Claimant's CEP Request fully complied with ICANN's CEP Rules, including Rule #1:

> the requesting party may invoke the cooperative engagement process by providing written notice to ICANN …, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue

During the CEP, in light of relevant IRP decisions discussed below, and in effort to discuss and narrow issues in this IRP, Claimant's counsel wrote two lengthy letters to ICANN -- on May 4, 2016, and August 19, 2019. ICANN never responded in any substantial manner to either of those letters, or to Claimant's 2014 CEP Request. ICANN refused to engage with Claimant in any substantive manner, in violation of CEP Rules which state: "ICANN is expected to participate in the cooperative engagement process in good faith." At minimum, good faith would have required some substantive written response and/or action from ICANN over seven years. Instead, ICANN said and did virtually nothing before terminating the CEP in May 2021.

[24] Annex 11, ICANN CEP Rules (2013).

J. Claimant Files IRP Complaint; ICANN 2021 Resolution; IRP Procedural History

On June 9, 2021, Claimant timely filed its first IRP Request with the ICDR. ICANN responded with an Emergency Motion to prevent Claimant from disclosing to the full IRP Panel their unanswered CEP correspondence to ICANN, as it allegedly constitutes "confidential settlement communications." On December 9, 2021, the Emergency Panelist issued an Interim Order punting that issue to the full IRP Panel. The next day, Claimant's filed an excised IRP Request. Then this IRP Panel was constituted.

Meanwhile, on September 12, 2021, the ICANN Board passed a resolution to "seek a stay of the .GCC IRP and open an informal dialogue with the GAC regarding the rationale for the GAC consensus advice on the .GCC application."[25] Two months later, on November 9, 2021, ICANN's President and CEO wrote to the GAC Chair to inform the GAC of the Board resolution and to open the informal dialogue with the GAC on this issue.[26] Two months later, on 25 January 2022, the GAC issued a letter[27] to Mr. Marby stating that the GAC had reviewed "GAC discussions from 2013" and that the rationale for the GAC Advice in the Beijing Communique was as follows:

- "The applied-for string (GCC) is an exact match of the known acronym for an Intergovernmental Organization (IGO), the Gulf Cooperation Council and as such, warrants special protection to its name and acronym.
- The application clearly targeted the GCC community without any support from the GCC, its six members or its community."

On February 10, 2022, in accord with Procedural Order No. 1, Claimant filed an Application for Review of the Emergency Panelist's Interim Order, and ICANN filed an Application to Stay the IRP. ICANN requested that the IRP be stayed so that the ICANN Board could consider what to do in

[25] Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), ICANN Ex. R-26.
[26] Letter from G. Marby (ICANN) to M. Ismail (GAC) (9 November 2021), ICANN Ex. R-28.
[27] Letter from M. Ismail (GAC) to G. Marby (ICANN) (25 January 2022), ICANN Ex. R-39.

response to the GAC's January 2022 letter, in light of Claimant's IRP Request and two prior, analogous and precedential IRP decisions relating to the .Africa and .Amazon gTLDs, discussed *infra*.

Both Applications were fully briefed, and on April 21, 2022, the Panel denied ICANN's Application to Stay the IRP via Procedural Order No. 2. The Panel found (at #42) that "ICANN has had ample opportunity and cause, particularly since the 2015 .AFRICA IRP decision, to review this matter with the GAC or otherwise re-evaluate its decision to deny GCCIX's gTLD application." Further, the Panel found (at #43) that "[c]ontrary to ICANN's contention, ICANN's consultation with the GAC and its request for a stay do not necessarily provide any of the relief GCCIX is requesting." Further (at #47), "ICANN contends that its ongoing activity may change the facts, claims and arguments in this IRP. But GCCIX is correct that any ongoing activity will not change the history of what has occurred." Finally, the Panel found (at #49):

> GCCIX is correct that its claims go beyond the mere denial of the application. While the denial of the .GCC application may have instigated this dispute, GCCIX has now raised an array of alleged wrongs relating to the handling of CEP, the IRP and other procedures that are of public concern and will not necessarily be advanced by delay.

