

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE INTERNATIONAL CENTRE FOR  
DISPUTE RESOLUTION**

ASIA GREEN IT SYSTEM BILGISAYAR SAN. VE	)	
TIC. LTD. STI.,	)	
	)	
Claimant,	)	
	)	
vs.	)	<b>ICDR Case No. 01-15-0005-9838</b>
	)	
INTERNET CORPORATION for ASSIGNED	)	
NAMES AND NUMBERS,	)	
	)	
Respondent.	)	
	)	
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**CLAIMAINT’S SUPPLEMENTAL BRIEF IN SUPPORT OF  
REQUEST FOR INDEPENDENT REVIEW PROCESS  
BY ASIA GREEN IT SYSTEM BILGISAYAR SAN. VE TIC. LTD. STI.**

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In its IRP Complaint filed Dec. 16, 2015 (“Complaint”), the Complainant Asia Green IT System (“AGIT”) set forth the factual background of its dispute with Respondent ICANN, referenced 19 documentary Annexes, and raised seven distinct arguments as to how ICANN has violated its Bylaws with respect to its handling of AGIT’s applications to operate the .Islam and .halal top-level domains (“TLDs”). ICANN responded on Feb. 1, 2016 (“Response”), providing thirty documentary Exhibits. AGIT does not reiterate the arguments from its Complaint, but incorporates them by reference and addresses ICANN’s Response as to each, in light of further and critical evidence discovered meanwhile. AGIT respectfully provides these further arguments and evidence for the Panel’s consideration in advance of the Feb. 17, 2017, scheduled IRP hearing.

**1. ICANN consulted in secret with the GAC Objectors regarding AGIT’s applications.**

**a. Beijing GAC Meeting – held in secret, no rationale for “some Members’ concerns.”**

ICANN does not address or dispute AGIT’s contention that all GAC deliberations leading to its critical Beijing Communique were held in closed session, with only ICANN Staff, executives and Board members allowed in the room with the GAC members. (Complaint, p.15.) No minutes, transcripts or rationale from those meetings have ever been released, leaving only one short paragraph from the Communique to represent the entire documentation of GAC deliberations and advice as to AGIT’s applications. This despite ICANN’s practice to hold all GAC meetings in public and with documentation such as minutes and a transcription. (Annex 20.) And despite AGIT’s DIDP request and IRP discovery requests seeking such documents. (Annex 15.)

The Beijing GAC meeting appears to have been the only GAC Meeting ever held with all sessions restricted to “Members Only”, as indicated by the publicly available GAC webpage listing the GAC’s documentary meeting archives. (Annex 20.) Yet no rationale has ever been offered by ICANN for holding these meetings in secret, in furtherance of any purported public interest. Indeed, in an interview conducted by ICANN right after the meeting, GAC Chair Heather Dryden acknowledged that the meetings were closed simply because some members found the discussions “sensitive.” She

acknowledged the public outcry over the unexplained closure of these crucial meetings, and expressed “it’s unfortunate that the community was not able to see.” She then acknowledged that, in the future, GAC meetings would be “more open.” (Annex 21; *see also*, Annex 20 (GAC Website: “Since mid-2013, GAC meetings have been open...,” with limited exceptions including “if the topic of discussion is a sensitive and purely internal matter.” (emphasis added)).)

The New TLD deliberations were clearly not a “purely internal” GAC matter; yet, no transcripts, recordings, minutes or other notes from those “sensitive” meetings have ever been published or produced to AGIT. This clearly violated, and continues to violate, ICANN’s “open and transparent” policy development obligations, set forth in the GAC’s rules, and in Core Value No. 7, and it violated ICANN’s Bylaws requirement to have all relevant facts in front of the Board when deciding. Instead, ICANN merely accepted the GAC’s bare, vague statement that “some [unspecified] members” were concerned about unspecified “religious sensitivities” with only AGIT’s two applications, and then held further secret meetings that also have never been documented.

**b. Durban Meeting – ICANN fails to follow Guidebook and its own Resolution.**

One secret meeting took place in Durban in July, 2013, supposedly per the NGPC Resolution of June 4, 2013, stating that it “stands ready to enter into dialogue with the GAC on this matter.”<sup>1</sup> Discovery has revealed that at least two ICANN Board Members clearly objected to this meeting not being held in public and with the entire GAC, as it was their belief that the Guidebook and post-Beijing Board resolution each required this in considering GAC advice. (Annex 22.)<sup>2</sup> Board members Mr. Plzak

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<sup>1</sup> ICANN irrelevantly argues that AGIT’s recent COO was present at the meeting. (Resp. Ex. 12.) However, that evidence shows that Mr. Soboutipour was not working for AGIT in July 2013, and only became COO in 2015. He was not at the meeting as a representative of AGIT. Indeed, AGIT was never informed by ICANN of the meeting, it was only noticed to the ICANN Board and some GAC members. (Annex 22.) Mr. Soboutipour attended only as part of the GAC delegation, as he indicated at the beginning of the meeting. (Annex 23.)

<sup>2</sup> The Guidebook elsewhere distinguishes subsets of the GAC, *e.g.* as to GAC Early Warnings (§ 1.1.2.4) and as to approval of geographic terms (§ 2.2.1.4.3), so no credence can be given to ICANN’s argument that “the GAC” means anything less than the full GAC. The Bylaws refer only to the full GAC. To the

and Mr. Silber both raised objections within the email string notifying the Board of this meeting. Mr. Plzak stated that “I do not like this. Why isn’t this being discussed in the scheduled meeting of the GAC and the NGPC?” (*Id.*, No. 159.) Mr. Plzak later confirmed that “the Chair of the GAC has made it clear that this is not a meeting with the GAC.” (*Id.*, No. 90; *see also, id.*, No. 161: “Then this sounds like lobbying... I think that this is best if it is the full GAC and the full NGPC.”)

Indeed, the GAC Chair had stated “this will not be a meeting of the GAC” because the GAC had already concluded its discussions. (*Id.*, No. 85: “Any discussions about these strings are extremely sensitive for a few reasons. I’ve named one i.e. that these terms are related to religion. The other reasons I am not prepared to outline in an email.” (emphasis added).)<sup>3</sup> ICANN’s Senior VP, Government Relations, Mr. Hedlund acknowledged this was to be a “smaller dialogue.” (*Id.*, No. 88.) Mr. Plzak pressed the issue, asking “Why is this being handled in a different manner? ... I am not comfortable that at some point in time in the future that the GAC will receive a report of these proceedings.” (*Id.*, No. 86.)

