

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN'S RESPONSE TO GCCIX'S REQUEST FOR
INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) responds to Claimant GCCIX, W.L.L.’s (“Claimant”) redacted Request for Independent Review Process submitted on 9 December 2021 (“IRP Request”).

1. In 2012, ICANN launched the long-anticipated and long-planned New gTLD Program, under which any interested party could apply to ICANN to operate new generic top-level domains (“gTLDs”) that were not already in use on the Internet. A gTLD, like .COM or .NET, is a registry in which consumers and entities can register Internet domain names.

2. Claimant submitted to ICANN the sole application to operate a .GCC gTLD. As Claimant must have expected, the application encountered immediate opposition because “GCC” is the well-known acronym for the Gulf Cooperation Council,¹ an Intergovernmental Organization (“IGO”) that consists of six Gulf countries including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates. Claimant’s application was not affiliated with, or supported by, the GCC or its member states and Claimant never identified any efforts to seek the GCC’s consent before submitting its application.

3. Given this lack of a connection between Claimant and the GCC, Claimant’s .GCC application faced multiple challenges. First, numerous public comments were submitted to ICANN in opposition to the .GCC application because it was identical to an IGO acronym and Claimant did not have the support of the GCC or the targeted community. As far as ICANN is aware, Claimant did nothing to address or even acknowledge these public comments.

4. Second, ICANN’s Governmental Advisory Committee (“GAC”), which is made up of national governments and IGOs, issued an “Early Warning” notifying ICANN and Claimant that certain GAC members had “serious concerns” with the .GCC application. Although given the opportunity, it appears that Claimant did not address these serious concerns with the GAC, the GCC or the GCC’s member states.

¹ This IGO is also known as the Cooperation Council for the Arab States of the Gulf.

5. Third, ICANN's Independent Objector ("IO"), which was charged with lodging objections to new gTLD applications in the best interests of global Internet users, excoriated Claimant's .GCC application and found that the application was "contrary to international public order." Claimant's response to the IO, however, was merely legal arguments challenging the GCC's claim that it had legally-protected interests in its acronym.

6. Fourth, the GCC filed a formal Legal Rights Objection ("LRO") against the .GCC application, alleging that the .GCC application infringes on the existing legal rights of the GCC under generally accepted and internationally-recognized principles of law. Claimant responded to that filing with more legal argument against the GCC's claimed rights.

7. Finally, in 2013, the GAC issued to the ICANN Board consensus advice that the .GCC application should not be approved, which according to the New gTLD Program rules created a strong presumption for the ICANN Board that the application should not proceed. Knowing that the GAC's rationale for the consensus advice against the application was that contained in the GAC's Early Warning, which was consistent with the public comments, the IO report and the GCC's LRO, Claimant responded to that GAC rationale with argument as to why the GAC had no legal interest in the GCC acronym, but never identified any engagement with the community its application targeted or any support for its application. Ultimately, in June 2013, the ICANN Board determined that Claimant's application should not proceed any further.

8. Since then, two IRP panels have separately issued final declarations, in 2015 and 2017, relating to Board acceptance of GAC consensus advice regarding other new gTLDs, finding that the rationale for accepting the GAC consensus advice in those instances was not sufficient. In light of these prior IRP decisions, Claimant asserts, among other things, that the Board's acceptance of the GAC advice against the .GCC application was not consistent with ICANN's Bylaws. While the Board did not have the benefit of those prior IRP decisions when it accepted the GAC consensus advice regarding .GCC in 2013, and the evidence indicates that the GAC's rationale for the advice against the .GCC application was clear to the ICANN Board and to Claimant, the ICANN Board nevertheless recently decided to seek further information from

the GAC regarding its rationale for the GAC consensus advice on the .GCC application. Specifically, in September 2021, the ICANN Board adopted a resolution authorizing ICANN to seek a stay of this IRP and open a dialogue with the GAC regarding the rationale for the GAC consensus advice on the .GCC application, noting that such discussions with the GAC could provide valuable information that may be beneficial to reaching a determination as to the next steps regarding this IRP and the .GCC application. That dialogue is currently underway.

9. Because this Board resolution and resulting GAC dialogue provides Claimant with much of the relief it seeks in this IRP, ICANN asked Claimant to agree to a stay of this IRP, but Claimant refused, opting again to continue litigating. Not only does the ICANN-GAC dialogue go to the core allegations and requested relief in Claimant’s IRP Request, but ICANN’s subsequent actions as a result of that dialogue could moot this IRP or, at the very least, significantly alter the factual landscape of the IRP. Accordingly, it is ICANN’s view that this IRP should be stayed until ICANN completes this process with the GAC² and the full factual record of this IRP is developed, to the extent necessary.

10. Claimant’s remaining, peripheral claims regarding various ICANN actions and inactions are unsupported because ICANN complied with its Articles and Bylaws.

SUMMARY OF RELEVANT FACTS

I. ICANN AND THE NEW GTLD PROGRAM.

11. ICANN was formed in 1998, as a California nonprofit public benefit corporation. As set forth in ICANN’s Bylaws,³ its mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”⁴ Part of ICANN’s work includes oversight of the top-level domains used in the Internet’s domain name system (“DNS”), including gTLDs, which is

² Since Claimant would not agree to stay the IRP, the deadline for ICANN’s response to the IRP Request came due before the Panel was convened. ICANN will be filing a request to stay the IRP from the full IRP Panel, once constituted, and reserves all rights to supplement this response following the dialogue with the GAC.

³ All references to the Bylaws are to the 11 April 2013 Bylaws, which were in place in June 2013 when the ICANN Board removed Claimant’s application from consideration, unless otherwise noted.

⁴ Bylaws, Art. I, § 1, Ex. R-1.

the portion of a domain name to the right of the final dot (such as “.COM” or “.GOV”).

