

.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. )  
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**ICANN'S RESPONSE TO GCCIX'S SECOND AMENDED 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 (“GCCIX”) Second Amended Request for Independent Review Process submitted on 22 December 2023 (“Second Amended IRP Request”).<sup>1</sup>

1. In 2012, ICANN launched the long-anticipated and long-planned New gTLD Program, under which any interested entity 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. GCCIX submitted to ICANN the sole application to operate a “.GCC” gTLD. GCCIX’s application indicated that the gTLD was meant to target Internet “users in the Gulf and Middle East region.”<sup>2</sup> As GCCIX must have expected, the application encountered immediate opposition because “GCC” is the well-known acronym for the Gulf Cooperation Council (“GCC”),<sup>3</sup> an Intergovernmental Organization (“IGO”) that consists of six Gulf countries including Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates. GCCIX’s application was not affiliated with, or supported by, the GCC or its member states, and GCCIX never identified any efforts to seek the GCC’s consent or support before submitting the gTLD application.

3. Given this lack of a connection between GCCIX and the GCC, GCCIX’s application faced multiple challenges. First, ICANN made available a public process whereby anyone could comment on any new gTLD application; numerous public comments were

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<sup>1</sup> Concurrent with the filing of this Response to Second Amended IRP Request, ICANN is also filing a Motion to Dismiss Second Amended IRP Request based on GCCIX’s “Deleted by law” *corporate* status in the country of GCCIX’s incorporation, Bahrain. ICANN respectfully requests that ICANN’s Motion to Dismiss be resolved before additional discovery is permitted to be taken in this matter.

<sup>2</sup> New gTLD Application submitted to ICANN by GCCIX W.L.L., Annex 1 to Second Amended IRP Request, p. 6.

<sup>3</sup> This IGO is also known as the Cooperation Council for the Arab States of the Gulf.

submitted to ICANN in opposition to the .GCC application because it was identical to the GCC's acronym, yet GCCIX did not have the support of the GCC or the targeted community. As far as ICANN is aware, GCCIX did nothing to address or even acknowledge these 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 GCCIX that certain GAC members had "serious concerns" with the .GCC application.

5. Third, ICANN's Independent Objector ("IO"), who was charged with lodging objections to new gTLD applications that the IO believed were not in the best interests of global Internet users, expressed significant concerns about GCCIX's .GCC application and found that the application was "contrary to international public order." GCCIX'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. GCCIX responded to that filing with more legal argument against the GCC's claimed rights; yet, as far as ICANN is aware, GCCIX has never explained why it sought to operate a .GCC gTLD (as opposed to .GCCIX, for example) other than the fact that "GCC" clearly has a strong connection to the Gulf region.

7. Finally, in 2013, the GAC issued to the ICANN Board "consensus advice" that the .GCC application should not proceed ("GAC Advice"), which according to the New gTLD Program rules at the time created a strong presumption for the ICANN Board that the application should not be approved. Knowing that the GAC's rationale for the GAC Advice was the rationale contained in the GAC's Early Warning about the .GCC application (which was

consistent with the public comments, the IO report and the GCC's LRO), GCCIX argued that the GAC had no legal interest in the GCC acronym, although GCCIX never identified any engagement with the community that its application for .GCC targeted or any support for its application. Ultimately, in June 2013, a subset of the ICANN Board—the New gTLD Program Committee or “NGPC” (which was delegated with full Board authority)—determined that GCCIX's application should not proceed any further based on the GAC's consensus advice that the application not proceed (“2013 NGPC Resolution”).

8. Since that time, two IRP panels have separately issued final declarations, one in 2015 regarding .AFRICA and one in 2017 regarding .AMAZON, relating to Board acceptance of GAC consensus advice, finding that the rationale for accepting the GAC consensus advice in those instances was not sufficient. In light of these prior IRP decisions, GCCIX asserts, among other things, that the Board's acceptance of the GAC Advice was not consistent with ICANN's Bylaws. While the Board obviously did not have the benefit of these prior IRP decisions when it accepted the GAC Advice in 2013, and while the evidence indicates that the GAC's rationale for the advice against the .GCC application was apparent to the ICANN Board and to GCCIX, the ICANN Board nevertheless subsequently decided to seek further information from the GAC regarding its rationale for the GAC Advice. Specifically, in September 2021, the ICANN Board adopted a resolution authorizing ICANN to open a dialogue with the GAC regarding the rationale for the GAC Advice, 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.

9. ICANN received a response from the GAC in January 2022 setting forth the rationale for the 2013 GAC Advice that GCCIX's application should not proceed, which, as stated in the GAC Early Warning, related specifically to the fact that GCCIX's application

targeted the GCC's member states and community without any support from the GCC or its member states. Thereafter, the ICANN Board reviewed and analyzed the GAC's correspondence in response to the Board's inquiry, various materials relating to the .GCC application, objections and challenges thereto, and the recommendation from ICANN's Board Accountability Mechanisms Committee ("BAMC"). Following the Board's Review and analysis, on 30 April 2023, the Board resolved to reaffirm acceptance of the GAC Advice and that proceeding with the .GCC application would not be in the public interest ("April 2023 Resolution"). The Board's April 2023 Resolution also contains a detailed rationale for the Board's decision.

10. GCCIX then filed a Second Amended IRP Request that reasserts its original claims regarding the 2013 NGPC Resolution and added new claims regarding the Board's April 2023 Resolution. As to GCCIX's claims about the 2013 NGPC Resolution, ICANN, in an effort to streamline this IRP, has repeatedly informed GCCIX that ICANN does not dispute a number of the key facts relating to those claims. Moreover, ICANN has already provided GCCIX much of the procedural relief GCCIX seeks with this IRP. Specifically, as GCCIX argued ICANN should have done, ICANN went back to the GAC to request a written rationale for the GAC Advice, ICANN independently evaluated that advice as well as various other materials, including GCCIX's communications and position papers and, as noted above, ICANN issued a detailed rationale in the April 2023 Resolution as to why it found that GCCIX's .GCC application was not in the public interest and should not proceed, all of which is consistent with the findings in the prior .AFRICA and .AMAZON IRPs and how ICANN responded to them.

11. As to the claims regarding the Board's April 2023 Resolution, GCCIX fails to establish that the Board acted contrary to ICANN's Articles of Incorporation ("Articles") or Bylaws in taking this action. The Board thoroughly considered all available materials regarding GCCIX's application and reached a well-reasoned and transparent decision, which was well

within the realm of reasonable business judgment. As a result, this IRP Panel should not supplant the informed and reasonable business judgment exercised by the ICANN Board.

12. As to GCCIX’s remaining, peripheral claims they are unsupported because ICANN complied with its Articles and Bylaws in all respects.

## **SUMMARY OF RELEVANT FACTS**

### **I. ICANN AND THE NEW GTLD PROGRAM.**

13. ICANN was formed in 1998 as a California nonprofit public benefit corporation. As set forth in ICANN’s Bylaws,<sup>4</sup> its mission “is to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”<sup>5</sup> 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 the portion of a domain name to the right of the final dot (such as “.COM” or “.GOV”).