No such report was ever produced by ICANN, and there is no indication the GAC or NGPC later received any information whatsoever about the meeting.<sup>4</sup> Mr. Plzak also stated that the Board was not following its own resolution to discuss the matter with the GAC: “We have not had a dialogue with the GAC regarding how this was going to move forward.” (*Id.*, No. 166.) Mr. Silber agreed the Board was not following its resolution: “That’s not what we said ...” (*Id.*, No. 180.) Mr. Plzak also asked whether the meeting would be recorded and open to the public, and was told by another Board member that it would be open. But in fact, it was not open, as it was not noticed to the public nor included on any

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extent “the GAC” is ambiguous in Guidebook §3.1, it should be construed against ICANN here. (*See infra*, n.16.)

<sup>3</sup> *See also*, Annex 22, No. 177, Ms. Dryden email to ICANN Board Member Chris Disspain: “Just noticed that this [meeting invite] says 90 minutes! Might want to reduce that right down to say 45 mins... type of thing.” In fact, the meeting lasted just 32 minutes.

<sup>4</sup> ICANN Staff had ordered a transcription service for the meeting (*id.*, No. 165, 168), but no transcript was provided to the GAC or NGPC, otherwise made public, or produced in response to AGIT requests.

publicly available agenda, it was only noticed to the Board private list, the Iranian GAC rep, and the UAE GAC rep – it does not appear even to have been noticed to the entire GAC. (*See id.*, Nos. 174-176 (UAE GAC rep acknowledging that he would attend and would round up other objecting countries to attend).) Also, neither minutes, a transcript nor a recording was ever provided to the GAC or the NGPC, or otherwise made public. The recording only came to light after AGIT’s repeated requests, several years after the challenged decision of the Board.

There is no indication as to how such objections were further discussed or resolved by the Board. The meeting then occurred that week, between only eight Board members and ten GAC members.<sup>5</sup> The audio recording of this 32-minute meeting indicates that the primary speaker was the UAE rep who had filed the failed Community Objections against AGIT’s applications, reiterating those same arguments then pending consideration by the Community Objection panel. (Annex 23.) The recording further indicates that neither Mr. Plzak nor anyone else asked the GAC Chair what were the “other reasons” the strings were deemed so sensitive, which she stated to the Board that she could not put into writing to the Board. Nobody asked about any specific concerns with AGIT’s applications, or how those concerns might be resolved.

So, the Board did not follow its own resolution as to these applications, nor the Guidebook requirement, to discuss the GAC advice with the GAC. (Annex 9 (resolution), and Guidebook § 5.1.) Instead, only a few NGPC members discussed the GAC advice with a few GAC members, in a hastily called secret meeting -- without ever informing the entire GAC of what occurred at the meeting, and without ever informing AGIT, the GNSO, or the public of the meeting, or of what occurred at the meeting. There is no reference in the GAC Communique, either to this meeting, or at all as to AGIT’s applications. (Annex 24.) Indeed, it appears that the NGPC itself (other than the few members present) was never even informed of what occurred at the meeting.

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<sup>5</sup> There are 20 Board Members per the Bylaws. And per the Durban Communique there were 63 GAC Members and Observers in attendance, of more than 100 total membership at that time. (Annex 24.)

AGIT's CEO specifically asked ten Board and GAC members for the opportunity to meet with them in Durban, but nobody accepted the offer and there were no meetings. (Annex 25.)<sup>6</sup> The Board failed to fulfill its duty to consult with "the GAC" about the unspecified concerns of some of its members, and failed to consult with AGIT despite its Core Value No. 9 -- obtain informed input from those entities most affected. So, the Board failed to have sufficient information before it when it iced AGIT's applications and denied AGIT's reconsideration request.<sup>7</sup>

**c. Additional meetings with OIC – discovery reveals OIC and ICANN intent.**

IRP discovery has revealed that ICANN subsequently held additional, secret meetings with the OIC to advise it how to further object to AGIT's applications, despite the untimeliness and lack of documented procedure for any further objections. On or about October 29, 2013, Baher Esmat, ICANN VP, met on the phone with the OIC rep, upon OIC learning that AGIT had prevailed in the Community Objections filed by the UAE, with the OIC's stated purpose for such meeting "to discuss this matter and get your advice." (Annex 26, Nos. 35-36.) Then, those same men met in person at ICANN's Buenos Aires meeting in Nov., 2013. (*Id.*) Despite AGIT's DIDP and discovery requests, ICANN has not disclosed anything further about those meetings, which occurred immediately prior to the Dec., 2013 OIC resolution cited in Dr. Crocker's Feb. 7, 2014 letter to AGIT. (Annex 12.)

These secret meetings were completely contrary to advice several months prior from ICANN Sr. VP, Government Relations, Mr. Jamie Hedlund, which advised that government officials would seek contact at ICANN meetings with ICANN Staff and Board members, and required that "[s]hould any of these instances arise, kindly ask the official(s) to bring their concerns through the GAC. *This is very important for the integrity of the New gTLD program as well as ICANN's multistakeholder model.*" (Annex 27, No. 188 (emphasis added).) Mr. Esmat ignored this advice, on several occasions.

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<sup>6</sup> Only one person even responded, the GAC Vice Chair saying after the meeting "I am happy that the GAC stopped its objections against .persiangulf and this application can go forward now." (Annex 25, 2d to last page.) AGIT's application for .persiangulf had also been the subject of non-consensus GAC advice.

<sup>7</sup> See Complaint p.11-13, n.16, and Annex 11 (*DCA Trust Final Declaration*).

Certainly, it was improper for ICANN to “advise” the OIC as to stating further objections to AGIT’s applications. Particularly because such objections were required per the Applicant Guidebook to have been submitted long before<sup>8</sup> -- in the form of a GAC Early Warning, via the Independent Objector, via a Community Objection, and/or through issuance of GAC Advice. All those mechanisms afforded AGIT a chance to participate and/or respond per ICANN’s documented process and timeline. These secret meetings did not, and thus clearly violated ICANN’s Core Values No. 7 and No. 9. (*See* Complaint, p. 17.) All the community- and Board-approved Guidebook processes had already been foreclosed, yet ICANN Staff and NGPC then secretly created a new, belated route for the OIC to object directly to the ICANN Board.<sup>9</sup> This clearly violated the Guidebook, and the GNSO recommendations and Board resolutions underpinning it -- particularly GNSO Recommendation Nos. 1, 9 and 12. (*See id.*, p. 18.)

Discovery has revealed that further secret meetings later occurred between senior ICANN Staff and the OIC rep several times, where the OIC’s intent in objecting to the applications became clear. First, in Singapore on March 23, 2014,<sup>10</sup> which “covered updates” on these applications and revealed the OIC’s true intent in objecting to them. The OIC rep “asked about the next round of New gTLDs”, confirming the OIC’s ultimate aim for *itself* to operate these TLDs. But, ICANN “did emphasize that ICANN cannot open the current round for the OIC to apply .islam and .halal, and so both applications are frozen now until the matter is resolved between OIC and AGIT, or wait until the next round.” (Annex 28, No. 187.) Then two weeks later the OIC asked different ICANN Staff whether these two TLDs could simply be delegated to OIC without any process. (*Id.*, No. 129: Email from ICANN Sr. Adviser to the President Tarek Kamel, “[OIC rep] Wajdi ... asked the funny question whether the two strings could be

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<sup>8</sup> *See, e.g.*, Annex 19 (last page), Dr. Crocker letter to OIC, Jan. 13, 2014: “The time window for formal objections on new gTLD strings has ended, but we will have to wait for the consideration and decision of the NGPC according to their rules and procedures.”