On April 28, 2022, the Panel deemed the Emergency Panelist's Order re confidentiality of CEP communications moot, and ordered Claimant to file an Amended IRP Request in accord with Procedural Order No. 3. On May 19, 2022, Claimant timely filed its Amended IRP Request and 14 Annexes. On June 10, 2022, ICANN filed its Response and 38 Exhibits (including several referenced herein). The parties engaged in document discovery and motion practice for six months in accord with Procedural Order No. 4, which culminated on December 12, 2022, with Procedural Order No. 5 relating to GCCIX document requests as of that time. ICANN was to produce further documents by March 3, 2023. The IRP Panel and parties agreed to a briefing schedule, and this IRP was set for Final Hearing on October 3 to 6, 2023.

K. BAMC Review of 2022 GAC Letter; Claimant's Input and Questions

On June 12, 2022, the ICANN Board passed a resolution requesting the BAMC "to review, consider, and evaluate the underlying basis for the GAC consensus advice that the .GCC application should not proceed, the Board's acceptance of that advice, and relevant related materials; and … to provide the Board with recommendations regarding next steps."[28] On August 2, 2022, the BAMC requested any further response from Claimant to the GAC's January 2022 letter. On September 7, 2022, Claimant provided a responsive letter.[29] In that letter, Claimant requested "to know the full extent of the information relied upon by the GAC in crafting its letter of January 25, 2022, and to know of the procedure by which any 'informal dialogue' was conducted between GAC and the ICANN Board." Claimants further requested "to know the full extent of the process that the GAC employed in drafting its letter of January 25, 2022, and any authority in the Bylaws or otherwise for the GAC to issue such a letter purportedly as consensus GAC Advice." Furthermore, Claimant asked "is there any precedent for any such intersessional, purportedly consensus GAC advice to the ICANN Board, outside of a GAC Communique?"

Claimant further noted that the GAC's letter mentioned two sources of previously undisclosed information from 2013, that purportedly informed the GAC's 2021 analysis; namely, "GAC discussions held in closed sessions at ICANN46 in Beijing" and "requests from several GAC members … that the application should not proceed for the reasons highlighted in the GAC Early Warning." Claimant noted that no evidence of either those discussions or those requests had ever been disclosed despite Claimant's repeated requests. And so, Claimant again requested it, and asked further questions about it:

> ICANN must provide the unredacted evidence of any and all "discussions" held in Beijing about the .GCC application, and also the purported "requests" received from

[28] https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-06-2022-en#2.e
[29] Annex 15, Rodenbaugh Law letter to ICANN, 7 September 2022.

> those GAC members and the CCASG. Did they contain any rationale for their requests? Were there comments from any other governments about such requests? Were GCCIX' comments considered at the time? Was the Independent Objector's advice considered? Was the briefing and evidence filed at WIPO by GCCIX and by the UAE considered? What was the process by which the GAC advice was rendered "in closed sessions", and why and by what authority were the sessions closed?

Claimant further pointed the BAMC and GAC to the 2013 GAC Chair Heather Dryden's sworn testimony in the *.Africa* IRP hearing in 2015. In light of early GAC Early Warnings as to the .Africa application, Ms. Dryden explained back then:[30]

> 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.)

Claimant thus asked further pointed questions to the BAMC and GAC:

> How does ICANN and the GAC explain away Ms. Dryden's testimony now, exactly? Did the GAC consider that testimony in drafting its January letter? Did the GAC consider the .Africa IRP result? How does ICANN and the GAC explain why there should be any different result in GCCIX' pending IRP, than there was in the .Africa IRP?

Claimant then briefly summarized its longstanding positions, which were explained repeatedly to ICANN in writing prior to and during the Reconsideration process and the CEP. Namely:

- Supermajority GNSO Advice Precludes IGO Acronym Protection at Top Level
- ICANN and the GAC Improperly Terminated the UAE's Legal Rights Objection
- There Are Two Reasonable Options
    - The .GCC application should be returned to GDD processing, as with .Africa

> … Neither the Board nor GAC have explained how this .GCC case is any different from .Africa, as both TLDs are obviously targeted to a geographic community. Moreover, neither the Independent Objector nor any government objector filed a Community Objection, even though they had ample opportunity and ability to do so.

[30] *DotConnectAfrica Trust v. ICANN,* ICDR Case No. #50-2013-001083 (9 Jul 2015), pp.49-62 (".Africa Final Decision").