12. In its early years, ICANN focused on increasing the number of companies that could sell domain name registrations to entities and individuals within then existing gTLDs, known as “registrars,” in order to increase competition and consumer choice. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. The New gTLD Program, which the ICANN Board approved in June 2011, constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system.⁵

13. Under the New gTLD Program, any interested party could apply for the opportunity to operate new gTLDs that were not already in use in the DNS. The New gTLD Program arose from policy recommendations by ICANN’s Generic Names Supporting Organization (“GNSO”), which were developed by the community during the period beginning in 2005 and ending in 2007.⁶ On 26 June 2008, the ICANN Board adopted the GNSO’s policy recommendations and directed the ICANN organization to develop an implementation plan for the New gTLD Program, which the Board approved.⁷

II. THE APPLICANT GUIDEBOOK.

14. A key part of this implementation plan was creation of the New gTLD Applicant Guidebook (“Guidebook”), which establishes the process for evaluating new gTLD applications. The Guidebook was based on ICANN community input over several years and several iterations.⁸ In 2008, ICANN published the first version of the Guidebook calling for public comment.⁹ Revisions were made, and additional comments were received. That process repeated many times until, ultimately, ICANN went forward with the New gTLD Program based on the 4 June 2012 version of the Guidebook.¹⁰

⁵ ICANN Approved Board Resolutions | Singapore (20 June 2011), Ex. R-2.

⁶ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), Ex. R-3.

⁷ ICANN Adopted Board Resolutions | Paris (26 June 2008), Ex. R-4.

⁸ ICANN gTLD Applicant Guidebook (“Guidebook”), Preamble, Ex. R-5.

⁹ ICANN | Archives, Applicant Guidebook, Ex. R-6.

¹⁰ *See generally*, Guidebook.

15. The Guidebook is divided into “Modules,” with Module 1 being the “introduction,” Module 2 containing the “evaluation procedures,” Module 3 containing the “objection procedures,” and so forth.¹¹ These Modules provide a step-by-step procedure for new gTLD applicants. They specify what documents and information are required, what applicants can expect during the evaluation periods, and the dispute resolution procedures that could be invoked to object to new gTLD applications.

16. Given the importance of the involvement of governments in ICANN’s governance model, ICANN’s Governmental Advisory Committee (“GAC”), which is open to national governments and IGOs, was given a specified role in the Guidebook in providing advice to ICANN on new gTLD applications, particularly applications that “potentially violate national laws or raise sensitivities.”¹² Accordingly, the Guidebook allows the GAC to issue an “Early Warning” notice concerning individual applications.¹³ An Early Warning is intended to provide the applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments and to give the applicant the opportunity to withdraw its application (and receive an 80 percent refund of the application fee) or to continue the application, which “may include meeting with representatives of the relevant government(s) to try to address the concern.”¹⁴ Applicants are advised that an Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of further GAC advice against the application at a later stage in the process.¹⁵

17. The Guidebook also sets out a process whereby the GAC may issue advice to ICANN concerning applications. If the GAC “advises ICANN that it is the consensus of the GAC that a particular application should not proceed,” then this consensus advice “will create a

¹¹ See generally, Guidebook.

¹² *Id.*, §§ 1.1.2.4, 3.1.

¹³ *Id.*, § 1.1.2.4.

¹⁴ *Id.*, § 1.5.1.

¹⁵ *Id.*, § 1.1.2.4.

strong presumption for the ICANN Board that the application should not be approved.”¹⁶ GAC consensus advice concerning an application is published and ICANN promptly notifies the applicant, who may then submit a response to the GAC advice for consideration by the Board. The Board is required to consider the GAC Advice “as soon as practicable.”¹⁷

18. The Guidebook further provides that an appointed Independent Objector (“IO”)—who “does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet”—may file a formal objection to a gTLD application.¹⁸ The IO was put in place to further the public interest, and is therefore “limited to filing objections on the grounds of Limited Public Interest and Community.”¹⁹

19. In addition, a person or entity that meets the standing requirements is entitled to file a formal objection to an application on four separate grounds, one of which is a legal rights objection (“LRO”).²⁰ An LRO is meant for situations in which an “applied-for gTLD string infringes the existing legal rights of the objector.”²¹ This objection could be filed by an IGO if certain criteria are met, including that the organization is “widely considered to have independent international legal personality” and is “the subject of and governed by international law.”²² LRO proceedings were administered by the World Intellectual Property Organization and Mediation Center (“WIPO”).²³

20. An applicant is offered a Registry Agreement with ICANN to become a new gTLD registry operator only if the applicant passes evaluation as set forth in Module 2, and resolves any objection proceedings and any contention proceedings as set forth in Module 3.

21. In 2012, ICANN received 1,930 applications to operate new gTLDs.²⁴ To date,

¹⁶ *Id.*, § 3.1.

¹⁷ Guidebook, § 3.1.

¹⁸ *Id.*, § 3.2.5.

¹⁹ *Id.*

²⁰ *Id.*, § 3.2.1.

²¹ *Id.*

²² *Id.*, § 3.2.2.2.

²³ *Id.*, § 3.2.3.

²⁴ ICANN New gTLD Program Statistics, Ex. R-7.

1,239 new gTLDs have been introduced into the DNS, making the New gTLD Program an undeniable success in providing options to consumers. The vast majority of these new gTLD applications completed the process set forth in the Guidebook without objection. However, a handful of applications, such as those for .ISLAM, .HALAL, .PERSIANGULF, .THAI and Claimant's .GCC application, encountered significant challenges based on the applied-for names.

III. CLAIMANT'S APPLICATION FOR .GCC AND OBJECTIONS THERETO.

22. In 2012, Claimant submitted to ICANN the sole application to operate a .GCC gTLD.²⁵ Claimant's application foreshadowed the controversy it would stir:

GCC refers generally, but not exclusively, to the Cooperation Council for the Arab States of the Gulf.²⁶ Formed in May 1981 as a regional organization, it consists of six Gulf countries including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates. Its main objectives are to enhance coordination, integration and inter-connection between its members in different spheres. *This application is not connected with or sponsored by the Council. .GCC does not purport to represent the Council.*²⁷

Given this lack of connection with, and support from, the Gulf Cooperation Council (commonly referred to as the "GCC"), several objections were raised regarding Claimant's .GCC application.

23. Between July and September 2012, numerous public comments were issued to ICANN with respect to the .GCC application, virtually all of which were opposed to the application.²⁸ Comments came from several Gulf countries, but also entities and individuals, and their sentiment was the same; they objected to the .GCC application because it is the well-known acronym of the GCC and Claimant did not have support from the community it targeted.²⁹

24. Then, on 20 November 2012, the GCC, along with the governments of Bahrain, Oman, Qatar and United Arab Emirates, issued a GAC Early Warning notice regarding the .GCC

²⁵ New gTLD Application submitted to ICANN by GCCIX W.L.L., Annex 1 to IRP Request.

