



## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Reply In Support of Its Supplementary Request for Independent Review Process (“Reply”) submitted by claimant Gulf Cooperation Council (the “GCC”) on 29 March 2016.

1. The GCC’s Reply reasserts the same three arguments set out in its prior briefs, none of which identify any ICANN Board conduct that was inconsistent with ICANN’s Articles of Incorporation (“Articles”) or Bylaws, which is the only question at issue in this IRP. First, the GCC claims that the ICANN Board violated the Articles and Bylaws because it did not stall the processing of the .PERSIANGULF application (“Application”) in order to consult with the Governmental Advisory Committee (“GAC”) after the GAC stated that it “*does not object*” to the Application proceeding. This argument, however, invents Board obligations that do not exist, as clearly set forth in the Applicant Guidebook (“Guidebook”). Second, the GCC again claims that it will be materially affected if the Application proceeds to delegation, but the GCC still fails to provide any concrete example of how operation of .PERSIANGULF would cause injury or harm to it or any of its members. Third, in a final effort to argue that this IRP Request is not time-barred, the GCC relies on (and mischaracterizes) email discussions between counsel regarding the logistics of a post-IRP cooperative engagement process (“CEP”). However, the correspondence that the GCC submitted to support this argument actually demonstrates that there was no tolling of the IRP deadline.<sup>1</sup>

2. The GCC’s objection to – and intolerance of – the Application is not what is at

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<sup>1</sup> The Reply also discusses ICANN’s transparency obligations (Reply at Pgs. 5-7), but ICANN already responded to these arguments in its Response to the Claimant’s Supplementary IRP Request (at Pgs. 7-12).

issue in this IRP. Instead, the only question is whether the ICANN Board’s evaluation of the Application was consistent with ICANN’s Articles and Bylaws. At every step, the Board complied with the Articles and Bylaws, and followed the processes set forth in the Guidebook. As such, the GCC’s Supplementary IRP Request should be denied.

### **BACKGROUND**

3. The parties’ extensive prior briefing in these proceedings sets forth the relevant background facts. But two circumstances warrant emphasis, here. First, as a result of a significant investment of time and resources on the part of the applicant, the Application has already passed a number of important evaluations. Indeed, the Application’s Initial Evaluation involved background screening, an assessment of whether the .PERSIANGULF Application was “in contention” with any other applied-for string by reason of string similarity, a review of the Application’s proposed DNS stability, registry services, and technical, operational and financial capability, as well as a geographic names review.<sup>2</sup> The Application passed each part of these reviews.<sup>3</sup>

4. Second, the GCC availed itself of the full gamut of opportunities within the New gTLD Program to object to the Application. These objections were considered by a wide variety of independent third parties, *none of whom found any basis upon which to determine that the Application should not proceed*. Indeed, the GCC, and certain of its member States, first raised its concerns in 2012. Since then, in December 2012, ICANN’s Independent Objector (“IO”) reviewed the GCC’s concerns and found that he had no basis to object to the .PERSIANGULF

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<sup>2</sup>Initial Evaluation Report (Resp. Ex. R-27), <https://newgtlds.icann.org/sites/default/files/ier/m6bk8at7iydw5jrsb9zat5ia/ie-1-2128-55439-en.pdf>

<sup>3</sup> *Id.*

Application.<sup>4</sup> Thereafter, in July 2013, the GAC, an independent body that provides advice to ICANN on behalf of governments, completed its review of the Application and informed ICANN that it “*does not object*” to the .PERSIANGULF Application proceeding.<sup>5</sup> Following that, an independent expert appointed by the International Chamber of Commerce (“ICC”) to assess the GCC’s community objection to the Application determined, in a report issued on 30 October 2013, that the GCC’s community objection should be rejected.<sup>6</sup> To be sure, the Board maintains its discretion to intervene with respect to any particular application, regardless of the outcome of these procedures.<sup>7</sup> But the careful consideration, and rejection, of the GCC’s concerns at each step of the Application’s progress reaffirm the reasonableness of the Board’s determination that no such intervention was warranted.

5. It is with that backdrop that the GCC’s Reply should be considered. The GCC has had numerous opportunities to present its objections to the Application, each of which were unsuccessful. The same should be true of its Supplementary IRP Request, as the GCC has failed to identify any Board conduct that violated ICANN’s Articles or Bylaws.

## ARGUMENT

### I. NOTHING ABOUT THE BOARD’S HANDLING OF THE GAC’S STATEMENT THAT IT DID *NOT* OBJECT TO THE APPLICATION SUPPORTS THE GCC’S SUPPLEMENTARY IRP REQUEST.