14. In its early years, ICANN focused on increasing the number of companies known as “registrars” that could sell domain name registrations to entities and individuals within then existing gTLDs 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 to date of the Internet’s naming system.<sup>6</sup>

15. Under the New gTLD Program, any interested entity could apply for the opportunity to operate new gTLDs that were not already in use in the DNS. The New gTLD

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<sup>4</sup> The Bylaws applicable to all of GCCIX’s claims in this IRP, except the claims challenging the April 2023 Resolution, are the 11 April 2013 Bylaws, which were in place in June 2013 when ICANN removed GCCIX’s application from consideration following acceptance of the GAC Advice. The Bylaws applicable to the claims challenging the April 2023 Resolution are the 2 June 2022 Bylaws. All references to the Bylaws are to the 11 April 2013 Bylaws, unless otherwise noted.

<sup>5</sup> Bylaws for Internet Corporation for Assigned Names and Numbers (“Bylaws”) (11 April 2013), Art. I, § 1, Ex. R-1.

<sup>6</sup> ICANN Approved Board Resolutions | Singapore (20 June 2011), Ex. R-2.

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.<sup>7</sup> 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.<sup>8</sup>

## **II. THE APPLICANT GUIDEBOOK.**

16. A key part of this implementation plan was creation of the New gTLD Applicant Guidebook (“Guidebook”), which sets forth the processes for evaluating new gTLD applications that were received in 2012. The Guidebook was based on ICANN community input over several years and several iterations.<sup>9</sup> In 2008, ICANN published the first version of the Guidebook calling for public comment.<sup>10</sup> 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.<sup>11</sup>

17. 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.<sup>12</sup> 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.

18. Given the importance of the involvement of governments in ICANN’s governance

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<sup>7</sup> GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), Ex. R-3.

<sup>8</sup> ICANN Adopted Board Resolutions | Paris (26 June 2008), Ex. R-4.

<sup>9</sup> ICANN gTLD Applicant Guidebook (“Guidebook”) (4 June 2012), Preamble, Ex. R-5.

<sup>10</sup> ICANN | Archives, Applicant Guidebook, Ex. R-6.

<sup>11</sup> *See generally*, Guidebook, R-5.

<sup>12</sup> *See generally*, Guidebook, R-5.

model, ICANN’s Governmental Advisory Committee (“GAC”), which is open to national governments and IGOs, has 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.”<sup>13</sup> Accordingly, the Guidebook sets forth the process for the GAC to issue an “Early Warning” notice concerning individual applications.<sup>14</sup> An Early Warning is intended to provide the applicant with an indication that an 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 with the application, which “may include meeting with representatives of the relevant government(s) to try to address the concern.”<sup>15</sup> 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.<sup>16</sup>

19. 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 strong presumption for the ICANN Board that the application should not be approved.”<sup>17</sup> GAC consensus advice concerning an application is published, and ICANN promptly notifies the applicant, which 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.”<sup>18</sup>

20. The Guidebook further provides that an appointed Independent Objector (“IO”)—

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<sup>13</sup> *Id.*, § 1.1.2.4, § 3.1.

<sup>14</sup> *Id.*, § 1.1.2.4.

<sup>15</sup> *Id.*, § 1.5.1, § 1.1.2.4.

<sup>16</sup> *Id.*, § 1.1.2.4.

<sup>17</sup> *Id.*, § 3.1.

<sup>18</sup> *Id.*

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.<sup>19</sup> 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.”<sup>20</sup>

21. 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”).<sup>21</sup> An LRO is meant for situations in which an “applied-for gTLD string infringes the existing legal rights of the objector.”<sup>22</sup> 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.”<sup>23</sup> LRO proceedings were administered by the World Intellectual Property Organization and Mediation Center (“WIPO”).<sup>24</sup>

22. The Guidebook further provides that the ICANN Board “has ultimate responsibility for the New gTLD Program.”<sup>25</sup> As such, the Board “reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application *as a result of GAC Advice* on new gTLDs or as a result of an ICANN accountability mechanism.”<sup>26</sup>

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<sup>19</sup> *Id.*, § 3.2.5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, § 3.2.1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, § 3.2.2.2.

<sup>24</sup> *Id.*, § 3.2.3.

<sup>25</sup> *Id.*, § 5.1.

<sup>26</sup> *Id.* (emphasis added).

23. In 2012, ICANN received 1,930 applications to operate new gTLDs.<sup>27</sup> To date, over 1,200 new gTLDs have been introduced into the DNS, making the New gTLD Program an undeniable success in providing options to Internet users. 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 GCCIX's .GCC application, encountered significant challenges based on the applied-for names.

### III. GCCIX'S APPLICATION FOR .GCC AND OBJECTIONS THERETO.

24. In 2012, GCCIX submitted to ICANN the sole application to operate a .GCC gTLD.<sup>28</sup> GCCIX'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.<sup>29</sup> 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.*<sup>30</sup>

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

25. 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.<sup>31</sup> 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 GCCIX did not have support from the community it targeted

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<sup>27</sup> ICANN New gTLD Program Statistics, Ex. R-7.

<sup>28</sup> New gTLD Application submitted to ICANN by GCCIX W.L.L., Annex 1 to Second Amended IRP Request.

<sup>29</sup> The Cooperation Council for the Arab States of the Gulf is also known as the Gulf Cooperation Council.

<sup>30</sup> Annex 1 to Second Amended IRP Request, p. 7 (emphasis added).

<sup>31</sup> ICANN New gTLD Program Application Comments, Ex. R-8.

with its application.<sup>32</sup>

26. In addition, 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 application.<sup>33</sup> The Early Warning detailed “serious concerns” with GCCIX’s .GCC application in two respects: (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”<sup>34</sup>; 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.”<sup>35</sup> 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.<sup>36</sup>

27. The Early Warning advised GCCIX that “ICANN strongly encourages you to work with relevant parties as soon as possible to address the concerns voiced in the GAC Early Warning.”<sup>37</sup> The Early Warning also advised GCCIX that “ICANN strongly encourages you to contact [gacearlywarning@gac.icann.org](mailto:gacearlywarning@gac.icann.org) as soon as practicable regarding the issues identified in the Early Warning.”<sup>38</sup> The Early Warning further stated that “[i]f you choose to continue with

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<sup>32</sup> *Id.*, p. 2.

<sup>33</sup> GAC Early Warning – Submittal GCC-AE-21010, Ex. R-9.

<sup>34</sup> *Id.*, pp. 1- 2.

<sup>35</sup> *Id.*, p. 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, p. 3.

<sup>38</sup> *Id.*, p. 4.

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.”<sup>39</sup> Despite these advisements, and similar directions in the Guidebook,<sup>40</sup> as far as ICANN is aware, GCCIX did not complete the “Applicant’s Response” section of the Early Warning.

28. Next, the IO reviewed GCCIX’s .GCC application and identified the obvious “public concerns on this controversial application[.]”<sup>41</sup> In its IRP Request, GCCIX asserts that it was “[GCCIX’s] written position and evidence presented” that caused the IO to not formally object to the application.<sup>42</sup> Nothing could be further from the truth; the IO found multiple reasons to object.

29. 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.<sup>43</sup>

30. 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.”<sup>44</sup> The IO also noted

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<sup>39</sup> *Id.*

<sup>40</sup> 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.”).

<sup>41</sup> Annex 3 to Second Amended IRP Request, p. 1.

<sup>42</sup> Second Amended IRP Request, p. 9.

<sup>43</sup> Annex 3 to Second Amended IRP Request, p. 1.

<sup>44</sup> *Id.*, p. 3 ¶ 7.