- Otherwise, GCCIX should be afforded at least the same facilitation as Amazon

> … With respect to both of the .Amazon and .GCC applications, regional governments have objected to the private operation of a TLD that allegedly corresponds to an informal name of that region. Neither the Board nor GAC have explained how this case is any different from that one, either. Did the GAC even consider this IRP decision when contemplating its January letter? How does it justify this disparate treatment of .GCC now?
>
> To be sure, GCCIX stands ready to discuss any specific concerns with its proposed governance model, if any, as our client has been eager and able to do since 2012. GCCIX is ready to discuss any other mutually acceptable resolution that allows GCCIX to give voice to the customers it seeks to serve through operation of the .GCC TLD, to recoup its investment in the TLD application, and to operate a successful global business. At minimum, ICANN and the GAC must step forward and facilitate that dialogue, with that stated goal, just as was done with .Amazon.

L. ICANN Resolution of April 30, 2023

Neither the BAMC nor the GAC responded to any of Claimant's questions, or asked for any further input from Claimant. There were no discussions, no interviews, no retention of independent experts to help the ICANN Board. Essentially there was absolute silence from ICANN for nine months. Suddenly, on April 30, 2023, the Board issued another resolution,[31] which also did not address any of Claimant's questions. Instead, the resolution glossed over all of those questions. It stated that:

> GAC had reviewed "GAC discussions from 2013" and that the rationale for the GAC Advice was as follows (and as expressed in the GAC Early Warning): (i) "The applied-for string (GCC) is an exact match of the known acronym for an Intergovernmental Organization (IGO), the Gulf Cooperation Council and as such, warrants special protection to its name and acronym."; and (ii) "The application clearly targeted the GCC community without any support from the GCC, its six members or its community."

It then resolved:

> the Board: (a) has analyzed the GAC Advice and other issues relating to the .GCC application, as well as the BAMC's recommendation; (b) reaffirms its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based on the second issue identified in the GAC's rationale for the GAC Advice,

[31] https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-30-04-2023-en#section2.d

based on the Board's evaluation of other materials relevant to the .GCC application, which are set forth in the Rationale and the Reference Materials, and based on the Board's determination that proceeding with the .GCC application is not in the public interest; and (c) directs the Interim President and CEO, or her designee(s), to continue to not proceed with the .GCC application.

II. SUMMARY OF ARGUMENT

A. Claimant's Longstanding IRP Claims.

For almost ten years, ICANN refused to provide any rationale whatsoever for the GAC's or the NGPC's rejection of the .GCC application. That is because there was and is no legitimate rationale for that decision. The ICANN Board refused to consider it for nearly a decade, nor to allow an expert to decide it a decade ago, because there is only one reasonable position -- that Claimant's application is "in the public interest." ICANN's own, specially-commissioned Policy Development Process resulted in a unanimous, binding decision to that effect – that IGO acronyms are not to be reserved at the top level for public policy reasons, namely that such acronyms should be available for use by parties other than IGOs, and of course IGOs were free to apply for their acronym as a TLD if they saw fit. The NGPC apparently found that advice inconvenient at the time and so ignored it, as the ICANN Board has ignored it throughout the ten years since. Claimant requests that ICANN follow its Bylaws by accepting the binding GNSO advice that IGO acronyms at the top level are **not** reserved for exclusive use of such IGOs.

Claimant requests equal treatment to other similarly situated gTLD applicants such as Amazon, Inc. (.Amazon) and DCA Trust (.Africa). Each of those applicants were forced to file IRP complaints when ICANN rejected their applications after governments objected, and each prevailed, with ICANN reversing itself and reimbursing the applicants' costs in both cases. Those two IRP cases cost ICANN more than $700,000 in fees paid to the ICDR and its panelists – not including the parties' legal fees. For good reason, IRP decisions are deemed precedential by ICANN's Bylaws.

The Bylaws also require that similarly situated parties be treated similarly by ICANN. The .Africa IRP decision required ICANN to disregard unsubstantiated and secretly devised GAC Advice, made also in the Beijing Communique, used by ICANN to reject that application. The decision required reversal of the resulting ICANN Board decision to reject the Complainant's application, and required ICANN to pay the Complainant's IRP costs of more than $300,000.[32] That decision should have substantially resolved this case, or at least narrowed the issues to be considered by this IRP panel.

