



September 7, 2022

ICANN
c/o Becky Burr
Chair, Board Accountability Mechanisms Committee (BAMC)

Via email: independentreview@icann.org

Re: Response to GAC letter re .GCC TLD application of GCCIX W.L.L.

Dear Becky,

We write in response to your letter dated August 2, 2022, on behalf of the BAMC. In your letter, you reference the ICANN Board Resolution 2022.06.12.18(e) entitled *Update on Independent Review Process re: Application of .GCC*. Your request raises an abundance of new questions, to which our client respectfully requests a thoughtful response from the BAMC and the GAC.

The GAC Letter Raises Many Questions

Both your letter, and that Resolution, reference the GAC letter dated January 25, 2022, with the subject *GAC Response to ICANN CEO letter on .GCC Application*. That GAC letter purportedly was in response to the ICANN CEO's letter to the GAC Chair, dated November 9, 2021, requesting "an informal dialogue with the GAC regarding the rationale for the GAC consensus advice on the .GCC application" and "whether the GAC would prefer to receive any additional information from ICANN org in advance of such a dialogue."

Neither your letter, nor the GAC letter, mention whether there was any such "informal dialogue" between ICANN and the GAC, other than the exchange of these two short letters. Nor does either letter mention whether the GAC requested and/or received any additional information from ICANN in advance of such dialogue, if any, as suggested by ICANN. Therefore, GCCIX does not know what "informal dialogue" and/or "additional information" the GAC relied upon, if any. We respectfully request to know the full extent of the information relied upon by the GAC in crafting its letter of January 25, 2022, and to know of the procedure by which any "informal dialogue" was conducted between GAC and the ICANN Board.



Moreover, we note that between the time of ICANN’s CEO’s letter of November 9, 2021, and the GAC letter of January 25, 2022, there were no ICANN meetings.¹ We also are not aware that there were any meetings of the GAC during that period. Typically, GAC advice to the Board, as per the Bylaws, is only rendered in GAC Communiques at the end of ICANN meetings. So, we respectfully request to know the full extent of the process that the GAC employed in drafting its letter of January 25, 2022, and any authority in the Bylaws or otherwise for the GAC to issue such a letter purportedly as consensus GAC Advice. Furthermore, is there any precedent for any such intersessional, purportedly consensus GAC advice to the ICANN Board, outside of a GAC Communique?

ICANN Must Provide Evidence of 2013 Discussions

We note that the GAC letter does not specifically cite to any new information received since the GAC Early Warnings in 2012. However, the GAC letter does vaguely mention two sources of information from 2013, which the GAC purportedly relies upon now. First, the GAC acknowledged that it “review[ed] GAC discussions held in closed sessions at ICANN46 in Beijing on the .GCC application, which helped inform the language included in the Beijing Communiqué consensus advice text.” Second, the GAC states that, in 2013, it “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 Governmental Advisory Committee Advice that the application should not proceed for the reasons highlighted in the GAC Early Warning.”

We believe that ICANN has never released any evidence of these consultations, despite our repeated, specific requests to ICANN to provide same. We respectfully request, as we have previously requested several times, that all such information be provided for our review. Specifically, ICANN must provide the unredacted evidence of any and all “discussions” held in Beijing about the .GCC application, and also the purported “requests” received from those GAC members and the CCASG. Did they contain any rationale for their requests? Were there comments from any other governments about such requests? Were GCCIX’ comments considered at the time? Was the Independent Objector’s advice considered? Was the briefing and evidence filed at WIPO by GCCIX and by the UAE considered? What was the process by which the GAC advice was rendered “in closed sessions”, and why and by what authority were the sessions closed?

¹ See ICANN Meeting Calendar, <https://meetings.icann.org/en/calendar#2020>.
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Former GAC Chair's IRP Testimony Proves There Was No Rationale

We refer the BAMC and the GAC to former GAC Chair Heather Dryden's sworn testimony before the *DCA Trust* IRP panel in 2015. Even in light of early GAC Warnings as to the .Africa application, Ms. Dryden explained back then:²

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

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

We again respectfully request disclosure of the unredacted testimony of Ms. Dryden at that IRP hearing, as it was much closer in time to the current GAC consideration of our client's application to operate .GCC. And, based just on that excerpt relied upon by the *DCA Trust* IRP panel, the entire interview is likely to shed further light on the GAC's actual decision-making at the time. Until ICANN provides this information, GCCIX is unable to respond fairly and completely to ICANN's current inquiry to GCCIX.

GCCIX Briefly Summarizes Its Longstanding Positions

Since most if not all of the current GAC members were not in the GAC at any relevant time, similarly as with the current BAMC members, we take the opportunity to briefly summarize some of GCCIX' previously stated positions.

Supermajority GNSO Advice Precludes IGO Acronym Protection at Top Level

Core Value #2 requires ICANN to "ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent." The Applicant Guidebook was developed through the multistakeholder PDP and Supermajority GNSO advice, and provided for Legal Rights Objections as to IGO names to be decided by WIPO. Later, GNSO

² See *DotConnectAfrica Trust v. ICANN*, ICDR Case No. #50-2013-001083 (9 Jul 2015), pp.49-62 ("DotConnectAfrica Final Decision").



Supermajority advice **not** to reserve purported IGO Acronyms at the top level was developed through the multistakeholder PDP – a PDP conducted at the Board’s specific request. The Bylaws always have required the Board to accept Supermajority GNSO advice unless there is a strong, specifically identified public interest **not** to do so. There never was any such finding by the Board or GAC in 2013 or since. Instead, the decisions of the GAC and Board to reject our client’s application were only through secret and improper process, in clear violation of many of ICANN’s Bylaws. Does the GAC or Board have any comment on those facts and allegations; particularly, about how such a procedure has been in the public interest, and what rationale or authority does the Board have to ignore Supermajority GNSO advice?