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.”<sup>45</sup> 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 have adverse effects on the mission pursued by the organization.”<sup>46</sup> The IO further concluded that “the application is *contrary to international public order*.”<sup>47</sup>

31. 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.”<sup>48</sup> “[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*.”<sup>49</sup>

32. Despite all these bases for objecting to the application, the IO chose not to submit a formal objection based, not on GCCIX’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.”<sup>50</sup>

33. On 13 March 2013, the GCC did just that by filing an LRO with WIPO against

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<sup>45</sup> *Id.*, p. 4 ¶ 8.

<sup>46</sup> *Id.*, p. 6 ¶ 13; *see also id.*, p. 4 ¶ 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.”).

<sup>47</sup> *Id.*, p. 6 ¶ 13 (emphasis added).

<sup>48</sup> *Id.*, p. 8 ¶ 2.

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Id.*, p. 10.

GCCIX's application.<sup>51</sup> 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."<sup>52</sup>

34. Finally, on 11 April 2013, the GAC issued its Beijing Communiqué to ICANN, which contained several points of advice to ICANN, including the GAC Advice that the .GCC application should not proceed.<sup>53</sup> As noted above, the Guidebook states that GAC consensus advice against an application creates "a strong presumption for the ICANN Board that the application should not be approved."<sup>54</sup>

35. As set forth in the Guidebook, GCCIX was given an opportunity to respond to the GAC Advice and state its case to ICANN, which GCCIX did. And despite claiming in this IRP that GCCIX was completely in the dark as to the GAC's rationale for the GAC Advice, GCCIX's written response to the GAC Advice, in May 2013, tells a different story. In its response, GCCIX states that ICANN Board member Cherine Chalaby, who was the Chair of the Board's NGPC,<sup>55</sup> informed GCCIX 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."<sup>56</sup>

36. GCCIX's May 2013 response to the GAC Advice responded to both of the rationales set forth in the Early Warning.<sup>57</sup> GCCIX, however, responded with only legal arguments; nowhere did GCCIX indicate that it had made any attempts to interact or work with

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<sup>51</sup> Gulf Cooperation Council v. GCCIX W.L.L. Legal Rights Objection (13 March 2013), Ex. R-10.

<sup>52</sup> *Id.*, p. 6.

<sup>53</sup> GAC Communiqué – Beijing, People's Republic of China, p. 3 (11 April 2013), Ex. R-11.

<sup>54</sup> Guidebook, § 3.1(I).

<sup>55</sup> 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.

<sup>56</sup> GCCIX W.L.L. GAC Advice Response Form, Ex. R-12.

<sup>57</sup> *Id.*

the GCC or the people and institutions the GCC represents, nor did GCCIX explain why it sought to operate a .GCC gTLD other than what appears to be an attempt to seize on the GCC's connection to the region.<sup>58</sup>

37. On 8 May 2013, the NGPC met to consider a plan for responding to the GAC Advice contained in the Beijing Communiqué.<sup>59</sup> On 10 May 2013, ICANN's Chair of the Board informed the GAC of the NGPC's plan,<sup>60</sup> 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.<sup>61</sup>

38. On 4 June 2013, the NGPC discussed the GAC Advice regarding the .GCC application<sup>62</sup> and ultimately resolved to accept the advice and to direct that processing of GCCIX's .GCC application be halted, which ultimately mooted the GCC's pending LRO.<sup>63</sup> GCCIX was invited to either withdraw its application and receive a partial refund or seek relief according to ICANN's Accountability Mechanisms.<sup>64</sup> GCCIX chose the latter.

#### **IV. ICANN'S ACCOUNTABILITY MECHANISMS.**

39. To help ensure that ICANN is serving and remains accountable to the global Internet community, the ICANN community included 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

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<sup>58</sup> *Id.*

<sup>59</sup> Letter from S. Crocker (ICANN) to H. Dryden (GAC) (10 May 2013), Ex. R-13.

<sup>60</sup> *Id.*

<sup>61</sup> NGPC Progress on GAC Advice (10 May 2013), Ex. R-14.

<sup>62</sup> Minutes | New gTLD Program Committee (4 June 2013), Ex. R-15.

<sup>63</sup> Annex 1 to NGPC Resolution No. 2013.06.04.NG01 (4 June 2013), Ex. R-16; Approved Resolution | Meeting of the New gTLD Program Committee (4 June 2013), Ex. R-17.

<sup>64</sup> Annex 1 to NGPC Resolution No. 2013.06.04.NG01 (4 June 2013), Ex. R-16.

reconsideration of that action by the Board” (“Reconsideration Request”).<sup>65</sup> 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.<sup>66</sup> 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 staff action, within 15 days of the requestor becoming aware of the staff action.<sup>67</sup>

40. The Bylaws also provide the IRP process by which a legal person or entity 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.<sup>68</sup> IRP requests are submitted to the International Centre for Dispute Resolution (“ICDR”), and are governed by ICDR rules, ICANN’s Bylaws, and the Interim Supplementary Procedures.

41. The Bylaws encourage a potential 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.”<sup>69</sup> The CEP is akin to a settlement conference and, therefore, the Bylaws in effect at that time provided 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

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<sup>65</sup> Bylaws, Art. IV, § 2.1.

<sup>66</sup> *Id.*, Art. IV, § 2.3.

<sup>67</sup> *Id.*, Art. IV, § 2.5.

<sup>68</sup> *Id.*, Art. IV, § 3.1.

<sup>69</sup> *Id.*, Art. IV, § 3.14.

party.”<sup>70</sup> 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. GCCIX INVOKED VARIOUS ACCOUNTABILITY MECHANISMS REGARDING ICANN’S ACCEPTANCE OF THE GAC ADVICE.**

42. On 14 November 2013, GCCIX submitted a Reconsideration Request to ICANN challenging the NGPC’s June 2013 acceptance of the GAC Advice against GCCIX’s application.<sup>71</sup> The BGC considered GCCIX’s Reconsideration Request but recommended denying the Reconsideration Request on the ground that it was untimely (among other reasons).<sup>72</sup> Specifically, the challenged NGPC action was published on ICANN’s website on 6 June 2013, but GCCIX did not submit the Reconsideration Request until November 2013, well outside the 15-day requirement.<sup>73</sup> The NGPC adopted the BGC’s recommendation on 30 January 2014, and denied the Reconsideration Request.<sup>74</sup>

43. In February 2014, GCCIX initiated a CEP with ICANN regarding the Board’s action on the .GCC application.<sup>75</sup> Either party could have terminated the CEP at any time, but the parties continued to discuss the issues for several years, although ultimately no resolution was reached.<sup>76</sup> GCCIX therefore initiated this IRP in June 2021.<sup>77</sup>

44. On 15 July 2021, before this Panel was formed, ICANN requested an Emergency

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<sup>70</sup> *Id.*, Art. IV, § 3.17.

<sup>71</sup> GCCIX W.L.L. Request for Reconsideration pp. 13-17 (14 November 2013), Ex. R-18.

<sup>72</sup> Recommendation of the BGC, Reconsideration Request 13-17 (8 January 2014), Ex. R-19.

<sup>73</sup> *Id.*, p. 2.

<sup>74</sup> Approved Resolutions | Meeting of the New gTLD Program Committee (30 January 2014), Ex. R-20.

<sup>75</sup> Cooperative Engagement and Independent Review Processes Status Update (18 May 2021), Ex. R-21.

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

<sup>77</sup> GCCIX’s original IRP Request also contained a series of allegations and descriptions of the parties’ confidential CEP discussions. After GCCIX 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 GCCIX to file a new IRP Request with the CEP allegations “excised” from the text.