²⁶ The Cooperation Council for the Arab States of the Gulf is also known as the Gulf Cooperation Council.

²⁷ Annex 1 to IRP Request, p. 7 (emphasis added).

²⁸ ICANN New gTLD Program Application Comments, Ex. R-8.

²⁹ *Id.*

application.³⁰ The Early Warning detailed “serious concerns” with Claimant’s .GCC application on two fronts: (i) because the applied-for gTLD “exactly matches a name of an Intergovernmental Organization,” namely the GCC, the Early Warning asserted that “it should not be allowed to be registered as a gTLD unless sufficient approvals are obtained from the IGO”³¹; and (ii) the Early Warning noted that the .GCC application “clearly shows that the applicant is targeting the GCC community which basically covers the 6 member states of the GCC,” but the application “[lacked] . . . community involvement and support.”³² According to the Early Warning:

[T]he applicant did not consult the targeted community in regards to launch of the proposed TLD, its strategy and policies. The applicant did not obtain any endorsement from the GCC Secretariat General or any of its organizations, or any governmental or nongovernmental organization within the GCC member states. The applicant did not present any endorsement or support letters in its application.³³

25. The Early Warning advised Claimant that “ICANN strongly encourages you to work with relevant parties as soon as possible to address the concerns voiced in the GAC Early Warning.”³⁴ The Early Warning also advised Claimant that “ICANN strongly encourages you to contact gacearlywarning@gac.icann.org as soon as practicable regarding the issues identified in the Early Warning.”³⁵ The Early Warning further stated that “[i]f you choose to continue with the application, then the ‘Applicant’s Response’ section below should be completed. In this section, you should notify the GAC of intended actions, including expected completion date.”³⁶ Despite these advisements, and similar directions in the Guidebook,³⁷ as far as ICANN is aware,

³⁰ GAC Early Warning – Submittal GCC-AE-21010, Ex. R-9.

³¹ *Id.*

³² *Id.*, p. 2.

³³ *Id.*

³⁴ *Id.*, p. 3.

³⁵ *Id.*, p. 4.

³⁶ *Id.*

³⁷ Guidebook, § 1.1.2.4 (“To reduce the possibility of a GAC Early Warning, all applicants are encouraged to identify potential sensitivities in advance of application submission, and to work with the relevant parties (including governments) beforehand to mitigate concerns related to the application.”).

Claimant did not contact any of the complaining governments, the GCC or the GAC, and did not complete the “Applicant’s Response” section of the Early Warning.

26. Next, the IO reviewed Claimant’s .GCC application and identified the obvious “public concerns on this controversial application.”³⁸ In its IRP Request, Claimant asserts that it was “Claimant’s written position and evidence presented” that caused the IO to not object to the application.³⁹ Nothing could be further from the truth; the IO found multiple reasons to object.

27. The IO first examined the “numerous” public comments made on the application and noted that “[m]ost of the comments against the application raise identical issues:”

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.⁴⁰

28. The IO next noted “that international organizations have tasks and purposes of a fundamental importance for the international society, including *inter alia* international peace and security, public health, sustainable economic and social development, children and women’s rights, protection of minorities and refugees or peacekeeping operations.”⁴¹ The IO also noted that “a misuse of the Internet as a communication tool, notably through the direct reference to the acronym of an international organization, could harm the causes advanced by these organizations.”⁴² Thus, the IO concluded that “it is reasonable to assume that the use and management of the acronym of an international organization, in this case the Gulf Cooperation Council, by a third party which did not receive the endorsement from the said organization could

³⁸ Annex 3 to IRP Request, p. 1.

³⁹ IRP Request, p. 8.

⁴⁰ Annex 3 to IRP Request, p. 1.

⁴¹ *Id.*, ¶ 7.

⁴² *Id.*, ¶ 8.

have adverse effects on the mission pursued by the organization.”⁴³ The IO further concluded that “the application is contrary to international public order.”⁴⁴

29. The IO also set forth his “opinion that, the applied for gTLD string explicitly targets the community of the Arab States of the Gulf, even if the applicant indicates that the application does not intend to represent the international organization itself.”⁴⁵ “[T]hat five of the six governments as well as the international organization directly targeted by the gTLD expressed their disagreement with the application, it must be considered that there is an *obvious and substantial opposition from a significant portion of the community*.”⁴⁶

30. Despite bases for objecting to the application, the IO chose not to based, not on Claimant’s evidence and presentations, but on the reasoning 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 appropriate.”⁴⁷

31. Accordingly, on 13 March 2013, the GCC did just that by filing an LRO with WIPO against Claimant’s application.⁴⁸ The GCC argued (among other things) that the applied for string “infringes the existing legal rights of the objecting IGO as recognized and enforceable under generally accepted and internationally recognized principles of law.”⁴⁹

32. Finally, on 11 April 2013, the GAC issued its Beijing Communiqué to ICANN, which contained several points of advice to ICANN, including GAC consensus advice that the .GCC application should not proceed.⁵⁰ As noted above, the Guidebook states that GAC consensus advice against an application creates “a strong presumption for the ICANN Board that

⁴³ *Id.*, ¶ 13; *see also id.*, ¶ 9 (“For the purpose of this evaluation, the IO is of the opinion that applications for a ‘.GCC’ gTLD could raise problems with regards to international public order and legal norms of morality.”).

⁴⁴ *Id.*, ¶ 13.

⁴⁵ *Id.*, ¶ 2.

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Id.*, p. 10.

⁴⁸ Gulf Cooperation Council v. GCCIX W.L.L. Legal Rights Objection (13 March 2013), R-10.

⁴⁹ *Id.*, p. 6.