ICANN violates its Bylaws by failing to provide relief to Claimant that was afforded Amazon and/or DCA Trust after their highly analogous IRP cases were decided and acted upon by ICANN. ICANN has just two reasonable options, consistent with past IRP precedents in highly analogous cases. Either the .GCC application must be returned to ICANN's GDD for processing, per the .Africa precedent; or, ICANN must facilitate a dialogue with GCCIX and the government objectors, as it has done with .Amazon – with the express purpose to allow GCCIX to run the TLD.

Given ICANN's efforts to engage Amazon, Inc. and Amazonian government objectors re .Amazon in dialogue, after the adverse IRP decision in that case, ICANN should provide the same facilitation to GCCIX and the Gulf state objectors – specifically, with the express view of reaching a "mutually acceptable solution to allow for the use" of .GCC as a top-level domain. ICANN has provided no rationale for failing to provide the same facilitation in this case.

Similarly, under identical circumstances with respect to the .Africa TLD applicant, an IRP panel held that ICANN violated its Bylaws by failing to provide any rationale from the GAC (in the Beijing Communique) or otherwise. So, as that panel specifically ordered, ICANN returned that application to processing without regard to the unsubstantiated GAC Advice. ICANN has no reason not to do the

[32] Annex 12, *DCA Trust v.* ICANN, Final Declaration, ¶28, 109, 148-150.

same with the .GCC application. ICANN should finish its processing of the application, and a Registry Agreement should be awarded.

ICANN has never substantively responded to Claimant's 2014 CEP Request, nor to Claimant's 2016 or 2019 letters during CEP. Instead, ICANN unilaterally and abruptly terminated the CEP in April 2021, also with no substantive explanation. That violated ICANN's CEP Rules requiring cooperative engagement, in good faith. ICANN never even gave Claimant the courtesy of any substantive written response, to four different letters during the CEP (nor to Claimant's 2022 letter to the BAMC). ICANN never attempted to narrow any issues in this IRP until long after it was filed. ICANN simply refused to engage at all in the CEP, in bad faith, for seven years.

ICANN has never explained why it terminated the fully-briefed WIPO Legal Rights Objection proceeding that was pending expert decision and analysis, rather than allow its own expert process to complete. ICANN also has never considered the unanimous GNSO policy advice re IGO acronym protection at the top level, despite its Bylaws plainly requiring that. Then, ICANN provided only a sham Reconsideration process, and a sham Cooperative Engagement processes to Claimant.

B. Claimant's New IRP Claims.

In September 2021 (eight years after accepting the 2013 GAC Advice), the ICANN Board finally admitted it did not have the rationale needed to avoid the loss of yet another Independent Review Process (this very case), and so resolved to try and finally obtain a legitimate reason from the GAC.[33] In an unprecedented move, ICANN this year finally

[33] *See* ICANN Board resolutions (section 2(b)) from September 21, 2021 (https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-12-09-2021-en#2.b). More specifically: "Whereas, in light of certain prior IRP Panel Declarations, the Board Accountability Mechanisms Committee (BAMC) discussed whether, in advance of proceeding with the current .GCC IRP, it would be helpful to

attempted to address the Claimant's application. In what can only be described as an attempt *post facto* to exonerate themselves from an adverse decision in this IRP, ICANN issued a self-serving non-independent decision which unsurprisingly created a new and wholly improper rationale to reject Claimant's application. Without any legitimate process as afforded in the AGB, ICANN now has attempted to justify its previous rejection of the application in a manner which seeks to avoid scrutiny from governments, but maintains the damage to Claimant. In adopting this very new and unprecedented mechanism for deciding disputes, ICANN yet again has violated its Bylaws by failing to follow its own Applicant Guidebook, and singling out Claimant for unprecedented disparate treatment.