Panelist to rule on whether certain of GCCIX’s allegations and annexes should be struck because they disclosed confidential settlement discussions between GCCIX and ICANN during the CEP.<sup>78</sup> The Emergency Panelist directed GCCIX to file an amended IRP Request that excised specified allegations and annexes relating to the parties’ CEP.<sup>79</sup> After GCCIX sought review of the Emergency Panelist’s order, this Panel permitted GCCIX to file its Amended IRP Request “providing limited detail on the CEP consistent with the terms of [Procedural] Order [No. 3.]”<sup>80</sup> GCCIX filed its Amended IRP Request on 19 May 2022.<sup>81</sup>

## **VI. THE BOARD’S SEPTEMBER 2021 RESOLUTION REGARDING THE .GCC APPLICATION AND THIS IRP.**

45. On 12 September 2021, the ICANN Board considered this IRP in light of two prior IRP final declarations referenced in GCCIX’s IRP Request and Amended IRP Request, which 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 written rationale was inconsistent with ICANN’s Articles and Bylaws.<sup>82</sup> 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 further information regarding that advice[.]”<sup>83</sup>

46. 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

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<sup>78</sup> Procedural Order No. 3, ¶ 4.

<sup>79</sup> *Id.*, ¶ 5.

<sup>80</sup> *Id.*, ¶ 74.

<sup>81</sup> See generally Amended IRP Request.

<sup>82</sup> *DotConnectAfrica Trust v. ICANN*, Final Declaration ¶¶ 113, 115 (9 July 2015), Ex. R-22.

<sup>83</sup> Approved Board Resolutions | Special Meeting of the ICANN Board (16 July 2015), Ex. R-23.

written rationale was not consistent with ICANN’s Articles and Bylaws.<sup>84</sup> 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 [...] any other new or additional information to provide to the Board regarding the GAC’s advice that the Amazon applications should not proceed.”<sup>85</sup>

47. “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.”<sup>86</sup> 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”),<sup>87</sup> the ICANN Board recently considered alternatives to the general practice of not taking action on applications that are the subject of pending Accountability Mechanisms.<sup>88</sup>

48. Although it appears that the NGPC and the GCCIX were aware that the GAC Advice was based on the concerns identified in the GAC Early Warning notice regarding GCCIX’s .GCC application,<sup>89</sup> 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 Advice on the .GCC application.”<sup>90</sup>

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

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<sup>84</sup> *Amazon v. ICANN*, Final Declaration ¶ 116, Annex 14 to Second Amended IRP Request.

<sup>85</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board (29 October 2017), Ex. R-24.

<sup>86</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), Ex. R-25.

<sup>87</sup> Bylaws (as amended 28 November 2019), Art. 4, § 4.3(vi), Ex. R-26 (“November 2019 Bylaws”).

<sup>88</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), Ex. R-25.

<sup>89</sup> GCCIX W.L.L. GAC Advice Response Form, 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.”).

<sup>90</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), Ex. R-25.

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.<sup>91</sup>

49. Thereafter, on 9 November 2021, ICANN’s President and Chief Executive Officer wrote the GAC Chair to inform the GAC of the Board resolution and to open the dialogue with the GAC on this issue.<sup>92</sup>

50. On 25 January 2022, Manal Ismail, the GAC Chair, responded to ICANN’s letter stating that the GAC had reviewed GAC discussions from 2013 in Beijing on the .GCC application, “which helped inform the language included in the Beijing Communiqué consensus advice text.”<sup>93</sup> Ms. Ismail further explained that in November 2012, “the governments of Bahrain, Oman, Qatar and UAE issued a GAC Early Warning to the Applicant expressing serious concerns against the application;” in February 2013, “the GAC received requests from several GAC members (Bahrain, Oman, Qatar and UAE) as well as the Gulf Cooperation Council (‘GCC’) to include ‘.GCC’ in a GAC Objection Advice that the application should not proceed for the reasons highlighted in the GAC Early Warning;” and “that the GAC, during ICANN46 Beijing (April 2013) deliberated and reached consensus on ‘GAC Objection Advice’ and advised the ICANN Board that the application should not proceed in accordance with Module 3.1 part I of the Applicant Guidebook for the reasons expressed by the concerned GAC members 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,

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<sup>91</sup> *Id.*

<sup>92</sup> Letter from G. Marby (ICANN) to M. Ismail (GAC) (9 November 2021), Ex. R-27.

<sup>93</sup> Letter from M. Ismail (GAC) to G. Marby (ICANN) (25 January 2022), Ex. R-28.

its six members or its community.”<sup>94</sup>

51. ICANN sought a stay of this IRP in order to permit additional time for the GAC dialogue and subsequent ICANN analysis, however, GCCIX would not agree to a stay, and this Panel denied ICANN’s request for a stay in its Procedural Order No. 2, stating that “[t]he Tribunal appreciates that ICANN is working to reach a proper resolution of this dispute; however, the circumstances do not justify granting a unilateral request for delay.”<sup>95</sup>

## **VII. THE BOARD’S APRIL 2023 RESOLUTION.**

52. Following receipt of the GAC’s correspondence, the ICANN Board passed a resolution asking the BAMC to “review, consider, and evaluate the underlying basis for the GAC consensus advice that the .GCC application should not proceed” and to provide a recommendation to the ICANN Board.<sup>96</sup> Thereafter, the BAMC afforded GCCIX the opportunity to respond to the GAC’s January 2022 correspondence, which it did in September 2022.<sup>97</sup> GCCIX, however, did not respond substantively to any of the GAC’s stated concerns. Instead, GCCIX asked the BAMC a number of questions about its work and the work of the GAC and, as GCCIX concedes, merely “summarized its longstanding positions.”<sup>98</sup> The BAMC then reviewed and considered, and extensively discussed, the GAC Advice, the .GCC application, the GAC’s and GCCIX’s correspondence, as well as various other relevant materials related to the .GCC application, and recommended that the Board “reaffirm its acceptance of the GAC Advice and its decision to not proceed with the .GCC application based [on :]” (i) the lack of support and involvement from the relevant community, as stated in the second issue identified

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<sup>94</sup> *Id.*, p. 2.

<sup>95</sup> Procedural Order No. 2, ¶ 38.

<sup>96</sup> Approved Board Resolutions | Regular Meeting of the ICANN Board (12 June 2022), Ex. R-29.

<sup>97</sup> Annex 15 to Second Amended IRP Request.