⁵⁰ GAC Communiqué – Beijing, People’s Republic of China, p. 3 (11 April 2013), Ex. R-11.

the application should not be approved.”⁵¹

33. As set forth in the Guidebook, Claimant was given an opportunity to respond to the GAC consensus advice and state its case to ICANN, which Claimant did. And despite asserting in this IRP that Claimant was completely in the dark as to the GAC’s rationale, Claimant’s written response to that GAC advice, in May 2013, tells a different story. In its response, Claimant states that ICANN Board member Cherine Chalaby, who was the Chair of the Board’s New gTLD Program Committee (“NGPC”),⁵² informed Claimant that it was “the ICANN Board New gTLD Program Committee’s understanding that the GAC [...] based on the rationale contained in the Early Warning has reached a consensus to object.”⁵³

34. As such, Claimant’s May 2013 response to the GAC consensus advice responded to both of the rationales set forth in the Early Warning.⁵⁴ Claimant, however, responded with only legal arguments; nowhere did Claimant ever indicate that it had made any attempts to interact with or work with the GCC or the people and institutions the GCC represents.⁵⁵

35. On 8 May 2013, the NGPC met to consider a plan for responding to the GAC advice contained in the Beijing Communiqué.⁵⁶ On 10 May 2013, ICANN’s Chair of the Board informed the GAC of the NGPC’s plan,⁵⁷ and the NGPC shared with the ICANN community its progress in considering the Beijing Communiqué and what steps were still to be taken, which included soliciting input from applicants and from the community.⁵⁸

36. ICANN staff prepared a Board paper for use in evaluating the GAC’s advice on

⁵¹ Guidebook, § 3.1(I).

⁵² The NGPC was comprised of all ICANN Board members who did not have a conflict of interest relating to the New gTLD Program, in addition to two non-voting liaisons. It was formed at the 10 April 2012 meeting of the ICANN Board and was delegated with the full legal decision making authority of the Board in matters concerning the New gTLD Program.

⁵³ GCCIX W.L.L. GAC Advice Response Form, Ex. R-12.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Letter from S. Crocker (ICANN) to H. Dryden (GAC) (10 May 2013), Ex. R-13.

⁵⁷ *Id.*

⁵⁸ NGPC Progress on GAC Advice (10 May 2013), Ex. R-14.

the .GCC application and other issues,⁵⁹ which summarized Claimant’s response to the GAC advice.⁶⁰ ICANN staff also recommended that the Board review Claimant’s response in its entirety when evaluating the GAC consensus advice against the application.⁶¹

37. On 4 June 2013, the NGPC discussed the GAC consensus advice regarding the .GCC application⁶² and ultimately resolved to accept the advice and to direct that processing of Claimant’s .GCC application be halted, which ultimately mooted the GCC’s pending LRO.⁶³ Claimant was invited to either withdraw its application and receive a partial refund or seek relief according to ICANN’s Accountability Mechanisms.⁶⁴ Claimant chose the latter.

IV. ICANN’S ACCOUNTABILITY MECHANISMS.

38. To help ensure that ICANN is serving and remains accountable to the global Internet community, the ICANN community established several Accountability Mechanisms in ICANN’s Bylaws that allow certain aggrieved parties to challenge or seek review of ICANN actions that allegedly harmed those parties. For instance, ICANN’s Bylaws provide for a process by which “any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board” (“Reconsideration Request”).⁶⁵ Reconsideration Requests are elevated to a committee of the ICANN Board, previously the Board Governance Committee (“BGC”) and currently the Board Accountability Mechanisms Committee (“BAMC”), empowered to hear, consider and recommend to the Board whether to accept or deny a Reconsideration Request.⁶⁶ Under the Bylaws in place when the NGPC accepted the GAC consensus advice, a Reconsideration Request had to be submitted as follows: (1) if challenging Board action, within 15 days of the posting of the relevant Board resolution; or (2) if challenging

⁵⁹ ICANN Board Paper re Summary & Analysis of Applicant Responses to GAC Advice (31 May 2013), Ex. R-15.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Minutes | New gTLD Program Committee (4 June 2013), Ex. R-16.

⁶³ Annex 1 to NGPC Resolution No. 2013.06.04.NG01 (4 June 2013), Ex. R-17; Approved Resolution | Meeting of the New gTLD Program Committee (4 June 2013), Ex. R-18.

⁶⁴ Ex. R-17.

⁶⁵ Bylaws, Art. IV, § 2.1.

⁶⁶ *Id.*, Art. IV, § 2.3.

staff action, within 15 days of the requestor becoming aware of the staff action.⁶⁷

39. The Bylaws also provide a process by which a party that was allegedly materially and adversely affected by an ICANN Board action or inaction may submit its claims to an “independent third-party” for review – the IRP.⁶⁸ IRP requests are submitted to the ICDR, and are governed by ICDR rules, ICANN’s Bylaws, and the Interim Supplementary Procedures.

40. The Bylaws encourage a claimant to participate in a Cooperative Engagement Process (“CEP”) prior to initiating an IRP, which is 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.”⁶⁹ The CEP is akin to a settlement conference and, therefore, the Bylaws provide that “[a]ll matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.”⁷⁰ CEP confidentiality encourages open communications and candor between the parties during the CEP and encourages the parties to attempt to resolve or narrow the issues in order to try to save the parties the time and expense of an IRP.

V. CLAIMANT INVOKED VARIOUS ACCOUNTABILITY MECHANISMS REGARDING ICANN’S ACCEPTANCE OF THE GAC CONSENSUS ADVICE.

41. On 14 November 2013, Claimant submitted a Reconsideration Request to ICANN challenging the NGPC’s June 2013 acceptance of the GAC advice against Claimant’s application.⁷¹ The BGC considered Claimant’s Reconsideration Request, but recommended denying the Reconsideration Request on the ground that it was untimely (among other reasons).⁷² Specifically, the challenged NGPC action was published on ICANN’s website on 6 June 2013, but Claimant did not submit the Reconsideration Request until November 2013, well outside the

⁶⁷ *Id.*, Art. IV, § 2.5.

⁶⁸ *Id.*, Art. IV, § 3.1.

⁶⁹ *Id.*, Art. IV, § 3.14.

⁷⁰ *Id.*, Art. IV, § 3.17.

⁷¹ GCCIX W.L.L. Request for Reconsideration 13-17 (14 November 2013), Ex. R-19.

⁷² Recommendation of the BGC, Reconsideration Request 13-17 (8 January 2014), Ex. R-20.