In ICANN's new-found rationale for rejecting Claimant's application in 2023, ICANN states that "the Board decided to conduct an independent analysis of the GAC consensus advice that the .GCC application should not proceed (GAC Advice) and other issues relating to the .GCC application now, rather than waiting for the completion of the *GCCIX, W.L.L. v. ICANN* IRP (.GCC IRP)."[34] The first obvious question is whether a review by the ICANN Board, the very entity that made the decision to reject the application in the first place, can be "independent." The answer clearly is no. The Applicant Guidebook never stated that disputes should be decided by the ICANN Board, but rather that "The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections **during evaluation of the applications**. It allows a party with standing to have its objection considered before a panel of qualified experts." It mandated that disputes like this be resolved by "**qualified experts**" – not by the Board.

seek further information from the GAC regarding the rationale for the GAC consensus advice on the .GCC application."

[34] https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-30-04-2023-en

In what manner are the ICANN Board members qualified experts? They are not. At least not with respect to the reasons in which they ultimately denied Claimant's application in 2023 (a decade after the initial rejection). More specifically, ICANN now has decided to reject the application because it "lack[ed] support and involvement from the relevant community."[35] In other words, ICANN on its own, decided to conduct a Community Objection process without the use of the independent and qualified experts that were retained and trained by the International Chamber of Commerce to hear and decide Community Objections through a fair and transparent adversarial process.

A Community Objection is one where a third party can demonstrate *inter alia* that "There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string is targeted"[36] However, in conducting its own community objection process in secret, consulting only the GAC, ICANN ignores all of the criteria set forth in the Applicant Guidebook -- the criteria which all other parties had to prove in order to prevail in any other Community Objection. Indeed, in order to even have standing to make a Community Objection, the objector needs to be an established institution that has an ongoing relationship with a clearly delineated community.[37] Under the criteria set forth in the AGB, the GAC would not qualify as such an institution, nor would the UAE, and it is highly questionable whether even the CCASG is truly a representative of any defined community. It is the same as the notion that the United Nations is truly a representative of the entire world – a highly dubious proposition on which qualified experts might differ in their opinion.

[35] *Id.*
[36] AGB Section 3.2.1
[37] *Id.*

The AGB also required that objections must be filed by the posted deadline date (which was more than ten years ago in 2013), and was to be heard by the International Chamber of Commerce ("ICC"). "ICANN selected [the ICC] on the basis ot [its] experience and expertise."[38] In order to select the ICC to decide Community Objections, the AGB states that the selection process began with a public call for expressions or interest, followed by dialogue with candidates. Providers had to demonstrate among other things their subject matter expertise and had to have a selection process to "recruit panelists who will engender the respect of parties to the dispute."[39] In other words, the AGB clearly set forth the ICANN community and Board's requirements that applications rejected based on lack of support by the targeted community had to be decided by qualified independent subject matter experts. It never was intended that the ICANN Board, which is neither qualified nor independent, would be the ultimate dispute resolution provider and decider of Community Objections (or, for that matter, any of the four formal Objection processes set out in great detail in the AGB). But that is exactly what the ICANN Board has done.

ICANN only this year has feigned to explain how the .GCC decision by either the GAC or the NGPC is in the public interest, despite its Bylaws requiring that analysis ten years ago. Its newly concocted "rationale" flies in the face of contemporaneous sworn testimony of the GAC Chair in the *.Africa* hearing, stating unequivocally that there was no consensus GAC rationale for these missives from the Beijing Communique. That rationale relies upon a purported "community objection" which was not raised by the Independent Objector, nor by any purported community via the Community Objection procedure set forth in the AGB.

[38] *Id.* At Section 3.2.3
[39] *Id.*

Therefore, Claimant seeks Independent Review of the several actions and inactions of ICANN that have led to ICANN's rejection of Claimant's application, without any reason stated contemporaneously by ICANN either for the rejection or for any of the other actions or inactions described herein.