<sup>98</sup> *See* Annex 15 to Second Amended IRP Request; Second Amended IRP Request, at pp. 21-22. GCCIX also argues that “no evidence of” the closed sessions in Beijing in April 2013 “had ever been disclosed despite GCCIX’s repeated requests.” *Id.* at p. 21. In so doing, GCCIX ignores that transcripts from those sessions have since been produced as part of ICANN’s document production in this IRP.

in the GAC’s rationale for the GAC Advice; (ii) “information contained in other materials relevant to the .GCC application[,]” as set forth in the 30 April 2023 Resolution and Rationale; and (iii) consideration of whether proceeding with the .GCC application is in the public interest.<sup>99</sup>

53. On 30 April 2023, the Board discussed the BAMC’s recommendation and considered whether to proceed with GCCIX’s application. The ICANN Board considered a comprehensive set of materials prior to issuing any resolution, including: the BAMC’s recommendation; GCCIX’s application; public comments regarding the application; the GAC Early Warning regarding the application; the IO’s comments on GCCIX’s application; the available LRO filings; the 2013 GAC Advice; the January 2022 letter from the GAC; and various communications from GCCIX to ICANN (including GCCIX’s April and May 2013 responses to the GAC Advice, GCCIX’s Reconsideration Request 13-17, and GCCIX’s September 2022 response to the GAC’s January 2022 letter).<sup>100</sup> Following its review and consideration of these voluminous materials, the Board resolved to reaffirm its acceptance of the GAC Advice and not proceed with GCCIX’s application because it was not in the public interest.<sup>101</sup>

54. In doing so, the Board first evaluated whether it was appropriate to review the .GCC application even though there was a pending IRP.<sup>102</sup> The Board agreed with the BAMC on this issue:

...it is important to do this analysis now, rather than waiting for the .GCC IRP to be completed, because taking these steps is appropriate in light of certain findings in prior IRP final declarations and in light of ICANN’s actions in response to those prior IRP declarations, and will benefit the community, including GCCIX, the GCC and the people it represents. This analysis,

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<sup>99</sup>Approved Resolutions | Regular Meeting of the ICANN Board, p. 13 (30 April 2023), Ex. R-30.

<sup>100</sup> *Id.*, p. 17.

<sup>101</sup> *Id.*, p. 17.

<sup>102</sup> *Id.*, p. 17.

Resolution, and Rationale provides the parties and the .GCC IRP Panel with a complete picture of the BAMC and Board evaluation of the GAC Advice and the .GCC application, and these steps are generally consistent with the Board's actions in response to the .AFRICA and .AMAZON IRP Final Declarations and address several of the claims raised in the current .GCC IRP. Moreover, taking this action now is consistent with the purposes of the IRP, as set forth in ICANN's Bylaws, in that this action may narrow and focus the claims in the .GCC IRP, should avoid having multiple IRPs regarding the same application, and should lead to the just resolution of the claims in the .GCC IRP in the most efficient manner possible. In furtherance of the aim of limiting the issues in dispute in the .GCC IRP, the Board acknowledges, as did the GAC, that there was no written rationale for the GAC Advice in the Beijing Communiqué in 2013 and that the NGPC did not provide a written rationale when it accepted the GAC Advice beyond reliance on Section 3.1 of the Applicant Guidebook. The GAC has now detailed its rationale for the 2013 GAC Advice in its January 2022 letter and, in this Resolution and Rationale, the Board has described the independent analysis that the BAMC and the Board have conducted regarding the GAC Advice and the .GCC application.<sup>103</sup>

55. In terms of substance, the Board had several reasons for finding that “not proceeding with GCCIX’s .GCC application is the right thing to do and is in the public interest.”<sup>104</sup> First, the Board recognized that GCCIX’s application “appears to be directly aimed at attracting and engaging with members of the community represented by the GCC and the GCC member states (as stated in GCCIX’s .GCC application) without the support of that community, the GCC, or the GCC’s member states. And it is noteworthy that it is *not a mere lack of support*; the GCC and its member states *have repeatedly objected* to GCCIX’s .GCC application.”<sup>105</sup> Second, the Board acknowledged that GCCIX’s selection of the .GCC string: (i) “is intended to attract, and/or will have the effect of attracting, the relevant community as a result of the association that the Gulf Cooperation Council and its member states have with the ‘GCC’ acronym and the region within which the GCC operates”; and (ii) “appears to capitalize on the reputation and goodwill that the GCC and its member states have developed through their

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<sup>103</sup> *Id.*, p. 17.

<sup>104</sup> *Id.*, p. 17.

<sup>105</sup> *Id.*, p. 17 (emphasis added).

representation of over 60 million people in the Gulf and Middle East region over the last 40 years[.]”<sup>106</sup> The Board also noted that “the application is not sponsored or endorsed by the GCC or its member states.”<sup>107</sup> Third, the Board found that GCCIX’s application “could lead to confusion and could create the false impression that the GCC and its member states have endorsed the operation of the .GCC gTLD and/or the content of domains using the .GCC gTLD, which the GCC and its member states have not done.”<sup>108</sup> The Board noted, as did the IO, that this confusion could interfere with the GCC’s and its member states’ legitimate interests, mission, and community outreach.<sup>109</sup>

56. The Board also explained that taking this action did not single GCCIX out for disparate treatment. Rather, the Board found that:

This action is consistent with the approach ICANN has taken with regard to other gTLD applications that were lacking support in the communities specifically targeted by the applications, such as .ISLAM, .HALAL and .PERSIANGULF. Further, this action is generally consistent with certain findings and recommendations in the .AFRICA and .AMAZON IRP Final Declarations as well as the actions taken by ICANN in addressing those IRP Final Declarations. Moreover, this action addresses several of GCCIX's claims in the current .GCC IRP, including its claims that ICANN should have sought from the GAC a written rationale for the GAC Advice, should have done an independent evaluation of that rationale, should have provided GCCIX with treatment equal to that provided to similarly situated applicants (such as .AFRICA and .AMAZON), and should provide a rationale for any action it takes on account of the GAC Advice regarding the .GCC application.<sup>110</sup>

57. Finally, the Board made clear, however, that its resolution was not based on the GAC’s reference to IGO acronyms at the top-level and that the Board did not intend to create

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<sup>106</sup> *Id.*, pp. 17-18.

<sup>107</sup> *Id.*, p. 18.

<sup>108</sup> *Id.*, p. 18.

<sup>109</sup> *Id.*, p. 18.

<sup>110</sup> *Id.*, p. 18.

any precedent regarding IGO name and acronym protections in gTLDs, which has been the subject of ICANN community-driven policy work.<sup>111</sup>

### **VIII. GCCIX'S SECOND AMENDED IRP REQUEST.**

58. Following the ICANN Board's April 2023 Resolution, GCCIX confirmed that it intended to challenge that resolution, and GCCIX and ICANN agreed that any such claims should be included in this IRP. In an attempt to resolve GCCIX's claims regarding the 2013 NGPC Resolution, ICANN offered to stipulate to certain facts, which ICANN had proposed numerous times throughout this IRP (including in correspondence from September 2022 and April 2023, as well as ICANN's response to GCCIX's Motion to Compel).<sup>112</sup>

59. GCCIX, however, did not withdraw or substantively amend these prior claims. Instead, GCCIX filed its Second Amended IRP Request on 22 December 2023, which largely mirrors its First Amended IRP Request, insofar as it challenges ICANN's 2013 acceptance of the GAC Advice and the removal of the .GCC application from further consideration.<sup>113</sup> Specifically, with regard to the 2013 claims, GCCIX's Second Amended IRP Request challenges ICANN's alleged decisions: (i) "to accept GAC advice to reject the .GCC application, despite lack of any contemporaneous rationale provided by GAC for its advice[;]" (ii) to fail "to request rationale from the GAC, investigate the matter or otherwise consider the public interest[;]" (iii) to deny GCCIX's Reconsideration Request "without providing any additional analysis or rationale, conducting any further investigation, or publishing the materials relied upon by the BAMC;" and (iv) "to refuse to facilitate discussions between [GCCIX] and [the GCC]" or to "allow [GCCIX's] application to proceed to contracting," as required by the .AFRICA and

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<sup>111</sup> *Id.*, p. 18.