15-day requirement.⁷³ The NGPC voted to adopt the BGC’s recommendation on 30 January 2014, and denied the Reconsideration Request.⁷⁴

42. In February 2014, Claimant initiated a CEP with ICANN regarding the Board’s action on the .GCC application.⁷⁵ The parties continued to discuss the issues for several years, but failed to come to a resolution.⁷⁶ Claimant therefore initiated this IRP in June 2021.⁷⁷

43. Claimant’s IRP Request challenges ICANN’s acceptance of the GAC consensus advice.⁷⁸ Specifically, Claimant’s IRP Request challenges ICANN’s alleged decisions: (i) “to accept GAC advice to reject the .GCC application, despite lack of any rationale provided by GAC for its advice;” (ii) “to refuse to request rationale from the GAC, investigate the matter or otherwise consider the public interest;” and (iii) “to refuse to provide any rationale for the NGPC decision to accept GAC advice[,]” among others.⁷⁹

VI. THE BOARD’S RECENT RESOLUTION REGARDING THIS IRP.

44. On 12 September 2021, the ICANN Board considered this IRP in light of two IRP final declarations that were issued after the NGPC’s 2013 acceptance of the GAC advice regarding the .GCC application. Specifically, in July 2015, an IRP panel in the *DCA v. ICANN* IRP ruled that ICANN’s acceptance of GAC consensus advice against a .AFRICA application that lacked a rationale was inconsistent with ICANN’s Articles and Bylaws.⁸⁰ After the *DCA* Panel issued its final declaration, the ICANN Board resolved to take several steps, including asking the GAC if “it wishes to refine that advice [on .AFRICA] and/or provide the Board with

⁷³ *Id.*, p. 2.

⁷⁴ Approved Resolutions | Meeting of the New gTLD Program Committee (30 January 2014), Ex. R-21.

⁷⁵ Cooperative Engagement and Independent Review Processes Status Update (18 May 2021), Ex. R-22.

⁷⁶ The Claimant always had the option of unilaterally terminating the CEP and ending settlement discussions with ICANN, but chose not to do so.

⁷⁷ Claimant’s original IRP Request also contained a series of allegations and descriptions of the parties’ confidential CEP discussions. After Claimant refused to remove these allegations from its IRP Request, ICANN requested the appointment of an Emergency Panelist to rule on ICANN’s Application to Strike the CEP allegations. On 8 December 2021, the Emergency Panelist issued his decision ordering Claimant to file a new IRP Request with the CEP allegations “excised” from the text.

⁷⁸ *See generally*, IRP Request.

⁷⁹ *Id.*, pp. 18-19.

⁸⁰ *DotConnectAfrica Trust v. ICANN*, Final Declaration ¶ 113 (9 July 2015), R-23.

further information regarding that advice.”⁸¹

45. Then, in July 2017, an IRP panel in the *Amazon v. ICANN* IRP ruled that ICANN’s acceptance of GAC consensus advice against applications for .AMAZON that lacked a rationale was not consistent with ICANN’s Articles and Bylaws.⁸² In addressing the final declaration of the *Amazon* Panel, the ICANN Board asked the GAC if it had “any information to provide to the Board as it relates to the . . . GAC’s advice that the Amazon applications should not proceed; or (ii) any other new or additional information to provide to the Board regarding the GAC’s advice that the Amazon applications should not proceed.”⁸³

46. “ICANN has generally followed a practice of not taking any actions on applications that are the subject of a pending Accountability Mechanism out of deference to ICANN’s Accountability Mechanisms.”⁸⁴ But given the previous findings in the .AFRICA and .AMAZON IRPs and in light of one of the purposes of the IRP (as explained in the current Bylaws but has always been the case, to “Reduce Disputes by creating precedent to guide and inform the Board”⁸⁵), the ICANN Board recently considered alternatives to the general practice of not taking action on applications that are the subject of pending Accountability Mechanisms.⁸⁶

47. Although it appears that the NGPC and the Claimant were aware that the GAC’s rationale for its consensus advice was that stated in the GAC Early Warning notice regarding Claimant’s .GCC application,⁸⁷ the ICANN Board ultimately adopted a resolution, on 12 September 2021, authorizing ICANN 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

⁸¹ Approved Board Resolutions | Special Meeting of the ICANN Board (16 July 2015), Ex. R-24.

⁸² *Amazon v. ICANN*, Final Declaration ¶ 116, Annex 16 to IRP Request.

⁸³ Approved Board Resolutions | Regular Meeting of the ICANN Board (29 October 2017), Ex. R-25.

⁸⁴ Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), Ex. R-26.

⁸⁵ Bylaws (as amended 28 November 2019), Art. 4, § 4.3(vi), R-27 (“November 2019 Bylaws”).

⁸⁶ Ex. R-26.

⁸⁷ Ex. R-12 (“the ICANN Board New gTLD Program Committee’s understanding that the GAC [...] based on the rationale contained in the Early Warning has reached a consensus to object.”).

application.”⁸⁸ The Board explained its rationale for adopting this resolution as follows:

After careful review of the underlying facts, prior applicable IRP Panel Declarations, and the BAMC’s recommendation, the Board has concluded that, before proceeding further with the .GCC IRP, it could be beneficial to ask the GAC for any new or additional information that the GAC might choose to offer regarding its advice that the .GCC application should not proceed. The Board, therefore, authorizes the President and CEO, or his designee(s), 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.⁸⁹

48. Thereafter, on 9 November 2021, ICANN’s President and Chief Executive Officer, Göran Marby, wrote the GAC Chair to inform the GAC of the Board resolution and to open the dialogue with the GAC on this issue.⁹⁰ That dialogue is currently underway.

49. Given this recent Board resolution, the fact that the resolution provides Claimant much of the relief it seeks in this IRP, and that it could end up mooted the IRP, ICANN requested that Claimant agree to a stay of the IRP until after ICANN consults with the GAC. Claimant refused, choosing again to litigate without allowing the GAC an opportunity to provide further information that could be helpful toward resolution of this matter, or at least parts of it. Thus, ICANN is responding to Claimant’s IRP Request based on the facts currently available to it, and based on what is most likely an incomplete record. ICANN reserves the right to amend this Response following ICANN’s dialogue with the GAC and any resulting ICANN action.⁹¹

STANDARD OF REVIEW

50. An IRP Panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles, Bylaws, and internal policies and procedures.⁹² With respect to IRPs challenging the ICANN Board’s exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN.⁹³ Rather, the core task of an IRP panel

⁸⁸ Ex. R-26.