<sup>9</sup> *See also*, Annex 28, No. 129, Apr. 3, 2014 email between ICANN government relations staffers: “Key in this process was a resolution adopted by the OIC last December.... OIC has been participating in ICANN GAC since Beijing particularly for this issue.”

<sup>10</sup> This email string states that ICANN Staff would further “follow up” with the OIC rep after this meeting (*id.*, No. 186), but ICANN has not produced any records as to that additional follow-up.

delegated to the OIC. We told him never outside the process. OIC is now calm ... at least we do not have a burning political issue in the Middle East anymore as a year ago." (emphasis added).)

This correspondence indicates that, for purely political reasons having nothing to do with public policy, ICANN has secretly agreed with OIC that OIC is the only appropriate operator of these TLDs, and they should be stalled until the "next round" when OIC can apply for them. But there was absolutely no GNSO or public input into that solution; indeed, it has never been publicly disclosed as such by ICANN. And it was specifically refuted by both experts that had been devised by multistakeholder-approved policy development set forth in the Board-approved Guidebook. The Independent Objector and Community Objection panelist were specifically tasked by ICANN to decide whether the sole applicant for those TLDs, AGIT, could properly operate them in light of relevant public policy criteria carefully defined by ICANN and the internet community. Those experts further agreed that it would impinge Muslims' rights of free expression if the TLDs were not delegated as soon as possible, despite some governments' concerns over control of the TLDs. (See Complaint, p.22-23.) Per Guidebook Module 3, it was the GAC's responsibility to suggest rejection of any applications if they violated any public interest. But the GAC refused to make that recommendation as to AGIT's applications, thus implicitly affirming GAC consent to them.

**d. Previous IRP precedents have found ICANN violations in similar circumstances.**

The unanimous *DCA Trust* panel found that ICANN violated its Bylaws by accepting bare, consensus GAC advice, without further investigating nor requiring any rationale from the GAC. (See Complaint, p.11, n.16 and Annexes 11, 15.) In a later case, another unanimous panel found that ICANN violated its Bylaws by working with a community evaluation panel to draft objections to TLD applications.<sup>11</sup> By doing so, the Board violated its Articles and Bylaws.

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<sup>11</sup> Annex 29, *DotRegistry v. ICANN*, Case No. 01-14-0001-5004, p.58-60 (July 29, 2016) (finding that the Board "failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations, including both the failure to make available the research

In this case, ICANN did essentially both of those things, but even more egregiously. It accepted unsupported, non-consensus GAC advice of only “some members,” after secretly engaging in dialog with only those members at least four times. It also gave out-of-bound advice to one GAC Observer, the OIC, who then belatedly submitted an out-of-bound objection to AGIT’s applications. It then kowtowed to the unspecified “concerns” of those few government bodies, giving them the power to decide whether and under what conditions AGIT’s applications would be approved.

Both the *DCA Trust* and *DotRegistry* facts are highly analogous to the facts of this case. As to AGIT’s applications, the NGPC has never required any rationale or documentation other than purported, vague religious “sensitivity”, expressed by only a few government bodies in less than one paragraph of a GAC Communique, and a few paragraphs from a few letters from those bodies. It then worked secretly with the OIC, advising it with respect to further objection even though the time period and process for objecting had long ended. It then accepted that belated, out-of-bound objection from the OIC without any further discussion with AGIT, or any further public or GNSO comment, and put AGIT’s applications on ice forever – intending to ensure that the OIC instead runs the TLDs. It then rubber-stamped the BGC’s cursory reconsideration process, without any further investigation by the BGC or the Board.

This was not a designated process nor a permitted outcome in the Guidebook, or otherwise contemplated by the GNSO or the Board in developing the New TLD Program. Indeed, these are the only two applications – of more than 1900 – stalled or denied on the basis of non-consensus GAC advice. These are the only applications involving ICANN delegation of veto power over specific applications to any third party. These are the only applications (other than those subject to the *DotRegistry* IRP) where ICANN has demonstrably preferred a particular “winner” – disregarding that the OIC failed even to apply to operate them. This behavior is clearly contrary to ICANN’s Core Values No. 7 and No. 9, and

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on which the EIU and ICANN staff purportedly relied, and the failure to make publicly available the ICANN staff work on which the BGC relied” in reaching subsequent reconsideration decisions).

represents a secret policy development process applicable only to AGIT, without consultation from the GNSO which is responsible for devising new TLD policy.

**e. ICANN cannot reasonably disregard its own appointed experts.**

Many previous IRP decisions have confirmed ICANN’s staunch, correct position that the Board, and IRP panels, must not second-guess the outcomes of Guidebook objection procedures.<sup>12</sup> ICANN cannot now argue that it is appropriate only to second guess – actually, to wholly disregard -- the Community Objection results in AGIT’s cases. In the challenged resolution denying AGIT’s Reconsideration Request, the BGC and the NGPC said the ICC Determinations were not even material to their analysis.<sup>13</sup> That is a further violation of Guidebook Sec. 3.1 specifically suggesting that the Board should take such expert opinions into account, and Core Value No. 7 requiring well-informed decisions based on expert advice. That procedure (as well as the Independent Objector procedure and the GAC Advice procedure) was carefully designed and crafted to analyze the public interest, by the GNSO community and ICANN Staff, approved by the GNSO Council and ICANN Board. But in this case, ICANN has disregarded all of that.

ICANN has wholly failed to consider the results of its own processes, instead simply disregarding the outcomes in each instance – without substantial discussion or rationale -- for nothing more than secret political expedience. The challenged Board resolutions provide no analysis whatsoever of either of the documented expert determinations, though both found AGIT’s applications to be in the public

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<sup>12</sup> See, e.g., Complaint, p.19-20, n.29; *Merck KGaA v. ICANN*, Case no. 01-14-0000-9604, p.15 (Dec. 11, 2015) (finding that "Merck's complaints are ... focused on the correctness of the conclusion of the Sole Panel Expert. . . . [T]his is not a basis for action by the Panel."); *Booking.com B.V. v. ICANN*, Case no. 50-20-1400-0247, p.33 (Mar. 3, 2015) (finding that the string similarity review results should not be second-guessed by the ICANN Board or the IRP panel); *Despegar Online SRL v. ICANN*, Case no. 01-15-0002-8061, p.39 (Feb. 11, 2016) (holding the .eco IRP “was little more than an attempt to appeal the Community Priority Evaluation decision . . . [and, therefore] was always going to fail”).