<sup>112</sup> Email from E. Enson to M. Rodenbaugh (16 September 2022), Ex. R-31; Letter from E. Enson to M. Rodenbaugh (13 April 2023), Ex. R-32; ICANN's Response to Claimant's Motion to Compel (11 November 2022), Ex. R-33.

<sup>113</sup> *See generally*, Second Amended IRP Request.

.AMAZON IRP Panels, among others.<sup>114</sup> GCCIX then added two new claims, alleging that ICANN “fail[ed] to have a reasonable amount of evidence and analysis before it when making the decisions in both the 2013 and 2023 resolutions to reject [GCCIX’s] application” and that ICANN “fail[ed] to exercise independent judgment in making both of those decisions, and various intermediate decisions.”<sup>115</sup>

## STANDARD OF REVIEW

60. 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.<sup>116</sup> 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.<sup>117</sup> Rather, the core task of an IRP panel is to determine whether ICANN has failed to comply with its foundational documents.<sup>118</sup>

61. Article 4.3(i)(iii) of the June 2022 Bylaws requires that IRP Panels defer to ICANN’s “reasonable business judgment.”<sup>119</sup> Although the June 2022 Bylaws do not define “reasonable business judgment,” that term has a well-established legal meaning. Every United States jurisdiction, including California, recognizes the “business judgment rule,” which provides a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”<sup>120</sup>

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<sup>114</sup> *Id.*, p. 30.

<sup>115</sup> *Id.*, p. 31.

<sup>116</sup> Bylaws, Art. IV, § 4.3; Bylaws (as amended 2 June 2022) (“June 2022 Bylaws”), Art. 4 § 4.3(b)(iii)(A), R-34.

<sup>117</sup> Bylaws, Art. IV, § 4.3(4); June 2022 Bylaws, Art. 4, § 4.3(i)(iii), R-34; *see also Booking.com v. ICANN*, Final Declaration, ¶ 115 (3 March 2015), Ex. R-35.

<sup>118</sup> Bylaws, Art. IV, § 4.3(4); June 2022 Bylaws, Art. 4 § 4.3(b)(iii)(A), Ex. R-34.

<sup>119</sup> Compare June 2022 Bylaws, Ex. R-34, Art. 4, § 4.3(i)(iii) (stating that the Panel “shall not replace the Board’s reasonable judgment with its own”) with, e.g., *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 257 (1999) (“a court will not substitute its judgment for that of the corporation’s board of directors.”), RLA- Ex. 1.

<sup>120</sup> *Lee v. Interinsurance Exch., of the Auto. Club of S. Cal.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)), RLA- Ex. 2. The California Supreme Court has noted “that rule of judicial deference to corporate decision making ‘exists in one form or another in every American jurisdiction.’” *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass’n*, 42 Cal. 3d 490, 507 n.14 (1986)), RLA- Ex. 1.

## ARGUMENT

### I. GCCIX'S CLAIMS REGARDING THE 2013 NGPC RESOLUTION ARE UNTIMELY.

62. The Bylaws in place at the time of the NGPC's 2013 acceptance of the GAC 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.<sup>121</sup>

63. Here, the NGPC resolution accepting the GAC Advice was published on ICANN's website on 6 June 2013, but GCCIX did not submit the Reconsideration Request until November 2013, well outside the 15-day requirement.<sup>122</sup> The fact that GCCIX may have sent ICANN letters complaining about the NGPC's action does not cure the fact that GCCIX failed to file its Reconsideration Request within the Bylaws-mandated time period.

64. Accordingly, all claims asserted in GCCIX's Reconsideration Request and re-asserted in this IRP – namely, with regard to “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”<sup>123</sup> – are time barred.

65. Moreover, to the extent that GCCIX's Second Amended IRP Request includes new claims regarding the 2013 NGPC Resolution that have never before been asserted, these claims are time barred by many years. For instance, GCCIX newly asserts that the NGPC purportedly failed “to have a reasonable amount of evidence and analysis before it when making the decision[] in” the 2013 resolution “to reject [GCCIX's] application.”<sup>124</sup> Similarly, GCCIX newly asserts that the NGPC “fail[ed] to exercise independent judgment” in issuing the NGPC

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<sup>121</sup> Bylaws, Art. IV, § 2.5.

<sup>122</sup> *Id.*

<sup>123</sup> GCCIX W.L.L. Request for Reconsideration ¶ 3, Ex. R-18.

<sup>124</sup> Second Amended IRP Request, p. 31.

Resolution.<sup>125</sup> These new claims should be dismissed as untimely by over a decade.

## **II. ICANN DOES NOT DISPUTE MANY OF THE FACTS RELATING TO GCCIX'S CLAIMS REGARDING THE 2013 NGPC RESOLUTION AND THE RELATED REQUESTS FOR RELIEF HAVE ALREADY BEEN ADDRESSED BY ICANN.**

66. Putting aside that GCCIX's claims regarding the 2013 NGPC Resolution are time-barred, as set forth above, ICANN has made clear to GCCIX multiple times in this IRP that it does not dispute many of the facts on which these claims are based.<sup>126</sup> The factual allegations that ICANN does not dispute include:

- On 11 April 2013, ICANN's Governmental Advisory Committee ("GAC") issued the Beijing Communiqué, which contained, in part, GAC consensus advice that the .GCC application should not proceed ("GAC Advice").
- There was no written rationale for the GAC Advice in the Beijing Communiqué in 2013.
- On 4 June 2013, ICANN's New gTLD Program Committee ("NGPC") passed a resolution accepting the GAC Advice.
- The NGPC did not provide a written rationale in its resolution when it accepted the GAC Advice beyond reliance on Section 3.1 of the Applicant Guidebook, which states that GAC consensus advice against an application proceeding "will create a strong presumption for the ICANN Board that the application should not be approved."
- The Final Declarations of the IRP Panels in the .AFRICA and .AMAZON IRPs were based on facts similar to those not disputed by ICANN above.<sup>127</sup>

67. In addition, in its April 2023 Resolution, the ICANN Board "acknowledge[d], as did the GAC, that there was no written rationale for the GAC Advice in the Beijing Communiqué in 2013 and that the NGPC did not provide a written rationale when it accepted the GAC Advice beyond reliance on Section 3.1 of the Applicant Guidebook."<sup>128</sup> ICANN reiterated these undisputed facts in a 13 April 2023 letter to GCCIX's counsel so that "[GCCIX's] presentation in its Statement of Claim can be streamlined and made more efficient."<sup>129</sup>

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<sup>125</sup> *Id.*, p. 31.

<sup>126</sup> *See e.g.*, Letter from E. Enson to M. Rodenbaugh (13 April 2023), Ex. R-32.

<sup>127</sup> *Id.*

<sup>128</sup> Approved Resolutions | Regular Meeting of the ICANN Board p. 17 (30 April 2023), Ex. R-30.

<sup>129</sup> Letter from E. Enson to M. Rodenbaugh p. 2 (13 April 2023), Ex. R-32.