We again request a detailed written update from ICANN as to any deliberations between the Board, GAC, IGOs and/or GNSO with respect to any potential protection of IGO acronyms at the top level, and as to any communications with the GAC and/or government objectors relating to the .GCC application. What has happened since 2016, if anything, with ICANN’s effort to resolve the policy split between the GNSO and GAC with respect to IGO acronyms at the top level? Was this part of the recent outreach to the GAC? What documents evidence any such happenings?

ICANN and the GAC Improperly Terminated the UAE’s Legal Rights Objection

Pursuant to the Applicant Guidebook, a governmental Objector (the UAE) filed a Legal Rights Objection that was fully paid for by the parties, and fully briefed by their lawyers - before an ICANN-appointed expert at WIPO. So the case should have been decided, at minimum as a valuable input to the Board consideration of the .GCC application and GAC Advice pertaining to it. ICANN’s Bylaws state its purported core Commitment (iv)(B): to “promote well-informed decisions based on expert advice.” Instead, ICANN inexplicably ordered WIPO to terminate the pending LRO expert proceeding, effectively deciding the case itself, based only upon opaque and unsupported GAC Advice. ICANN terminated exactly one of 68 WIPO LRO proceedings, and thus by definition GCCIX has been “singled out for discriminatory treatment” in violation of ICANN’s core Commitment (v). Does the Board or GAC have any comment on those facts? In particular, how does that comport with any idea of “public interest”, to **not** have expert input that was paid for by the relevant parties, and so close to being provided?

There Are Two Reasonable Options

ICANN now has just two reasonable options, consistent with past IRP precedents in highly analogous cases. Either the .GCC application must be returned to ICANN’s GDD for processing, per the .Africa precedent; or, ICANN must facilitate a dialogue with GCCIX and the government objectors, as it has done with .Amazon – *with the express*

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purpose to allow GCCIX to run the TLD. Have the GAC and/or Board considered either of these two options, in light of those two IRP precedents? Have the GAC and/or Board made any finding that our client's operation of the .GCC TLD would not be in the public interest?

The .GCC application should be returned to GDD processing, as with .Africa.

Upon terminating the pending LRO proceeding in 2013, ICANN deemed that our client's application would not proceed. ICANN's only purported rationale parroted the unsubstantiated and conclusory advice from its own Government Advisory Committee, devised in secret in Beijing and decreed to the Board in the Beijing Communique. No reasoning or rationale whatsoever was provided by either the GAC or the Board to support the conclusion to kill our client's legitimate investment in this project, which had relied on the voluminous, clear and consensus terms of the Applicant Guidebook.

Under identical circumstances with respect to the .Africa TLD applicant, an IRP panel held that ICANN violated its Bylaws by failing to provide any rationale from the GAC or otherwise. So, ICANN returned that application to processing without regard to the unsubstantiated GAC Advice. ICANN should do the same now with the .GCC application. Neither the Board nor GAC have explained how this .GCC case is any different from .Africa, as both TLDs are obviously targeted to a geographic community. Moreover, neither the Independent Objector nor any government objector filed a Community Objection, even though they had ample opportunity and ability to do so. Therefore, the Board should direct GDD to finish its processing of the application, and a Registry Agreement should be awarded to GCCIX.

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

ICANN was specifically rebuked in the .Africa and .Islam/.halal IRP decisions for not getting adequate rationale from the GAC, and instead blindly parroting the GAC's unsubstantiated advice. That process seems merely to have been repeated now again, for the second time as to our client's application. Given efforts to engage applicant and government objectors re .Amazon in dialogue, after the adverse IRP decision in that case, why has neither ICANN nor the GAC provided the same facilitation to GCCIX – specifically, with the express view of reaching a “mutually acceptable solution to allow for the use” of .GCC as a top level domain?

With respect to both of the .Amazon and .GCC applications, regional governments have objected to the private operation of a TLD that allegedly corresponds to an informal name of that region. Neither the Board nor GAC have explained how this case is any different



from that one, either. Did the GAC even consider this IRP decision when contemplating its January letter? How does it justify this disparate treatment of .GCC now?

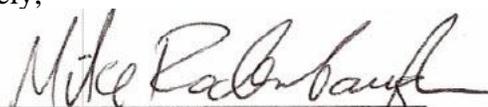
To be sure, GCCIX stands ready to discuss any specific concerns with its proposed governance model, if any, as our client has been eager and able to do since 2012. GCCIX is ready to discuss any other mutually acceptable resolution that allows GCCIX to give voice to the customers it seeks to serve through operation of the .GCC TLD, to recoup its investment in the TLD application, and to operate a successful global business. At minimum, ICANN and the GAC must step forward and facilitate that dialogue, with that stated goal, just as was done with .Amazon.

Conclusion

ICANN has delayed the .GCC application for more than ten years, without any effort to resolve its own belated, internal policy differences re IGO acronyms at the top level. Also, without any effort to engage the GAC or government objectors to even understand their concerns about the .GCC application until November 2021.

Now, the Board owes GCCIX a real discussion with the purported government objectors, with the aim of getting the .GCC TLD live as soon as possible. Otherwise, the Board must follow the only competent evidence and advice in front of it, and return the application to processing by the GDD because it is in the public interest -- having fulfilled all of ICANN's requirements in the Applicant Guidebook.

Sincerely,

By: 

Mike Rodenaugh
RODENAUGH LAW