III. CLAIMANT'S REQUESTS FOR INDEPENDENT REVIEW

Based on the limited information available to date, Claimant timely seeks Independent Review of ICANN's actions and inactions to date, namely as follows, *inter alia*:

1) to accept GAC advice to reject the .GCC application, despite lack of any contemporaneous rationale provided by GAC for its advice, while failing to request rationale from the GAC, investigate the matter or otherwise consider the public interest for nine years;

2) to terminate the fully briefed WIPO Legal Rights Objection before it could be heard, without providing any rationale for refusing to consider a WIPO expert decision;

3) to refuse to accept the unanimous GNSO Council recommendation denying IGO acronym reservation at the top-level, without a 2/3 vote of the Board and articulation of reasons for the decision, without providing any rationale for doing so;

4) to refuse to consider the conflict between the NGPC decision to reject the .GCC application based on purported IGO name rights, and the GNSO PDP consensus against IGO acronym protection at the top level;

5) to to fail to provide meaningful review and to refuse Claimant's Request for Reconsideration as to the above actions and inactions, without providing any additional analysis or rationale, conducting any further investigation, or publishing the materials relied upon by the BAMC;

6) 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, after the *.Amazon* IRP decision was rendered;

7) to refuse to allow Claimant's application to proceed to contracting, as required by the .Africa (*DCA Trust*) 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, based also solely on the GAC's Beijing Communique;

8) to fail to cooperate in good faith to narrow the issues in this IRP, throughout a sham Cooperative Engagement Process that lasted more than eight years;

9) to fail to have a reasonable amount of evidence and analysis before it when making the decisions in both the 2013 and 2023 resolutions to reject Claimant's application;

10) to fail to exercise independent judgment in making both of those decisions, and various intermediate decisions.

IV. 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 2013 NGPC decision rejecting the .GCC application, the 2023 Board decision reaffirming the 2013 decision, and other actions and inaction, ICANN has failed to exercise due diligence and care in having a reasonable factual record in front of it, and has failed to exercise independent judgment in taking that decision as well as various intermediate 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 for almost ten years.

A. ICANN's Core Values That Have Been Violated

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.

ICANN has employed a closed, secret policy development mechanism as to this application, disallowing an otherwise allowed application without any explanation whatsoever until well after this IRP was filed. 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.

In addition, by its 2023 "reaffirmation" of its 2013 decision, ICANN has created a new process (without community review) to administer its own community-based objection process without any of the criteria or protections provided in the Applicant Guidebook for Community Objections. By deciding to reject the application for failure to have support from the alleged community being targeted, ICANN substituted itself and its own judgement for that of the International Chamber of Commerce, the very entity selected by ICANN to hear such disputes because of their subject matter expertise. Whether or not an application improperly targets a community is a difficult decision that requires expertise that neither the ICANN legal department nor the ICANN Board have. Neither the IO, the UAE or the CCASG even attempted to make such a claim, even though all were in position to do so. By conducting this new made-up and unreviewed process, it is clear that the ICANN Board never intended to treat the Claimant's application fairly, but rather, has implemented a secret solely designed to reaffirm its original decision and appease the GAC.

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. ICANN in its 2023 resolution usurps the role of the Community Objection procedure, deeming itself the arbiter of a community objection that was never actually raised by any bona fide community.

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

ICANN for nearly ten years 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 LRO determination that was briefed and pending decision, which it had designed for specifically that purpose -- without even asking either of the parties. ICANN did not conduct a Community Objection procedure as documented in the AGB. ICANN has also refused to facilitate any discussion between GCCIX and CCASG, as it facilitated in the .Amazon matter. ICANN has failed to faithfully 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 provided for nearly ten years. Then in 2023 it essentially deemed the CCASG to have prevailed in a Community Objection procedure that the CCASG never did assert.

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 nine years, ICANN steadfastly refused to even try to justify its decision. Its belated, concocted 2023 resolution is a weak attempt to rewrite the history of the matter, and find a "Community"-based rationale – and effectively decide a Community Objection -- that was never asserted in accordance with the AGB. Indeed, none of the due process or decision-making criteria thoroughly detailed in the Applicant Guidebook with respect to the Community Objection process has been provided to Claimant.

B. ICANN Created New Policy, Without Community Input, Which Accepts Effective Government Veto of Applications for Any Reason Or No Reason.

The 2012 resolution, reaffirmed in 2023, effectively grants to the GAC an absolute veto of Claimant's application. This despite Claimant paying $185,000 in application fees to ICANN, and passing ICANN's onerous operational, technical and financial evaluations documented in the AGB. This also despite the complete lack of any contemporaneous 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 before effectively deciding a Community Objection that was never actually asserted. The GAC Advice, Independent Objector, Legal Rights Objection and Community Objection processes all were carefully designed and documented by the entire ICANN Community in the exhaustive AGB, 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 nor the BAMC 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. And now the Board has *sua sponte* raised and decided a Community Objection without even paying lip service to the very detailed requirements for such an objection process, as thoroughly detailed in the AGB.