68. Moreover, ICANN has already granted GCCIX much of the relief it has sought in this IRP. For instance, GCCIX asserts that ICANN should have sought from the GAC a written rationale for the GAC Advice, ICANN should have done an independent evaluation of that rationale, ICANN should have provided GCCIX with treatment equal to that provided to similarly situated applicants in the .AFRICA and .AMAZON IRPs, and ICANN should provide a rationale for any action it takes on the .GCC application.<sup>130</sup> That is exactly what the ICANN Board has now done leading up to and through its April 2023 Resolution. Even further, the ICANN Board considered anew not only the GAC’s written rationale for the GAC Advice, but also GCCIX’s application and GCCIX’s various correspondence, among various other relevant materials, prior to evaluating GCCIX’s application.<sup>131</sup> In addition, the Board’s consideration and evaluation was not only consistent with what the IRP Panels in .AFRICA and .AMAZON recommended ICANN do, but it is also consistent with how ICANN responded to the final declarations in those two IRPs. Thus, the relief that GCCIX has sought in this IRP with respect to the 2013 NGPC Resolution has already been provided to GCCIX.

69. ICANN made these representations and took these steps in an attempt to streamline this IRP and to focus on the actual live issues for which relief may be granted (although ICANN disputes that GCCIX is entitled to any relief whatsoever). GCCIX, however, has not narrowed the claims in this IRP.

### **III. ICANN COMPLIED WITH ITS ARTICLES AND BYLAWS WITH RESPECT TO THE APRIL 2023 RESOLUTION.**

70. The ICANN Board fully complied with its Articles and Bylaws when it issued the April 2023 Resolution that GCCIX’s application should not proceed, and this decision was well within the realm of reasonable business judgment. First, the ICANN Board tasked the BAMC

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<sup>130</sup> See Second Amended IRP Request, pp. 24, 30-31.

<sup>131</sup> Approved Resolutions | Regular Meeting of the ICANN Board p. 17 (30 April 2023), Ex. R-30.

with making an initial recommendation to the ICANN Board as to whether GCCIX’s application should proceed. Accordingly, on behalf of the Board, the BAMC solicited input from GCCIX, considered the relevant materials, discussed the matter extensively, and ultimately recommended that the application not proceed based on: (i) the lack of support and involvement from the relevant community, as stated in the second issue identified in the GAC’s rationale for the GAC Advice; (ii) “information contained in other materials relevant to the .GCC application[,]” as set forth in the 30 April 2023 Resolution and Rationale; and (iii) “consideration of whether proceeding with the .GCC application is in the public interest.”<sup>132</sup>

71. The ICANN Board then discussed the BAMC’s recommendation and considered anew whether to proceed with GCCIX’s application. Like the BAMC, the ICANN Board considered a voluminous amount of materials prior to issuing its resolution, including the BAMC’s recommendation, GCCIX’s application, public comments regarding the application, the GAC Early Warning, the IO’s comments on GCCIX’s application, the available LRO filings, the 2013 GAC Advice, the January 2022 letter from the GAC, and various communications from GCCIX to ICANN (including GCCIX’s April and May 2013 responses to the GAC Advice, GCCIX’s Reconsideration Request 13-17, and GCCIX’s September 2022 response to the GAC’s January 2022 letter).<sup>133</sup> Following its comprehensive review, the ICANN Board resolved not to proceed with GCCIX’s application for a number of reasons, including that the targeted community has repeatedly objected to GCCIX’s application, and that the application could create the false impression that the GCC and its member states have endorsed the operation of the .GCC gTLD, which they clearly have not done.<sup>134</sup> In so doing, the ICANN Board publicly and transparently issued a lengthy and detailed rationale for its resolution, further demonstrating

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<sup>132</sup> *Id.*, p. 13.

<sup>133</sup> *Id.*, p. 17.

<sup>134</sup> *Id.*, p. 18.

that the Board carefully considered whether GCCIX’s application should proceed and whether proceeding with the application would be in the public interest.<sup>135</sup> As is abundantly clear, GCCIX’s application faced significant resistance generally, and in particular from the members of the community that the application targeted.<sup>136</sup> Since 2013, GCCIX had every opportunity to respond substantively to the concerns raised by the public comments, the GAC Early Warning, the IO, the GCC and its member states, and the GAC, but GCCIX has never done so, further supporting the Board’s resolution.

72. GCCIX makes a number of arguments regarding the April 2023 Resolution, each of which lacks merit. First, GCCIX argues that the ICANN Board failed to have a reasonable amount of evidence before it when making this decision and failed to exercise independent judgment.<sup>137</sup> Yet, GCCIX does not identify any evidence that the Board should have further considered in making its April 2023 Resolution. As set forth above, the ICANN Board considered a voluminous amount of materials prior to issuing the April 2023 Resolution, and thoroughly considered the issues before it.<sup>138</sup> The Board also considered GCCIX’s application anew, rather than relying on the 2013 NGPC Resolution.<sup>139</sup> The ICANN Board acted consistently with the Articles and Bylaws in conducting its independent evaluation of the .GCC application and the basis for the GAC Advice, and clearly exercised its reasonable business judgment in reaching the April 2023 Resolution. That GCCIX disagrees with ICANN’s decision does not amount to a violation of ICANN’s Articles or Bylaws (nor has GCCIX identified any Article or Bylaws provision that ICANN allegedly violated in any event).

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<sup>135</sup> *Id.*

<sup>136</sup> *See id.*, p. 18 (“Based on its analysis of these materials, the Board believes that this dichotomy between appearances and actual support could lead to confusion and could create the false impression that the GCC and its member states have endorsed the operation of the .GCC gTLD and/or the content of domains using the .GCC gTLD, which the GCC and its member states have not done.”)

<sup>137</sup> *See* Second Amended IRP Request, pp. 11-12, 31.

<sup>138</sup> Approved Resolutions | Regular Meeting of the ICANN Board p. 17 (30 April 2023), Ex. R-30.

<sup>139</sup> *Id.*, p. 17.

73. Second, GCCIX contends that the ICANN Board sua sponte created a Community Objection process that it resolved itself as opposed to deferring to independent experts, which does not adhere to the requirements set forth in the Guidebook.<sup>140</sup> This argument is a non sequitur, insofar as the Guidebook’s Community Objection process is in no way implicated by the April 2023 Resolution or this IRP. No party has ever instituted a Community Objection process regarding .GCC, and the Board did not consider GCCIX’s application as part of the Community Objection process. Rather, the April 2023 Resolution is a result of GAC advice set forth in Section 3.1 of the Applicant Guidebook, which allows the GAC to “provide advice on any application,” and which is “intended to address applications that are identified by governments to be problematic[.]”<sup>141</sup> Moreover, the Applicant Guidebook explicitly allows the Board to individually consider any new gTLD application, including as a result of GAC advice:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or the use of an ICANN accountability mechanism.<sup>142</sup>

GCCIX’s argument is merely an attempt to obfuscate the actual issues in this IRP and should be rejected.

74. Third, GCCIX argues that ICANN has refused to acknowledge the precedential effect of the .AFRICA and .AMAZON IRPs.<sup>143</sup> Nothing could be further from the truth. In fact, the ICANN Board affirmatively elected to address the issues identified by the .AFRICA and .AMAZON IRP Panels insofar as they applied to the .GCC application and the GAC advice

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<sup>140</sup> See Second Amended IRP Request, p. 36.

<sup>141</sup> Guidebook, § 3.1.

<sup>142</sup> Guidebook, § 5.1.

<sup>143</sup> Second Amended IRP Request, pp. 40-41.

regarding the .GCC Application.<sup>144</sup> Specifically, the Board asked the GAC for a written rationale for its GAC Advice, conducted an independent evaluation of the .GCC application and the GAC Advice, and then set forth a detailed written rationale for its decision not to proceed with the .GCC application.<sup>145</sup> And, given the Board’s April 2023 Resolution that GCCIX’s application should not proceed, there is no basis to return GCCIX’s application to processing or facilitate conversations between GCCIX and the GCC (or its member states) as GCCIX claims. Furthermore, GCCIX has had years to try to engage with the GAC, GCC and/or the GCC’s member states if GCCIX wished to discuss a resolution with those entities.