<sup>13</sup> See Annex 14, Mar. 22, 2014 Board resolution denying AGIT’s Reconsideration Request (“The BGC also concluded that the Requester has also failed to demonstrate that the ICC’s Determinations were material to the NGPC’s Resolution or otherwise identify how the Determinations would have changed the actions taken by the NGPC. The NGPC agrees.”).

interest, furthering the fundamental human rights of Muslims to express themselves through these TLDs. (Annexes 3, 8.) The Board's ignorance even of these findings (and of the voluminous documentation leading to each) clearly violates Principal G of the TLD Program to make decisions in furtherance of human rights, and the Bylaw requiring the Board to have all material facts when deciding.

Moreover, ICANN has disregarded the clear (albeit implicit), vast majority advice of the GAC that there were insufficient concerns stated within the GAC to warrant consensus advice against the applications. The NGPC never considered, and ICANN has not required the GAC or Objectors to show, how icing and effectively killing AGIT's applications serves any public interest. That topic was never broached with any member of the GAC. And the Board itself has not made any public determination of what public interest could possibly be served by doing so.

Indeed, there is no evidence the full Board or GAC were made aware of what transpired at the Durban meeting among "some members" of each group. Certainly, neither the GNSO nor the public was ever made aware even of the existence of the meeting. And there is no evidence that the GAC, Board, GNSO or public was ever made aware of ICANN Staff's back-channel "advice" and support to the OIC's belated, out-of-bound objection. ICANN's Bylaws require it to act always transparently, always in the public interest -- not for political expedience, and always to provide clear rationale tying its decisions to a considered public interest. ICANN is also required to consult with those most affected by its decisions, i.e. AGIT. ICANN has wholly failed those obligations as to these applications, just as it failed those obligations as to the applications at issue in the *DCA Trust* and *DotRegistry* matters.

**2. ICANN refuses to specifically investigate or identify the Objectors' concerns, how those concerns might be resolved by AGIT, or any process by which the concerns might be resolved.**

Despite many opportunities and requests, ICANN still has never specifically identified the Objectors' outstanding concerns or how they could potentially be resolved. ICANN relies only on two paragraphs from the Feb. 7, 2014 letter, which very briefly summarizes the UAE's failed Community Objection, i.e. that AGIT's applications "[are] not supported by the community, applicants did not

consult the community; [Objectors] believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC.” (Annex 12.) In other words, if the OIC does not manage the TLDs, then the Objectors will never stop objecting.

Of course, AGIT did prove a great deal of community support, and thus clearly did consult the community. (Annexes 4, 6, 16.) And of course, both the Independent Objector and the Community Objection panelist, Mr. Cremades, found that the community was consulted and that AGIT had put forward a community management plan. (Annexes 3, 8.) The Feb. 7 letter acknowledges that plan, which is tied to the proposed Registry Agreement by a binding Public Interest Commitment. (Annex 6.)

So, there can be no dispute that those vague, sparse objections were in fact met by AGIT, to the satisfaction of two experts commissioned by ICANN to review precisely the question of potential harm to the “community” as alleged by the Objectors – each finding no likelihood of material detriment to the Muslim community. Indeed, each finding that in fact there would be material detriment to the community’s human rights if the TLDs are not delegated forthwith to AGIT. (Annexes 3, 8.) The Feb. 7 letter only states there are unspecified “conflicts” between AGIT’s governance model, but those conflicts are not specified because they do not exist. If they do, then why cannot ICANN express them?

AGIT’s governance model clearly calls for a multi-stakeholder management operation as desired by the Objectors, specifically including the Objectors if they so choose. (Complaint, p.7-8; Annexes 4, 6, 30.) ICANN’s lawyers now say that “AGIT had not provided the Board with any evidence of such an arrangement” (Response, p.17), but that is patently false as indeed acknowledged in the Feb. 7 letter. (*See also*, Annex 6.) They now say further that “the OIC contradicted the claims,” but they provide no explanation of what claims they are referring to, nor any evidence or explanation of any contradiction. Instead, the evidence reveals that the OIC simply wants to operate the TLDs itself, which notion is supported by a few of the OIC countries, and consequently by ICANN itself, for purely political reasons.

But AGIT has not been given any fair hearing of its legitimate applications, the only applications to operate these TLDs. And most countries, including many countries with heavily Muslim populations such as Saudi Arabia, Iran, India and the United States (as well as the vast majority of GAC nations; and also Indonesia with respect to .halal) either have not objected within ICANN's processes, or have since withdrawn those objections – either way indicating their implicit consent. (See also Annex 28, ICANN No. 130, email between ICANN Government Affairs staff: “would be good to know about .islam and .halal . . . the Europeans – here in force and very critical of ICANN after the .vin issue – are assuming decision [to suspend the applications] will be annulled following the GAC advice [that only “some members” had concerns].” (emphasis added). (See also, *supra*, n.6.))

Indeed, the OIC itself acknowledged and opposed the “probable authorization by the GAC allowing use of these new gTLDs.” (Response, p.20; Annex 10.) This correspondence indicates that ICANN knew full well that most governments implicitly supported the applications, by refusing to recommend via the GAC that ICANN reject them. And by doing so those governments expected the applications to “move forward” since there was no GAC objection. (*Supra*, n.6.) Yet ICANN wholly disregarded this fact, and those governments -- and instead met secretly only with the Objectors, kowtowing to their unsubstantiated, unfair, unprecedented and untimely demands.

AGIT has repeatedly reached out to the OIC to understand its concerns and to involve it in the management of the TLDs. (Annexes 6, 30.) But AGIT has been thoroughly rebuffed, with nothing other than the vague, pernicious objection to ICANN, to the effect that “they are not us, we should be running these TLDs.” (Despite the fact they did not apply to operate them....) ICANN now says it “exercised its discretion to place the applications on hold.” (Response, p.17.) But it does not point to any provision of the Guidebook or any adopted policy which allows ICANN to indefinitely suspend any application. Nor does is there any policy permitting ICANN to delegate approval power to any third party. The Guidebook is extremely detailed as to all possible outcomes for any applications, involving any sort of

objections and contention; yet none of those outcomes provide for “on hold” status for any reason, much less subject to the unfettered whim of a few government actors. (See Complaint, p.18-19, discussion of TLD Recommendations 1, 9, 12, and Core Value 8.)

Obviously, ICANN has no basis to deny AGIT’s applications, else clearly it would have done so. But, for reasons solely of political expedience, ICANN also refuses to approve them. Instead, ICANN delegated its approval function to a few objecting governments, whose objections had been overruled through transparent community process, and who offer no criteria or process by which AGIT could possibly succeed. This is unfair, unprecedented, and unsupported by any public policy goal or by any community-based, Board-approved TLD policy. Therefore, it violates ICANNs Bylaws, TLD Recommendations, and Guidebook. (See Complaint, p. 16-19.)