6. The Guidebook provides that GAC advice triggers certain Board obligations *only* when the GAC provides advice *against an application proceeding* in one of three circumstances.

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<sup>4</sup> The IO’s Comments on Controversial Applications (Ex. R-ER-5), <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-comments-on-controversial-applications/persianguf-general-comment/>.

<sup>5</sup> Durban Communiqué, ¶ IV.1.3 (Cl.’s Annex 24) (emphasis added).

<sup>6</sup> See Expert Determination on the GCC’s Expert Determination (Cl.’s ER Annex 2).

<sup>7</sup> Guidebook, § 5.1 (Resp. Ex. R-2) (“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.”)

7. First, pursuant to Module 3.1, Part I of the Guidebook, the GAC may issue “consensus advice” that an application “should not proceed.” Consensus advice “create[s] a strong presumption for the ICANN Board that the application should not be approved.”<sup>8</sup> Second, pursuant to Module 3.1, Part II of the Guidebook, the GAC may issue non-consensus advice indicating that it has “concerns about a particular application[,]” in which case the Board is expected to enter into a dialogue with the GAC to understand the scope of the concerns.<sup>9</sup> Third, pursuant to Module 3.1, Part III of the Guidebook, the GAC may issue advice to ICANN “that an application should not proceed unless remediated” which raises “a strong presumption for the Board that the application should not proceed unless there is a remediation method available[.]”<sup>10</sup>

8. The only advice the GAC offered concerning the Application is found in the Durban Communiqué, which was the official statement from the GAC to ICANN resulting from the Durban meeting. Therein, the GAC informed ICANN that it “finalized its consideration” of the Application and that the GAC “*does not object*” to the Application proceeding.<sup>11</sup> As such, the ICANN Board decided to continue processing the Application “in accordance with the established procedures in the [Guidebook.]”<sup>12</sup> This response is exactly what the Board was supposed to do—it considered and followed the GAC’s advice. There is no Article, Bylaws provision or Guidebook provision that requires the ICANN Board to do more.

9. The GCC’s Reply, however, reiterates its argument that the minutes from the GAC’s meeting in Durban constitute “non-consensus advice” against the Application

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<sup>8</sup> *Id.*, § 3.1(I).

<sup>9</sup> *Id.*, § 3.1(II)

<sup>10</sup> *Id.*, § 3.1(III).

<sup>11</sup> Durban Communiqué, ¶ IV.1.3 (Cl.’s Annex 24) (emphasis added).

<sup>12</sup> Annex 1 to NGPC Resolution 2013.09.10.NG03 at GAC Register #9 (R-ER-10), *also available at* <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-10sep13-en.pdf>.

proceeding.<sup>13</sup> As ICANN has previously explained, this argument is unsupported.<sup>14</sup> First, the GAC’s official statements of advice to the Board are communicated through communiqués, not minutes of its meetings.<sup>15</sup> Second, the meeting minutes in question do not support the GCC’s position. To start, the GCC places much weight on the fact that the minutes “noted the opinion of GAC members from UAE, Oman, Bahrain and Qatar that this application should not proceed due to lack of community support and controversy of the name.”<sup>16</sup> But those GAC members are also members of the GCC. In other words, although GAC members are encouraged to voice their opinions, these specific GAC members seeks to elevate *their own comments* made at the Durban meeting into GAC advice. The Guidebook, however, limits the types of GAC advice that can impose any sort of duty on the Board, and comments made by individual GAC members during a meeting is not among them. That is not to say that the GCC members’ comments were meaningless, as they were taken into account during the meeting, which was the proper forum for them. However, they simply do not comprise GAC advice of the sort that the Guidebook provides will trigger any sort of duty on the part of the Board. Third, and last, the meeting minutes made clear that with respect to .PERSIANGULF “the GAC does not provide advice against this string proceeding.”<sup>17</sup> So even if the minutes could constitute non-consensus advice (which they do not), they would still ultimately provide no support for the GCC’s Supplementary IRP Request.

10. Nor does the IRP panel’s declaration in the *DotConnectAfrica Trust v. ICANN* IRP (“DCA IRP”) provide any foothold for the GCC’s position. The situation in the DCA IRP is

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<sup>13</sup> Reply at Pg. 3.

<sup>14</sup> ICANN’s Response to Supplementary IRP Request at Pgs. 5-6.

<sup>15</sup> GAC Operating Principles 46, 51 (Resp. Ex. R-25).

<sup>16</sup> Reply at Pg. 3 (emphasis altered).