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 objection processes for <u>all</u> 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 vague and illusory government concerns — devising a secret process to kill Claimant's investment and opportunity, and completely disregarding the public interest in delegating the TLD for regional use. Not once has the GAC, NGPC, BAMC or ICANN Board stated any reason why GCCIX is purportedly unqualified to operate the .GCC TLD. To the contrary, GCCIX passed all of ICANN's evaluations, passed muster of the Independent Objector, and participated in the LRO process which might have legitimately defeated the

application if the UAE were successful. GCCIX also would have participated in any Community Objection process that any purported community could have raised, and if successful then that would have legitimately defeated the application. But ICANN terminated the LRO process in 2014, and now in 2023 has vaguely stated and decided a Community Objection *that was never actually or properly raised by any purported community.*

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, about GAC advice, and about Community Objections.

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. And now ICANN has created a sham Community Objection process that it has raised and decided on its own, without resort to the AGB process designed to adjudicate such matters through due process and independent expert decision.

No reasonable or legitimate basis exists for ICANN's repeated decisions 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, other than raising the specter of a possible Community Objection that was never brought, and then deciding that Objection in favor or a purported Community that has never been established in accord with the AGB-mandated process. The GAC veto has been granted inequitably without community input or transparency, demonstrating disparate treatment of Claimant.

C. ICANN Ignored 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. The BAMC then did essentially the same thing again, ten years later.

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 and Community Objection processes, and generally should consider the advice of such specialized experts who are tasked to carefully analyze such matters via defined

criteria and documented processes thoroughly stated in the AGB. 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. Instead, the NGPC refused to adopt a recommendation that affirms the propriety of this application, and the BAMC and Board have since ignored that recommendation for ten years running. Indeed, ICANN has resolved a separate and inequitable policy to bury just this application without GNSO or community input. For almost ten years, ICANN never even attempted to explain how this application could possibly fail the public interest. The recently concocted rationale is fanciful, and has no legitimacy because the AGB devised a specific and thorough process for Community Objections, and no such objection was ever filed. Nor can any such objection be properly adjudicated by ICANN, because that role was delegated to independent and specially trained expert panels constituted by the International Chamber of Commerce. 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. The recent "reaffirmation" is no better.

D. ICANN Refuses To Acknowledge That IRP Decisions Are Binding And Precedential, Thus 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.[40]

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.[41]

Those decisions should have substantially resolved this case, or at least drastically narrowed the issues to be considered by this IRP panel. At least, they should have forced ICANN to request transparent, documented rationale from the GAC so that ICANN, the

[40] *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…."

[41] Annex 14, *Amazon v. ICANN*, Final Declaration, ¶89, 96-106, 112-119, 124-126.

community and Claimant all could evaluate it. Yet ICANN refused for nine years to even take that step, and still refuses 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.

Instead, ICANN intentionally drives up Claimant's costs and time to decision in this matter, 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, including without limitation Claimant's lost application and consulting fees in submitting the TLD application, and subsequent attorneys' fees and costs in seeking Reconsideration, Cooperative Engagement, and Independent Review in accord with ICANN's bylaws.

V. RELIEF REQUESTED

GCCIX respectfully requests that the IRP Panel find that ICANN has violated its Bylaws in all of the aforementioned ways. GCCIX urges the Panel to order that ICANN follow the precedent of the .Africa decision, disregard the unsubstantiated GAC advice to reject that application, and return the application to processing. Alternatively, GCCIX urges the Panel to order that ICANN facilitate dialogue with the government objectors, with the stated aim to permit GCCIX to operate the .GCC TLD in accord with a mutually agreed governance model such as GCCIX has proposed from the start. 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.

Annex 11 – ICANN CEP Rules (2013)

Annex 12 – *DCA Trust v. ICANN*, Final Declaration

Annex 13 – ICANN DIDP Response

Annex 14 – *Amazon v. ICANN*, Final Declaration

Annex 15 – GCCIX letter to ICANN dated Sept. 7, 2023