**3. ICANN created new policy, without community input, which allows effective, non-consensus government veto of just two applications.**

The challenged resolution and Feb. 7 letter documents the Board’s unique policy to suspend only these two applications, due to vague “religious sensitivity” raised by a few governmental bodies, unless and until those bodies approve the applications. This flies in the face of the carefully designed Applicant Guidebook, GNSO and Board-approved TLD policy, and ICANN’s Articles and Bylaws.

ICANN spins the strawman argument that the applications “have not been vetoed.” But that is not AGIT’s complaint. Instead, AGIT complains that ICANN has given an effective veto to a few government actors, who have no incentive to engage in any dialogue with AGIT. The Objectors have all the leverage, and an indirect (or “pocket”) veto over AGIT’s applications. If they do nothing, as they have done since the challenged resolutions of the Board, then the TLDs are not delegated to AGIT and will never be delegated to AGIT. Their obvious strategy is to wait until the next round of applications, and then apply for themselves to run these TLDs. ICANN knew this, as ICANN’s own correspondence clearly proves. (*E.g.*, Annex 28, No. 187, 129.)

Moreover, to be sure, ICANN effectively has vetoed the applications. What is the difference to AGIT whether the applications are indefinitely suspended, or outright denied? Either way, more than a million dollars in investment in the TLDs (and legal wrangling over them) is lost, with no hope to recoup the investment. Only this IRP can provide AGIT with any relief from ICANN's unfair, unprecedented refusal to provide a decision on the applications – the only applications indefinitely suspended due to purported governmental “concerns”.

**a. The GNSO is tasked with TLD policy development -- not the Board, and not governments.**

ICANN's Bylaws clearly delegate new TLD policy development to the GNSO, consisting of many representatives from all stakeholders -- including domain registries, governments and civil society -- who participated in protracted Herculean efforts to produce the TLD Program policies and implementation via the Guidebook. (See Complaint, p.19-22, discussion of Core Value Nos., 3, 7, 8, Guidebook Sec. 3.1, and GNSO Principle G.) Where, as here, a Supermajority of the GNSO Council approves a policy, the Bylaws require the Board to accept it unless they specifically find it not in the public interest. And indeed, the Principles and Guidebook were specifically approved by the Board, after many rounds of GNSO community comment and iteration. Yet, when confronted with a political dilemma wrapped in the guise of religious sensitivity, the Board has wholly disregarded all of those carefully developed policies and process results, and has failed to even consult with the GNSO, internet community or AGIT about this decision.

The Objectors' expressed concerns are vague, unfounded, misplaced and belated. The OIC, and the various other Objectors, are not religious authorities at all, they are political bodies.<sup>14</sup> They have no standing to raise “religious sensitivities”. Islam is a global religion with no control structure, it is not a

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<sup>14</sup> See, e.g., Annex 31, Wikipedia entry for OIC -- Goals: “According to its charter, the OIC aims to preserve Islamic social and economic values; promote solidarity amongst member states; increase cooperation in social, economic, cultural, scientific, and political areas; uphold international peace and security; and advance education, particularly in the fields of science and technology.”

national or regional public policy to be determined by a few government bodies.<sup>15</sup> AGIT has shown much support from religious institutions across the world (Annexes 4, 6, 16), while the Board has not been presented with any objection from any religious institutions at all. To the extent the Objectors have sought to represent the global Muslim community, their objections have been denied by the experts appointed by ICANN to review that question, because the Objectors did not apply for these TLDs and have not shown that AGIT's operation of them would create detriment to the Muslim community.

ICANN has discriminated against AGIT as to these applications, treating them far differently than any other TLDs, including the analogous .kosher and .shia. ICANN's only response as to .kosher was that no governments objected to it (Response, n.73), and so it is operated by a private company, with no governmental oversight or management as demanded from AGIT by the Objectors and ICANN.

(Complaint, p.17, n.25, comparing the virtually identical PICs for .Islam and .halal, and .kosher; Annex 17, last page, .kosher PIC.) Presumably ICANN would have the same response as to .shia, one of Islam's two major sects, with the TLD delegated to AGIT after no objections were raised. (*Compare* Annex 6 (last page), AGIT PIC for .Islam and .halal, *with* Annex 32, AGIT PIC for .Shia – they are essentially identical.)

If the Objectors were concerned about "religious sensitivity" of .Islam and .halal, then why not also .shia or .kosher? Because they want to run the TLDs themselves, just as they run their own country code TLDs like .ae (UAE), .lb (Lebanon) and .id (Indonesia). They want government control over speech and content at these TLDs. But that is antithetical to ICANN's global public interest mission, and specifically to the community-developed, Board-approved goals of the New TLD Program.

Regardless of motive, the mere existence or non-existence of government objection cannot be a fair basis for disparate treatment by ICANN, as this effectively allows governments a veto if they object

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<sup>15</sup> See, *id.*, Wikipedia entry for Islam: "Most Muslims are of one of two denominations: Sunni (75–90%) or Shia (10–20%). About 13% of Muslims live in Indonesia, the largest Muslim-majority country, 32% in South Asia, 20% in the Middle East, and 15% in Sub-Saharan Africa. Sizable Muslim communities are also found in Europe, China, Russia, and the Americas. Converts and immigrant communities are found in almost every part of the world.

for any reason, or for no reason. That is a power far greater than any power the GAC is given in the Bylaws or the Guidebook, even when GAC consensus is reached. Instead, even when GAC consensus is reached, ICANN must investigate and consider any reasoned basis for any objection or advice, in light of ICANN's public interest mission. It then must come to its own determination as to how its decision benefits the public interest. It failed to do that in the *DCA Trust* case, and it has not done so in this case.

**b. Guidebook § 5.1 is illusory, and ICANN's interpretation in bad faith.**

ICANN cites Guidebook § 5.1 as the primary basis in documented policy for the challenged resolutions in this matter. (Response, p.20-21.) However, that provision is facially illusory, and anyway does not support ICANN here. On its face, it says the Board may "individually consider" an application "to determine whether approval would be in the best interest of the Internet community." (*Id.*) But in this case, ICANN has not made any such determination. There is no reference to the best interest of the Internet community in the Beijing Communique, the challenged Board resolution incorporating the NGPC Scorecard, the Feb. 7 letter, or the challenged resolution rejecting AGIT's Reconsideration Request. Instead, ICANN has left the matter to a few government actors to apparently make such a determination; but has not given any guidance as to what criteria or process those Objectors should use in making it, or that AGIT could use to challenge it. Therefore, the Board has not adhered to § 5.1, under any interpretation of that sentence.