⁸⁹ *Id.*

⁹⁰ Letter from G. Marby (ICANN) to M. Ismail (GAC) (9 November 2021), Ex. R-28.

⁹¹ ICANN also will be filing a request to the IRP Panel to stay the IRP, but its deadline to respond to Claimant’s IRP Request came due before the full IRP Panel was constituted.

⁹² Bylaws, Art. IV, § 4.3.

⁹³ *Id.*, Art. IV, § 4.3(4); *see also Booking.com v. ICANN*, Final Declaration, ¶ 115 (3 March 2015), Ex. R-29.

is to determine whether ICANN has failed to comply with its foundational documents.⁹⁴

ARGUMENT

I. CLAIMANT’S IRP REQUEST IS UNTIMELY.

51. The Bylaws in place at the time the NGPC accepted the GAC consensus advice regarding the .GCC application required a Reconsideration Request to be submitted within 15 days of the posting of the relevant Board resolution, if challenging Board action or, if challenging staff action, within 15 days of the requestor becoming aware of the staff action.⁹⁵

52. Here, the NGPC resolution accepting the GAC advice against the .GCC application was published on ICANN’s website on 6 June 2013, but Claimant did not submit the Reconsideration Request until November 2013, well outside the 15-day requirement.⁹⁶ The fact that Claimant may have sent ICANN letters complaining about the NGPC’s action does not remedy the fact that Claimant failed to file its Reconsideration Request within the specified time.

53. Accordingly, all claims asserted in Claimant’s Reconsideration Request and re-asserted in this IRP – namely “NGPC acceptance of GAC Advice to reject .GCC gTLD application,” “NGPC refusal to consider expert WIPO panelist determination, and NGPC refusal to consider contrary recommendation from GNSO”⁹⁷ – are time barred.

II. THE FACTUAL RECORD REGARDING THE CORE CLAIMS IN THIS IRP IS EVOLVING AND THIS IRP SHOULD BE STAYED.

54. Claimant’s core allegations in this IRP relate to the NGPC’s decision to accept the GAC consensus advice in June 2013 and to direct that the processing of Claimant’s .GCC application be halted. Claimant challenges ICANN’s alleged decisions: (i) “to accept GAC advice to reject the .GCC application, despite lack of any rationale provided by GAC for its advice;” (ii) “to refuse to request rationale from the GAC, investigate the matter or otherwise consider the public interest;” and (iii) “to refuse to provide any rationale for the NGPC decision

⁹⁴ Bylaws, Art. IV, § 4.3(4).

⁹⁵ Bylaws, Art. IV, § 2.5.

⁹⁶ *Id.*

⁹⁷ Ex. R-19, ¶ 3.

to accept GAC advice.”⁹⁸ Claimant also challenges ICANN’s alleged failure to follow the precedent set by the .AFRICA and .AMAZON IRP Panel Final Declarations.⁹⁹

55. These claims, however, are the focus of the ICANN Board’s recent resolution, in September 2021. That resolution takes the action Claimant demands in this IRP and the Board passed the resolution in light of the two prior IRP decisions relating to GAC consensus advice. The ICANN Board authorized staff to engage in a dialogue with the GAC regarding its rationale for the GAC advice on the .GCC application,¹⁰⁰ just as the Board did in response to the final rulings in the .AFRICA and .AMAZON IRPs. Indeed, the Board adopted its September 2021 resolution only after “careful[ly] review[ing] . . . the underlying facts” as well as “prior applicable IRP Panel Declarations,” namely the .AFRICA and .AMAZON Final Declarations.¹⁰¹

56. Moreover, any action ICANN may take as a result of its dialogue with the GAC, although currently unknown, could moot this entire IRP or at the very least alter the claims and defenses in this IRP. Accordingly, this IRP should be stayed until the GAC-ICANN dialogue is complete and the full factual record of this IRP is developed.

57. Claimant likely will argue that this IRP relates to ICANN’s past conduct and thus is not remediated by ICANN’s present decision to open a dialogue with the GAC. Any such argument, however, contradicts Claimant’s express claims and requests in this IRP that ICANN do just that. This argument also ignores the fact that, irrespective of the claims in this IRP, the Board has an independent duty to be guided by the Articles and Bylaws, as well as applicable IRP precedent, which the Board has clearly attempted to do with its September 2021 resolution. While Claimant has seen fit to litigate every challenge to its application, ICANN is attempting to engage, which could resolve this dispute or will at least bring the factual basis into better focus. Allowing this IRP to proceed based only on past conduct, when ICANN is in the process of

⁹⁸ IRP Request, p. 18.

⁹⁹ *Id.*, p. 19.

¹⁰⁰ Ex. R-26.

¹⁰¹ *Id.*

addressing Claimant's main complaints, would be inconsistent with the purpose of the IRP and hinder the ICANN Board's independent decision making, as guided by applicable IRP precedent.

III. CLAIMANT'S REMAINING CLAIMS ARE BASELESS.

58. Claimant appears to assert additional, peripheral claims based on various alleged ICANN actions and inactions. Claimant, however, has not demonstrated that ICANN acted contrary to its Articles or Bylaws.

A. ICANN Did Not Violate Its Articles Or Bylaws With Respect To The GCC's LRO Proceeding Regarding Claimant's Application.

59. Claimant asserts that ICANN improperly instructed WIPO to terminate the GCC's LRO proceeding against Claimant's application and that ICANN provided no rationale for that action.¹⁰² Claimant, however, makes no effort to explain how ICANN violated its Articles or Bylaws with respect to the closure of the GCC's LRO proceeding.