<sup>17</sup> GAC Meeting Minutes, 13-18 July 2013 at 2 (Cl. Annex-34).

not analogous to this matter. In the *DCA* IRP, the GAC provided the Board with consensus advice that a particular application for .AFRICA should not proceed. As previously noted, the Guidebook provides that such consensus advice should create a “strong presumption” that an application should not proceed. Here, in contrast, the GAC advised that it did *not* object to the .PERSIANGULF Application proceeding. In its Reply, the GCC completely disregards this important distinguishing point and, instead, contends that “ICANN’s transparency obligations arise when its Board makes a decision based on [the] GAC’s advice.”<sup>18</sup> This statement, however, misses the mark: here, the Board did not make a “decision” based on the GAC’s “advice.” Rather, the ICANN Board, after independent evaluation of the GAC’s advice, directed ICANN staff to continue processing the .PERSIANGULF Application after the GAC advised that it did not object to the Application proceeding.<sup>19</sup> In other words, because the GAC did not object to the Application, the Board did *not* intervene and halt the processing of the Application, which was proceeding per the terms of the Guidebook given that the Application had survived all objection proceedings and passed all evaluations.

11. Indeed, given that the GAC did not issue any advice of the sort that triggers the Board’s obligation to halt the Application’s progress, the GCC must be alluding to the Board’s discretion to individually consider an application.<sup>20</sup> But again, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a new gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it . . . .”<sup>21</sup>

12. In short, faced with the reality that the Board complied with all applicable

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<sup>18</sup> Reply at Pg. 5 ¶ 13.

<sup>19</sup> NGPC Resolution 2013.09.10NG03 (Ex. R-ER-9; Annex 1 to NGPC Resolution 2013.09.10NG03 (Ex. R-ER-10).

<sup>20</sup> See Guidebook, § 5.1 (Resp. Ex. R-2).

<sup>21</sup> Booking.com Final Determination ¶ 138 (Resp. Ex. R-28), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

Articles, Bylaws and Guidebook provisions, the GCC seeks to rewrite the Guidebook and insert a provision that converts comments by individual GAC members into “non-consensus advice” when transcribed into the meeting minutes. Nevertheless, the Guidebook cannot be interpreted in that manner, and the GCC has failed to show that the Board violated any Article or Bylaws provision when it determined not to halt the Application’s progress based on the GAC’s statement that the GAC “*does not object*” to the Application proceeding.<sup>22</sup>

**II. THE GCC HAS NOT BEEN “MATERIALLY AFFECTED” BY THE ICANN BOARD’S DECISION TO PROCEED WITH THE .PERSIANGULF APPLICATION.**

13. An IRP is only available to those “materially affected” by an ICANN Board action or decision.<sup>23</sup> As ICANN has previously explained,<sup>24</sup> the GCC has failed to identify any legally-recognizable injury or harm it will suffer if a .PERSIANGULF gTLD is created.

14. In fact, the IO and Judge Schwebel (the ICC expert panelist who considered the GCC’s community objection) have previously found that there is a real question about whether the GCC will suffer any legally-recognizable harm at all if the .PERSIANGULF gTLD is approved.<sup>25</sup> Judge Schwebel explained, “the fact remains that the practical effect of registration of .PERSIANGULF gTLD is difficult to discern and weigh. Hence it follows that a likelihood of material detriment has not been established.”<sup>26</sup> Moreover, as Judge Schwebel recognized in his expert determination on the GCC’s community objection, any perception that Arab states in the region accept the disputed name could be counteracted by the GCC’s “registration of a domain such as .ARABIANGULF gTLD.”

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<sup>22</sup> Durban Communiqué, ¶ IV.1.3 (Cl.’s Annex 24).

<sup>23</sup> Bylaws, Art. IV, § 3.2 (Resp. Ex. R-1).

<sup>24</sup> ICANN’s Response to Supplementary IRP Request, at Pgs. 12-14.

<sup>25</sup> Independent Objector’s Comments Regarding the Application (Resp. Ex. R-11); Expert Determination on the GCC’s Expert Determination (Cl.’s ER Annex 2).

<sup>26</sup> Expert Determination on the GCC’s Expert Determination ¶ 40 (Cl.’s ER Annex 2).

15. The GCC seeks to explain away these findings by trying to differentiate between the standard applied by Judge Schwebel (whether the GCC would suffer material *detriment* from the operation of the .PERSIANGULF string) and the standard that this Panel must consider (whether Claimant was materially *affected* by the Board’s decision not to stall the Application’s progress).<sup>27</sup> This semantic distinction identifies no substantive difference between the two standards. Indeed, the Bylaws make clear that for purposes of the IRP standing requirement, “[i]n order to be materially affected, the person must *suffer injury or harm* that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles . . . .”<sup>28</sup> In other words, the basic question at the heart of both inquiries is whether the GCC will be injured or harmed by the string’s operation. The GCC has never offered any answer to that question other than its simple preference that no one operate it. That subjective preference does not mean the GCC was “materially affected” in the manner necessary to support an IRP request.