More broadly, that provision is illusory on its face, as in ICANN's interpretation it provides "the authority to assess each new gTLD application on an individual basis" (Response, p.21.),<sup>16</sup> with no

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<sup>16</sup> This section also is ambiguous, providing no criteria as to "individual consideration;" and so is *contra proferentem* -- interpreted against ICANN as the drafter. California Civil Code §1654 ("In cases of uncertainty ... the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist"). See also, e.g., Restatement 2d of Contracts § 20 ("There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and ... neither party knows or has reason to know the meaning attached by the other....").

criteria whatsoever, deciding the fate of any application based upon any reason -- or for no reason.<sup>17</sup>

That is contrary to the vast Guidebook, and all of the community-based, Board-approved policies underpinning the Guidebook, which Guidebook is specifically incorporated into AGIT's contract (see Guidebook, Module 6) with ICANN to evaluate AGIT's application pursuant to the Guidebook (for a \$185,000 fee, per application). That was supposed to have happened within roughly 14 months, per the Guidebook § 1.1.5 (Scenario 4), but has now taken more than four years, with no end in sight.

ICANN's interpretation is a breach of the covenant of good faith and fair dealing inherent in every contract.<sup>18</sup> To be sure, ICANN's interpretation of §5.1 entirely redefines and eviscerates the contract, and is in bad faith. It creates new, wholly undefined process and criteria by which AGIT might pass ICANN's evaluation. It allows ICANN to usurp AGIT's hefty applications fees (\$370,000) with impunity. It also ignores the reasonable reliance that ICANN instilled in AGIT and all other new gTLD applicants as to the Guidebook procedures and requirements, causing them to invest significant monies in the prospective operation of the TLDs by hiring consultants to ensure the applications conformed with the Guidebook requirements, and lawyers to represent the applicants in the Guidebook objection procedures. In AGIT's case, those costs amount to at least a million dollars in total already, including negotiation and drafting of an unprecedented governance model not required of any other TLD applicant, including .kosher or .shia. And yet, ICANN responds only with the meek position that they can

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<sup>17</sup> See, e.g., *Asmus v. Pac. Bell*, 23 Cal.4th 1, 15 (2000) (defining an illusory contract as "a promise under which the promisor assumes no obligation, as when the promise is conditioned on something a promisor knows will not occur or is wholly under the promisor's control"); *Mattel v. Hopper*, 51 Cal.2d 119, 122 (1958) ("If one of the promises leaves a party free to perform or to withdraw from the agreement at his unrestricted pleasure, the promise is deemed illusory and it provides no consideration.").

<sup>18</sup> See, e.g., *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910-911 (9th Cir. 2001) (the Ninth Circuit concluded that "[g]ood faith limits the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses;" "Although the Committee had broad discretion to *interpret* the contract, it did not have the authority to *redefine* its terms." (emphasis in original)); *Craig v. Pillsbury Non-Qualified Pension Plan*, 458 F.3d 748, 752 (8th Cir. 2006) ("The Plan did not have discretion to redefine "Compensation" in a way that would undermine Craig's justified expectations - based on the Plan and the SPD - as to what that word meant. The Plan could not give "Compensation" a "double-secret" meaning after the fact and without notice.").

do whatever they want, for any reason or no reason, because they said so in one sentence of the 400+ page Guidebook.

**c. ICANN has breached its promise in Guidebook § 1.1.5 – Scenario 4.**

ICANN states that “prevailing in an objection proceeding does not mean an application will automatically proceed to delegation. No Guidebook or other provision promises as much.” (Response, p.21.) But in fact, the Guidebook § 1.1.5 does set out various application ‘Scenarios’, including the precise Scenario 4 in this case, “Pass Initial Evaluation, Win Objection, No Contention.” And it states unequivocally that in that Scenario: “The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for TLD.” (Complaint, p.6.) That broken promise is a fundamental basis for AGIT’s IRP Complaint.

Only as to AGIT’s applications, the Guidebook processes and outcomes were disregarded, and instead a new, vague process and outcome was created by the ICANN Board and Staff. Thus, discrimination has occurred, contrary to ICANN’s fanciful statements to the contrary, e.g. Response p.22. ICANN created a new policy only for these applications by allowing a few government bodies to create policy -- whether and on what conditions AGIT might have its applications approved -- without any community input or support, and without any clear criteria or process by which AGIT could know or understand the policy, much less comply with it. Instead, AGIT is left holding the bag, its investment gone, and its only guidance from ICANN to somehow “resolve” unspecified “concerns” and “religious sensitivity” of a few governments who have stated no public interest underlying their concerns, and have no real interest in talking to AGIT -- because they want to run the TLDs themselves. This violates Core Values Nos. 3, 7 and 8, as further argued in the Complaint, p.20-22.

**4. ICANN ignored unanimous advice of the GNSO Council and the Board’s resolution that ICANN, *inter alia*, must provide clear criteria for evaluation of all applications.**

The Board-developed .Islam/halal policy further violated the Bylaws provisions about developing gTLD policy through the GNSO, and with effective public notice and input, as set forth in the Complaint,

p.23-24. The Program Recommendations, No. 1, required “clear evaluation criteria” for all Applicants, which criteria was thoroughly and carefully explained in the Guidebook. ICANN’s response to this argument is that it did not develop any new policy, and followed the Guidebook. (Response, p.22.)

But AGIT has proved that the Board did not follow the Guidebook as to GAC Advice, because it did not meet with the GAC to discuss the concerns. Only a few Board members met with a few GAC members, in secret, over unresolved objection from at least two Board members that process was not being followed. No “concerns” about the applications were expressed other than the vague, demonstrably unsupported concerns expressed in the Independent Objector investigation and Community Objection proceedings, and which had been overruled by those ICANN-appointed experts.

Any GAC “sensitivities,” other than vague “religious sensitivities” of a few members, never came to light. Any “conflicts” between those sensitivities or concerns, and AGIT’s applications or governance model, never came to light. The Board did not consider the implicit advice of the vast majority of GAC members that the applications should not be rejected due to public interest concerns, even though ICANN Staff documented their knowledge, at least, that “the Europeans” and Iran were expecting the TLDs to be delegated to AGIT. (Annex 28, No. 130; *and supra*, n.6.) Since the full GAC did not suggest rejection of the applications, it implicitly approved them, while merely advising as to “some concerns” of “some Members.” That was supposed to trigger further discussion with the full GAC, but that never happened.

AGIT has proved that the Board did not even follow the minimal requirement of Guidebook §5.1, which at least required ICANN to make a determination that its decision was in the best interest of the Internet community. Another IRP panel has admonished ICANN for failing to do that.<sup>19</sup> In AGIT’s case, there was never any GAC or Board discussion or determination that the GAC or Board resolutions

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<sup>19</sup> *Booking.com B.V. v. ICANN*, Case no. 50-20-1400-0247, p.44 (Mar. 3, 2015) (panel recommended that the Board immediately consider whether “notwithstanding the result of the string similarity review of .hotel and .hotels, approving of both Booking.com’s and Despegar’s proposed strings would be in the best interest of the Internet community”).

would have any demonstrable benefit to the public interest. Board and GAC members ignored AGIT's requests to meet with them to understand those requests. (Annex 25.) No documents have ever been produced to prove any such discussion or determination ever happened either in the GAC or NGPC, or by the BGC. Public interest concerns were fully addressed in the Guidebook generally, and specifically as to these applications via the Initial Evaluation, Independent Objector, Community Objection and GAC Advice mechanisms.