60. WIPO's LRO Rules provide that "[i]f, prior to Panel appointment, it becomes unnecessary or impossible to continue a proceeding conducted under the Procedure for any reason, the Center in consultation with the parties and ICANN, may in its discretion terminate the proceeding."¹⁰³ When the NGPC accepted the GAC's consensus advice against the .GCC application, a panel to decide the LRO was not yet in place. Thus, WIPO exercised its discretion and terminated the GCC's LRO because the .GCC application would not be approved. Thereafter, WIPO informed the parties that the LRO proceeding was terminated without prejudice. In addition, ICANN explained to Claimant in its 5 September 2013 letter that the LRO proceeding was "not moving forward based on the NGPC's action on 4 June 2013."¹⁰⁴ And WIPO later confirmed that it had refunded to Claimant and to the GCC all WIPO panel fees, despite Claimant's incorrect claims to the contrary.¹⁰⁵

61. In sum, the termination of the LRO proceedings was in accordance with WIPO's

¹⁰² IRP Request, p. 9.

¹⁰³ WIPO Rules for New gTLD Dispute Resolution, Rule 14(b) (20 June 2011), R-31.

¹⁰⁴ Annex 9 to IRP Request.

¹⁰⁵ Letter from WIPO Arbitration and Mediation Center to BGC (20 November 2013), Ex. R-32.

rules, it was proper in that there was no longer a live case or controversy with respect to the .GCC application, and ICANN explained to Claimant that the LRO was terminated because the NGPC resolution halted the .GCC application and, therefore, mooted the LRO proceeding.

B. ICANN Did Not Violate Its Articles or Bylaws With Respect To The GNSO Report Regarding IGO Names and Acronyms.

62. Claimant appears to argue that ICANN violated its Articles and Bylaws by failing to adopt all of the recommendations in a November 2013 GNSO report regarding whether protections should be afforded to IGO names and acronyms.¹⁰⁶ Claimant, however, leaves out several important details that defeat this claim. First, the Board was not required to adopt all the recommendations in the GNSO report. Second, nothing in the GNSO report suggests that a third party, like Claimant, should be permitted to operate a TLD using an IGO acronym over the objection of that IGO. Third, before the GNSO issued its recommendations, the GAC had provided advice to ICANN regarding IGO protections that differed from some of the GNSO recommendations. And fourth, Claimant fails to mention that certain protections for IGO names and acronyms have already been granted, and that the ICANN community is continuing its policy development work on various aspects of this issue to this day through an open, transparent and bottom-up, multistakeholder policy development process in order to reach a compromise between the differing recommendations provided by the GAC and the GNSO.

63. In its April 2013 Beijing Communiqué, the GAC provided ICANN advice that “appropriate preventative initial protection for the IGO names and acronyms on the provided list be in place before any new gTLDs would launch.”¹⁰⁷ In other words, the GAC advised that certain IGO names and acronyms – such as the “Council of Europe” and “COE,” the “Hague Conference on Private International Law” and “HCCH,” and the “Cooperation Council for the Arab States of the Gulf” or “GCC” – should not be allowed to be registered as new gTLDs.¹⁰⁸

¹⁰⁶ IRP Request, pp. 10-12, 24-26.

¹⁰⁷ R-11.

¹⁰⁸ Annex 1 to Resolutions 2013.07.02 NG03 – 2013.07.02 NG06, Ex. R-33.

On 2 July 2013, long before the GNSO issued its report, the NGPC resolved to adopt initial protections for the IGO identifiers, but also resolved to continue a dialogue with the GAC and others on the issue of IGO identifiers.¹⁰⁹ Then, in April 2014, the NGPC adopted certain of the recommendations in the GNSO report that were “not inconsistent” with GAC advice received on the topic, and requested more time to consider the remaining inconsistent recommendations.¹¹⁰

64. Since then, ICANN’s Supporting Organizations and Advisory Committees have been involved in policy development work on IGO identifiers being registered as TLDs or second-level domain names, and that work continues today.¹¹¹

65. Claimants have not set forth any evidence suggesting that ICANN’s work and resolutions on the issue of IGO identifiers has violated ICANN’s Articles or Bylaws. To the contrary, the ICANN community’s policy development work on these topics has been open, transparent and inclusive of differing views.

C. ICANN Did Not Violate Its Articles Or Bylaws In Responding To Claimant’s DIDP Request And Any Such Claim Is Barred.

66. Claimant also argues that ICANN did not sufficiently respond to Claimant’s Documentary Information Disclosure Policy Request (“DIDP Request”). This argument, however, suffers from several flaws. First, Claimant overlooks the fact that the ICANN Board is not involved in responding to DIDP requests and that, according to the Bylaws in place at the time of Claimant’s DIDP Request, an IRP proceeding could only challenge *Board* action.¹¹² ICANN *staff*, not the Board, is tasked with responding to DIDP requests, so any allegations regarding ICANN’s response to Claimant’s DIDP Request (“DIDP Response”) pertain to staff actions. Claimant did not file a Reconsideration Request seeking the Board’s review of ICANN staff’s DIDP Response and, as such, the DIDP Response involved no Board action.

67. Second, any argument regarding the DIDP Response is untimely. Under the

¹⁰⁹ Approved Resolutions | Meeting of the New gTLD Program Committee (2 July 2013), Ex. R-34.

¹¹⁰ Approved Board Resolutions | Regular Meeting of the ICANN Board (30 April 2014), Ex. R-35.

¹¹¹ ICANN | GNSO, PDP Protection of IGO and INGO Identifiers in All gTLDs (24 September 2020), Ex. R-36.

¹¹² Bylaws, Art. IV, § 3.

Bylaws, a “request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting . . . that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”¹¹³ Here, there are no Board meeting minutes that address the DIDP Response, which further supports that the DIDP Response is not subject to review by the Panel. But even assuming for the sake of argument that the deadline can be calculated as of the date of the challenged DIDP Response, 8 June 2016, the deadline nonetheless passed well before Claimant submitted its IRP Request in 2021, therefore rendering Claimant’s DIDP claim time-barred.