16. The Reply does not attempt to fill the gap Judge Schwebel identified, and fails to identify any injury or harm that the operation of a .PERSIANGULF string would have upon the GCC or any of its members. Instead, the Reply merely summarizes the complaints about the new gTLD process that the GCC has raised throughout this IRP proceeding, contending that the “Board’s decision to proceed with the .PERSIANGULF application denied the GCC its right to due process and discriminated against” it.<sup>29</sup> However those arguments skip a necessary preliminary step – *before* attempting to show that the Board violated an Article or Bylaws provision (which it did not), an IRP claimant must establish standing by demonstrating that the Board conduct in question caused injury or harm to the claimant. The GCC’s Reply continues to

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<sup>27</sup> Reply at Pgs. 7-8.

<sup>28</sup> Bylaws, Article IV, § 3.2 (Resp. Ex. R-1) (emphasis added).

<sup>29</sup> Reply at Pg. 20.

omit any explanation of the injury or harm the GCC would experience should the Application proceed to delegation. Thus, the Supplementary IRP Request should be denied.

### III. THE GCC'S IRP REQUEST REMAINS TIME-BARRLED.

17. ICANN's Bylaws require that an IRP be initiated within *thirty days* of the posting of the minutes of the Board meeting that the IRP claimant contends demonstrates that ICANN violated its Articles or Bylaws.<sup>30</sup> As previously explained, the minutes and Board Briefing Materials related to Board's decision to direct ICANN staff to continue processing the .PERSIANGULF Application were posted on 30 September 2013.<sup>31</sup> Thus, the GCC's deadline expired on 30 October 2013, over a year before the GCC filed its Supplementary IRP Request.

18. In its Reply, the GCC presents only one new argument in response to this stark chronology. It tries to argue that the thirty-day deadline was tolled because ICANN purportedly told GCC "it could engage in a type of Cooperative Engagement Process."<sup>32</sup> This is incorrect.

19. *Prior to* initiating a request for IRP, complainants are urged to enter into a CEP with ICANN "for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP."<sup>33</sup> The CEP is invoked "by providing written notice to ICANN[.]"<sup>34</sup> The running of the thirty-day IRP filing deadline is tolled while the parties are engaged in a CEP.<sup>35</sup> Likewise, according to well-documented procedures, a potential IRP claimant and ICANN may modify the timing of a CEP or IRP, as long as that modification is memorialized in writing.<sup>36</sup>

20. The GCC never invoked CEP nor formally sought any sort of extension of the

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<sup>30</sup>Bylaws, Art. IV, §§ 3.3, 3.14, 3.15 (Resp. Ex. R-1).

<sup>31</sup>Minutes of 10 September 2013 Meeting of the NGPC (Ex. R-ER-16), *also available at* <https://www.icann.org/resources/board-material/minutes-new-gtld-2013-09-10-en>.

<sup>32</sup>Reply at Pg. 10 (emphasis altered).

<sup>33</sup>Bylaws, Art. IV, § 3.14.

<sup>34</sup>11 April 2013 Cooperative Engagement Process Request for Independent review (Cl. S-10).

<sup>35</sup>*Id.*

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

GCC's time to file its IRP Request. The GCC filed its initial IRP Request on 5 December 2014 (approximately 13 months after the deadline to do so). Nonetheless, the GCC seeks to avail itself of the CEP tolling principle by citing to an email sent to the GCC's counsel from ICANN's counsel on 19 December 2014, in which ICANN's counsel in fact expressed *skepticism* as to the utility or availability of the CEP mechanism in this instance since the GCC had already initiated an IRP.<sup>37</sup> Indeed, counsel for ICANN made clear: "A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. . . . ICANN representatives informed GCC representative, on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP."<sup>38</sup> This email, in which ICANN's counsel describes the logistical difficulties that would plague a post-IRP filing CEP, does not equate to a CEP initiation. Accordingly, neither the email nor any other excuse the GCC asserts for its tardy IRP filing operates to toll the IRP deadline, which the GCC missed by more than a year.

### CONCLUSION

21. The GCC has failed to demonstrate that ICANN's Board violated the Articles or Bylaws, does not identify any legally-recognized injury or harm to the GCC if the .PERSIANGULF Application proceeds, and submitted both the initial and Supplementary IRP Request long after the deadline. The GCC's Supplementary IRP Request should be denied.

Respectfully submitted,

JONES DAY

By: 

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Dated: April 12, 2016

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<sup>37</sup> 19 December 2014 email (Cl. S-11).

<sup>38</sup> *Id.*