AGIT prevailed in its arguments and evidence at every step, only to find that ICANN had secretly devised a policy that the OIC should be the only party to run these TLDs, either through agreement with AGIT, or without AGIT, in the Objectors' discretion. This despite the facts that AGIT paid the application fees, was the only applicant, relied on the Guidebook, and passed all of ICANN's community-designed, Board-approved, exhaustive and expensive application criteria and objection processes. Per § 1.1.5, Scenario 4, AGIT must now be allowed to enter registry agreements with ICANN and have these TLDs delegated to AGIT's operation and management, per its community governance model.<sup>20</sup>

**5. ICANN refused to provide documents reasonably requested by AGIT, which would illuminate and narrow the scope of IRP, and thus reduce costs and time to decision.**

AGIT's original document request in this case, dated August 10, 2015, was made in the context of the Cooperative Engagement Process ("CEP"), an IRP precursor outlined in the Bylaws. (Annex 15.) ICANN Staff lawyers then repositioned it as a DIDP request, and denied virtually all the requests on

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<sup>20</sup> AGIT posits that the .Islam and .halal applications could be handled differently. While the sparse GAC advice was the same as to both, the underlying governmental objections and potential public interests differed. There were less concerns expressed about .halal, indeed the largest majority Muslim country, Indonesia (see *supra* n.15), objected to AGIT operating .Islam, but not .halal. (Annex 13.) Also, there cannot be as much "religious sensitivity" or public interest in .halal as in .Islam, as indicated by ICANN's approval of the halal-equivalent, .kosher application, without any governance oversight model. Indeed, the Independent Objector, tasked by ICANN to ferret out potentially sensitive applications, did not consider .halal at all, focusing his efforts only on .Islam. (Annex 3.) None of the Objectors ever pointed to a purported "halal" community, only to an Islamic or Muslim community as the focus of their objection. While AGIT believes both of its applications clearly should be approved, in the event the panel finds it a close case, at least the scales should tip significantly farther in favor of .halal than .Islam.

vague grounds. The CEP requires the parties to engage in good faith to try to resolve or narrow the issues in any subsequent IRP. AGIT maintains that ICANN did not engage in good faith in the CEP, but instead entirely disregarded AGIT's attempt, in its letter, to narrow those issues by reference to the apposite .Africa IRP decision, asking pointed questions which are at the heart of this IRP, and seeking relevant documents. ICANN instead treated the letter merely as a document request, refused to answer any of the questions with any substance, and refused to provide virtually any documents. (Annex 19.)

ICANN should have produced all responsive documents during the CEP, or even under the DIDP. ICANN has been found lacking in a subsequent IRP case, where the panel recommended that ICANN "be as specific as possible in responding to DIDP requests, particularly when not disclosing requested documents." The Board then resolved that Staff must do just that. (Annex 33; *see also*, Complaint, p.24-25, n.36-37 (citing two other cases where ICANN was similarly admonished).) ICANN violated its transparency obligations with respect to AGIT in this matter as well.

ICANN again has acted in bad faith by refusing to produce highly relevant documents. AGIT below lists several concrete examples of documents produced by ICANN with unilateral redaction, indicating highly relevant context. AGIT pressed ICANN for further disclosure and unredacted versions, and ICANN produced "less redacted" versions of some documents, and a few new documents – showing highly responsive and relevant information. Yet still, those documents further indicate that ICANN maintains a unilateral and unfair redaction and non-disclosure policy that violates its transparency obligations.

Examples are shown in Annex 23, Durban recording not produced in DIDP Response, and Annex 27, Hedlund email re government interaction in Durban, initially not produced to AGIT even in this IRP. Further examples provided at Annex 34 (both redacted and less-redacted versions where ICANN later produced them), are described very briefly here. ICANN No. 128-129, Kamel email initially redacted re OIC and Iranian sensitivity. ICANN No. 186-187, Kamel/Esmat email re OIC meeting initially not

produced ICANN No. 18 and 47, internal Staff email re Indonesia and Lebanon positions, still redacted. No. 121 Kamel/Esmat mail re draft letter to AGIT, still redacted. Nos. 124-125, Kamel/Hedlund email re draft letter to AGIT, first redacted as 'non-responsive', then marked 'privileged' though no lawyer is copied. No. 182 email between GAC Chair and OIC rep, still redacted. All of these documents appear on their face to be highly relevant and responsive, non-privileged, and thus withheld from AGIT for no legitimate reason.

These are just a few examples. There are many other documents produced by ICANN, showing unilateral redaction by ICANN. Yet ICANN has no excuse to redact any documents, as the parties have agreed to maintain confidentiality in the documents and not use them for any purpose outside of this IRP. ICANN ought to be admonished, once again, to be much more transparent in its document discovery. Even though AGIT ultimately may have got some of what it needed through dogged discovery efforts, AGIT still does not know much of what ICANN has redacted, and is left with a very strong feeling that there is much yet to uncover.

Yet, ICANN maintains as to the DIDP that it "has the discretion to determine whether the public interest in the disclosure of responsive documents ... outweighs the harm that may be caused by such disclosure." (Response, p. 23.) So again, ICANN claims total discretion to do whatever it wants, with no oversight. In its response to AGIT's letter (Annex 19), ICANN said absolutely nothing about what factors it considers to be within "the public interest" in disclosure of any document, nor what factors of "harm" it considered when refusing to disclose them. As discovery in this IRP has proved, the only harm could have been to ICANN's reputation -- for conspiring with the OIC to belatedly and unfairly kill AGIT's applications, solely for political expedience, with no community oversight.

ICANN claims that "AGIT's substantive disagreement with that determination is not a basis for independent review." (Response, p.23.) But in fact, there can be no substantive disagreement because ICANN has not provided any substance to its unilateral, secret "determination" to deny AGIT's requests.

The panel must consider AGIT's complaint, as ICANN has repeatedly been found to have violated its Bylaws via non-transparent or deceptive document production, and has continued to do so in this case, even after the decision in *Despegar* and resulting Board resolution requiring greater transparency.