68. Third, even if ICANN’s DIDP Response was appropriate for review in this IRP, which it is not, ICANN staff clearly complied with the standards applicable to DIDP requests. In evaluating DIDP requests, ICANN staff is required to evaluate whether the information requested is appropriate for public disclosure or falls into one or more of the “Defined Conditions for Nondisclosure.”¹¹⁴ In its DIDP Response, ICANN explained that Claimant had requested documentary information that fell within certain of the Nondisclosure Conditions.¹¹⁵ Nevertheless, in response to each requested category, ICANN provided links to publicly available documents to direct Claimant to helpful, relevant information.¹¹⁶

69. Fourth, Claimant’s argument regarding a supposed “pattern” of withholding documents in IRPs is patently wrong and conflates two very different standards. In addition to ICANN’s practice of making many documents public as a matter of course, ICANN’s DIDP allows community members to request that ICANN make public documentary information “concerning ICANN’s operational activities” that is not already publicly available.¹¹⁷ In responding to a DIDP request, ICANN staff adheres to the “Process for Responding to ICANN’s [DIDP] Requests” and makes determinations whether the documents requested are appropriate

¹¹³ Bylaws, Art. IV, § 3.3 (emphasis added).

¹¹⁴ See ICANN Documentary Information Disclosure Policy, Ex. R-37.

¹¹⁵ See generally, Annex 15 to IRP Request .

¹¹⁶ *Id.*

¹¹⁷ Ex. R-37.

for public disclosure or are subject to certain of the DIDP Conditions for Nondisclosure.

70. The standards and processes applicable to document requests propounded in an IRP are vastly different. Among other things, parties to an IRP frequently agree to a protective order that provides confidentiality protection for documents produced in an IRP, and documents produced during the course of the IRP are not made publicly available as a matter of course. No similar confidentiality protections are afforded to documents produced in response to a DIDP because, by definition, a DIDP is a request to make the requested information public, requiring ICANN to consider confidentiality concerns. In short, the two processes serve completely different purposes, are subject to different parameters, and are not comparable.

D. ICANN Did Not Violate Its Articles Or Bylaws With Respect To The IRP Standing Panel.

71. Claimant alleges that ICANN has “refuse[d]” to provide a Standing Panel as required by its Bylaws.¹¹⁸ This is demonstrably false.

72. First and foremost, ICANN is (and has been) in the process of convening a Standing Panel for several years now. As set forth in the Bylaws, however, the process for convening a Standing Panel is not immediate. Instead, ICANN—in consultation with its Supporting Organizations and Advisory Committees—is required to follow a comprehensive four-step process when convening the Standing Panel:

(ii) ICANN shall, in consultation with the Supporting Organizations and Advisory Committees, initiate a four-step process to establish the Standing Panel to ensure the availability of a number of IRP panelists that is sufficient to allow for the timely resolution of Disputes consistent with the Purposes of the IRP.

(A) ICANN, in consultation with the Supporting Organizations and Advisory Committees, shall initiate a tender process for an organization to provide administrative support for the IRP Provider (as defined in Section 4.3(m)), beginning by consulting the “IRP Implementation Oversight Team” (described in Section 4.3(n)(i)) on a draft tender document.

¹¹⁸ IRP Request, p. 27. Claimant also argues that ICANN has “failed to implement IRP Rules as required by its Bylaws since 2013” (*id.*), but does not identify what those supposed rules are. Thus, ICANN cannot meaningfully respond to these generic, unsupported arguments.

(B) ICANN shall issue a call for expressions of interest from potential panelists, and work with the Supporting Organizations and Advisory Committees and the Board to identify and solicit applications from well-qualified candidates, and to conduct an initial review and vetting of applications.

(C) The Supporting Organizations and Advisory Committees shall nominate a slate of proposed panel members from the well-qualified candidates identified per the process set forth in Section 4.3(j)(ii)(B).

(D) Final selection shall be subject to Board confirmation, which shall not be unreasonably withheld.¹¹⁹

73. Thus, ICANN cannot snap its proverbial fingers to convene a Standing Panel; it is a community-driven process that is well underway.

74. Second, nothing in the Bylaws requires ICANN to convene a Standing Panel by a specific date. Instead, the Bylaws clearly anticipate that a Standing Panel will not be convened immediately, likely because of the extensive process for convening the Panel. To the extent there is any doubt on this point, the Bylaws explicitly provide a mechanism for an IRP Claimant and ICANN to appoint an IRP Panel in the absence of a Standing Panel:

In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist.¹²⁰

This is the same process that the parties are using to appoint the Panel in this matter and the same process that has been used in prior IRPs. Therefore, that ICANN (in consultation with the Supporting Organizations and Advisory Committees) has not convened a Standing Panel on Claimant's unilateral timetable does not somehow amount to a violation of ICANN's Articles or Bylaws or otherwise constitute a "refusal" to convene the Standing Panel.

75. Third, Claimants' reference to a 2014 order in the *DCA* IRP is misleading and inapposite. Claimants cite to an interim order on an unrelated issue, where the Panel made the

¹¹⁹ November 2019 Bylaws, Art. 4, § 4.3(j)(ii), Ex. R-27.

¹²⁰ *Id.*, Art. 4, § 4.3(k)(ii).

cited statements in dicta only; it did not constitute a “decision” on this issue of any kind or a determination that ICANN violated its Articles, Bylaws, policies, or procedures by not convening a Standing Panel as of that time.¹²¹ Additionally, the dicta does not apply to the current circumstances because the process for selecting a Standing Panel changed when ICANN enacted new Bylaws (drafted in large part by the Internet community) in October 2016, well after this 2014 interim order.¹²² To be clear, no IRP Panel has *ever* ruled that ICANN violated its Articles or Bylaws by not implementing the Standing Panel quickly enough.

CONCLUSION

76. ICANN respectfully requests that the IRP Panel deny Claimant’s IRP Request.

Respectfully submitted,

JONES DAY

Dated: 27 December 2021

By: /s/ Eric P. Enson

Eric P. Enson
Counsel for Respondent ICANN

¹²¹ Moreover, the parties in the *DCA* IRP did not even brief this issue. Instead, their discussion of the Standing Panel concerned whether claimant could seek emergency relief under the then-governing ICDR Supplementary Procedures before the Standing Panel was established. *See* *DCA Request for Emergency Arbitrator and Interim Measures of Protection*, p. 2 n.1, Ex. R-38.

¹²² The Bylaws in effect when *DCA* filed its IRP did not set forth the four-step process for establishing the Standing Panel as compared to the 2016 Bylaws. Bylaws, Art. IV, §§ 3.6-3.7, Ex. R-1. Under those Bylaws, a third party was responsible for assembling the Standing Panel; ICANN’s only role was to approve the Standing Panel once compiled.