#### **IV. EACH OF GCCIX’S REMAINING PERIPHERAL CLAIMS ARE BASELESS.**

75. GCCIX’s remaining peripheral claims lack merit insofar as GCCIX has not demonstrated that ICANN acted contrary to its Articles or Bylaws in any respect.<sup>146</sup>

##### **A. ICANN Did Not Violate Its Articles Or Bylaws With Respect To The GCC’s LRO Proceeding Regarding GCCIX’s Application.**

76. GCCIX asserts that ICANN improperly instructed WIPO to terminate the GCC’s LRO proceeding against GCCIX’s application, and that ICANN provided no rationale for that action.<sup>147</sup> GCCIX, however, makes no effort to explain how ICANN violated its Articles or Bylaws with respect to the closure of the GCC’s LRO proceeding.

77. WIPO’s LRO Rules provide that “[i]f, prior to Panel appointment, it becomes

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<sup>144</sup> See Approved Resolutions | Regular Meeting of the ICANN Board p. 17 (30 April 2023), Ex. R-30.

<sup>145</sup> See *id.*; see also Approved Board Resolutions | Regular Meeting of the ICANN Board (12 September 2021), Ex. R-25.

<sup>146</sup> In its original IRP Request, GCCIX asserted that ICANN had violated its Articles and Bylaws by not instituting an IRP Standing Panel on GCCIX’s preferred timetable. IRP Request, pp. 15, 27. In its Amended IRP Request, GCCIX challenged ICANN’s response to GCCIX’s Documentary Information and Disclosure Policy (“DIDP”) Request. Amended IRP Request, pp. 26-27. Those claims do not appear in GCCIX’s Second Amended IRP Request, and ICANN assumes that those claims have been voluntarily dismissed. ICANN will object to any subsequent efforts to re-assert either of these claims, and to the extent necessary, ICANN expressly incorporates by reference its previous responses to these claims. See Response to IRP Request, ¶¶ 66-75; Response to Amended IRP Request, ¶¶ 69-73.

<sup>147</sup> Second Amended IRP Request, pp. 10-12, 30.

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.”<sup>148</sup> When the NGPC accepted the GAC’s consensus advice against the .GCC application in 2013, 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 proceeding, as a result of the acceptance of the GAC Advice. Thereafter, WIPO informed the parties that the LRO proceeding was terminated without prejudice. In addition, ICANN explained to GCCIX in its 5 September 2013 letter that the LRO proceeding was “not moving forward based on the NGPC’s action on 4 June 2013.”<sup>149</sup> WIPO also later confirmed that it had refunded to GCCIX and to the GCC all WIPO panel fees, despite GCCIX’s incorrect claims to the contrary.<sup>150</sup>

78. In sum, the termination of the LRO proceedings was in accordance with WIPO’s rules, and it was proper because there was no longer a live case or controversy with respect to the .GCC application. ICANN explained to GCCIX 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.**

79. GCCIX 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.<sup>151</sup> However, the ICANN Board explicitly stated in its April 2023 Resolution that the Board’s decision was not based on the GAC’s reference to IGO acronyms at the top-level and further clarified that it did not intend to

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<sup>148</sup> WIPO Rules for New gTLD Dispute Resolution, Rule 14(b) (20 June 2011), Ex. R-36.

<sup>149</sup> Annex 9 to Second Amended IRP Request.

<sup>150</sup> Letter from WIPO Arbitration and Mediation Center to BGC (20 November 2013), Ex. R-37.

<sup>151</sup> Second Amended IRP Request, pp. 12-14.

create any precedent regarding IGO name and acronym protections in gTLDs.<sup>152</sup> Therefore, these claims are completely irrelevant to GCCIX’s application and this IRP.

80. GCCIX also leaves out several important details that defeat this claim. First, the Board was not required to adopt all of the recommendations in the GNSO report. Second, nothing in the GNSO report suggests that a third party, like GCCIX, should be permitted to operate a TLD using an IGO acronym over the objection of that IGO.<sup>153</sup> 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, GCCIX 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.

81. ICANN’s Supporting Organizations, with support and participation from ICANN’s Advisory Committees, have been involved in policy development work regarding IGO names at the top-level and IGO names and acronyms at the second-level, and related curative rights protection mechanisms.<sup>154</sup> Thus, there is no current policy development work being conducted with regard to IGO acronyms at the top-level and the Board explicitly did not base its April 2023 Resolution on that premise.<sup>155</sup> This is a red herring issue created by GCCIX.

82. GCCIX has 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

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<sup>152</sup> Approved Resolutions | Regular Meeting of the ICANN Board p. 18 (30 April 2023), Ex. R-30.

<sup>153</sup> See Annex 7 to Second Amended IRP Request.

<sup>154</sup> ICANN | GNSO, PDP Protection of IGO and INGO Identifiers in All gTLDs (24 September 2020), Ex. R-38.

<sup>155</sup> Approved Resolutions | Regular Meeting of the ICANN Board p. 18 (30 April 2023), Ex. R-30.

contrary, the ICANN community’s policy development work on these topics has been open, transparent and inclusive of differing views. Moreover, as stated above, these allegations have no bearing whatsoever on this IRP in that the Board explicitly stated in its April 2023 Resolution: “To be clear, however, the Board is not basing its decision to reaffirm acceptance of the GAC Advice on the GAC’s reference to IGO acronyms at the top-level. While the Board respects the GAC’s view, the Board does not want or intend to set any type of precedent regarding the level or source of IGO name and acronym protections in gTLDs, which has been and continues to be the subject of community-driven policy work.”<sup>156</sup>

**C. ICANN Did Not Act In Bad Faith During The CEP.**

83. GCCIX alleges that, during the CEP, “ICANN never responded in any substantial manner to” two letters written by GCCIX and that “ICANN refused to engage with GCCIX in any substantive manner.”<sup>157</sup> GCCIX is simply wrong. ICANN did respond to GCCIX’s positions in the various calls and conferences the parties had during the life of the CEP. Although ICANN cannot describe the substance of these discussions due to CEP confidentiality, ICANN did attempt to engage with GCCIX during the CEP through CEP conferences and, at all times, acted in good faith.<sup>158</sup> Indeed, if GCCIX truly believed that no substantive discussion was taking place, GCCIX could have terminated the CEP at any point and initiated an IRP. Instead, GCCIX allowed the CEP to proceed for approximately seven years. GCCIX has in no way established that ICANN did not act in good faith during the CEP.

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<sup>156</sup> *Id.*, p. 18.

<sup>157</sup> Second Amended IRP Request, p. 18.

<sup>158</sup> Without disclosing the contents of GCCIX’s letters due to CEP confidentiality, GCCIX’s 4 May 2016 and 19 August 2019 letters to ICANN during the CEP were not efforts to engage with ICANN, but were instead demands that ICANN stipulate to certain facts and provide certain information and documents to which a party is not entitled in a CEP.

**CONCLUSION**

84. ICANN requests that the IRP Panel deny GCCIX's Second Amended IRP Request.

Respectfully submitted,

JONES DAY

Dated: 5 February 2024

By: /s/ Eric P. Enson

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