**6. ICANN refuses to provide a Standing Panel as required by the Bylaws, in order to more effectively and efficiently resolve IRP disputes.**

ICANN admits that a "standing panel is not yet in place to hear IRPs." (Response, p.24.) But the Bylaws have maintained this requirement for nearly four years now, and it has been more than two and a half years since the unanimous *DCA Trust* panel found that ICANN violated its Bylaws by failing to implement the standing panel. (Complaint, p.25; Annex 11.) ICANN offers no explanation as to why it has not done so, or whether it even has begun to take steps towards doing so. It merely reiterates its same, insidious argument that the Bylaws do not impose a deadline for implementing that Bylaw, so ICANN has not violated the Bylaws by failing to implement it after nearly four years. This cavalier attitude towards a Bylaws-mandated accountability mechanism is extremely troubling, not least because it is consistent with ICANN's attitude towards discovery and transparency obligations generally.

The Bylaws further state that IRP panels should strive to issue decisions within six months, but that goal is plainly impossible without a standing panel. (Complaint, p.25, n.40.) In this matter, panel selection took four months. In another matter, it took more than a year. (*Id.*, n.39.) The average is somewhere in between. Panel selection costs time, and it costs money for the parties to investigate potential candidates and negotiate a list of chair prospects. It further costs money to pay panelists to learn ICANN Bylaws and IRP rules, and to inform them about prior decisions. Those costs would be less if the standing panel were implemented, as required.

But even more troubling is the pernicious attitude that ICANN apparently has about its own accountability. The Bylaws generally do not state deadlines to implement anything; so, by ICANN's reasoning, it is free to ignore any of those Bylaws, and free to offer no excuses for doing so? The Bylaws require the ICANN Board to consider at its next meeting the declarations of IRP panels; Art IV., Sec. 3,

No. 21 states: “the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.” Yet the Board apparently has never considered the *DCA Trust* panel’s unanimous declaration on this point, and ICANN ignores the precedential effect of that ruling by relitigating the same issue here.

**7. ICANN refuses to acknowledge that IRP decisions are binding and precedential, causing expensive and unnecessary relitigation of settled issues.**

In addition to relitigating the standing panel issue, ICANN ignores the precedential effect of the logic in the *DCA Trust* panel’s unanimous substantive opinion. (Complaint, p.26-27.) ICANN argues this case is different because “the Board entered into a dialogue with the GAC regarding the scope of its members’ concerns ... notably at the 18 July 2013 meeting.” (Response, p.24-25.) But the GAC Chair herself acknowledged that was “not a meeting of the GAC,” after that concern was raised by two different Board members, and further acknowledged as such (“a smaller dialogue”) by ICANN’s Senior VP, Government Relations. (Annex 22.) Nobody asked the Objectors about any specific “concerns” about AGIT’s applications, or about any “conflicts” with AGIT’s governance model. (Annex 23.) So, ICANN did not follow the Guidebook procedure with respect to investigating the GAC advice, did not require any rationale from the GAC, and did not consult further with AGIT, just as in the .Africa matter.<sup>21</sup>

Therefore, the precedent of the final .Africa declaration requires that AGIT’s applications be returned to processing, without regard to the unsubstantiated GAC advice. ICANN violated its Bylaws in this case in precisely the same manner as it violated the Bylaws in that case, by failing to properly investigate and failing to require any rationale from the GAC. Indeed, in this case the Board willfully

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<sup>21</sup> *DCA Trust*, p.44-45 (July 9, 2013) (finding ICANN's actions and/or inaction violated its Articles and Bylaws, including its transparency obligations, when it accepted the GAC's advice to reject DCA's application despite the fact that "the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities" and further given that "DCA Trust was never given any notice or an opportunity . . . to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice . . .")

disregarded the GAC Chair's email to the Board, stating that there were various concerns with the applications other than religious sensitivity, but refusing to state them in an email. (Annex 22, No. 85.) At minimum, the Board was required by its Bylaws and by the Guidebook to have pressed the entire GAC for that explanation, to decide whether suspending AGIT's applications would be in the public interest, and to provide such rationale to AGIT and to the broader community. That did not happen, and thus ICANN has again violated its Bylaws, Core Values, and Guidebook policy.

### **SCOPE OF REQUESTED RELIEF**

Per this panel's early request in this action, the parties have briefed the panel as to their positions with respect to the appropriate scope of relief in this IRP. AGIT will not reiterate that briefing now, but does call the panel's attention to two recent IRP decisions agreeing with AGIT's general position.<sup>22</sup> Furthermore, AGIT notes that the newly enacted Bylaws more clearly reflect AGIT's position as to the scope of appropriate relief in an IRP, and the binding, precedential effect of prior IRP decisions.<sup>23</sup> There is no reason why the older Bylaws should be interpreted any differently.

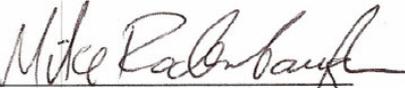
The .Africa precedent requires that the Board return AGIT's applications to processing, without regard to unsubstantiated GAC advice. Effectively, that means they would proceed to contracting as promised by the Guidebook, § 1.15, Scenario 4. This is the only relief requested by AGIT, other than to deem AGIT the prevailing party, requiring ICANN to reimburse all AGIT's IRP costs and fees paid to the ICDR. Such relief is proper for a prevailing Complainant, and in some cases has been awarded to non-prevailing Complainants who raised serious issues of public interest. AGIT prays that it has done so in this case, and greatly appreciates the Panel's time and consideration of AGIT's arguments and evidence.

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<sup>22</sup> See, *Corn Lake, LLC v. ICANN*, Case No. 01-15-0002-9938, p. 72-73 (Oct. 17, 2016) (recommending affirmative relief for Claimant, that the Board "extend the new Inconsistent Determinations Review procedure to include a review of Corn Lake's .CHARITY Expert Determination").

<sup>23</sup> See ICANN Bylaws, Art. IV, § 4.3 (a) (as amended October 1, 2016) ("The IRP is intended to hear and resolve Disputes for the following purposes . . . "(vi) Reduce Disputes by creating precedent ... (viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.").

Respectfully submitted,

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#### **ADDITIONAL CLAIMANT ANNEXES**

- Annex 20 – GAC Meeting document archive, and GAC Rule re transparency
- Annex 21 – ICANN interview with GAC Chair, Heather Dryden
- Annex 22 – ICANN Board email re secret Durban meeting with GAC members
- Annex 23 – Recording of Durban meeting with GAC members (in mp3 format)
- Annex 24 – GAC Communique, Durban
- Annex 25 – AGIT requests for meetings in Durban
- Annex 26 – ICANN email with OIC
- Annex 27 – ICANN email from Senior VP, Government Relations
- Annex 28 – ICANN Staff email re OIC resolution, secret meetings and intent
- Annex 29 – *DotRegistry v. ICANN* Final Declaration (July 29, 2016)
- Annex 30 – AGIT letter to OIC, Invitation to Public Advisory Committee
- Annex 31 – Wikipedia entries for OIC and Islam
- Annex 32 – AGIT PIC for .Shia
- Annex 33 – ICANN Board resolution re DIDP transparency
- Annex 34 – Evidence of improper ICANN redaction of documents