

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ASIA GREEN IT SYSTEM  
BILGISAYAR SAN. VE TIC. LTD. STI., ) ICDR CASE NO. 01-15-0005-9838  
)  
Claimant, )  
)  
and )  
)  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
)  
Respondent. )  
\_\_\_\_\_)

**ICANN'S RESPONSE TO  
ASIA GREEN IT SYSTEM BILGISAYAR SAN. VE TIC. LTD. STI.'S  
REQUEST FOR INDEPENDENT REVIEW PROCESS**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Request for Independent Review Process (“IRP Request”) submitted by claimant Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (“AGIT”) on 16 December 2015.

1. AGIT argues that independent review is warranted because ICANN has “vetoed” its applications (“Applications”) to operate the .HALAL and .ISLAM generic top-level domains (“gTLDs”).

2. AGIT’s claims are based on fundamental misunderstandings or misinterpretations of the scope of the applicable rules and procedures. Most importantly, AGIT has not identified any ICANN Board action or decision that was inconsistent with ICANN’s Articles of Incorporation (“Articles”) or Bylaws, which is the only question at issue in this IRP. To the contrary, the record demonstrates that ICANN’s Board’s actions with respect to the Applications were consistent with the Articles and Bylaws and the processes set out in the New gTLD Applicant Guidebook (“Guidebook”). In some instances, the ICANN Board actually went above and beyond those processes to assist AGIT with the Applications.

3. In addition, AGIT’s claims rest upon factual inaccuracies. First, AGIT wrongly claims that ICANN has refused to disclose the identity of the entities that oppose the Applications, and the nature of those objections. Second, AGIT portrays ICANN as having “vetoed” its Applications, when in fact the Applications are “on hold” until AGIT redresses the serious concerns voiced by those opponents, as permitted by the Guidebook. Third, AGIT attempts to explain away the Applications’ opposition by claiming, without support, that it has addressed the oppositions’ concerns, and portraying the evidence in an inaccurate manner.

4. Nothing should distract the Panel from the core issue here, namely whether the Board has complied with the Articles and Bylaws. Five incontrovertible facts are critical to

understanding the background within which the ICANN Board acted, and why AGIT's IRP Request should be denied. One, countries and organizations representing the people targeted by these Applications fiercely objected to them, which, in part served as the basis for clear advice from ICANN's Governmental Advisory Committee ("GAC"). The GAC is a critical and independent ICANN body consisting of members appointed by, and representing, governments that was formed to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where . . . they may affect public policy issues."<sup>1</sup> Two, as required by the Guidebook, the ICANN Board consulted the GAC on its advice relating to the Applications in a meeting that included AGIT's current Chief Operating Officer. Three, the Board then exercised its ultimate discretion over the New gTLD Program by deferring further action on the Applications until resolution of the conflict between AGIT's claim that it had worked with the objectors on a multistakeholder approach that would serve the interests of Muslims,<sup>2</sup> and the objectors' stated concerns about "allowing the use of [...] .ISLAM and .HALAL by any entity not representing the collective voice of the Muslim People."<sup>3</sup> Four, ICANN was always clear with AGIT as to the source and nature of the objections, and what must be done before ICANN will resume its consideration of the Applications. Five, to date, AGIT has not demonstrated to ICANN that AGIT has resolved the conflict between AGIT's commitment to work with the objectors and other stakeholders in relation to the operation of the .ISLAM and .HALAL TLDs. Other facts and issues also render AGIT's IRP Request deficient; but based on these alone, AGIT's IRP Request should be denied.

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<sup>1</sup>ICANN's Bylaws ("Bylaws"), Art. XI § 2.1(a) (Resp. Ex. 2), <https://www.icann.org/resources/pages/governance/bylaws-en>. "Resp. Ex. \_\_" refers to exhibits submitted by ICANN, and "Cl. Annex \_\_" refers to exhibits submitted by claimant AGIT. ICANN's articles are included as Exhibit 1.

<sup>2</sup> See Cl. Annex 6.

<sup>3</sup> Letter from the Organisation of Islamic Cooperation to Steve Crocker, dated 19 December 2013 (Resp. Ex. 3), <http://www.icann.org/en/news/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf>.

## BACKGROUND FACTS

### I. ICANN

5. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”).<sup>4</sup> ICANN is a complex organization that facilitates input from stakeholders around the globe. ICANN has an international Board of Director and over 300 staff members. In addition to the Board, staff, and Ombudsman,<sup>5</sup> ICANN’s community includes a Nominating Committee,<sup>6</sup> three Supporting Organizations,<sup>7</sup> four Advisory Committees,<sup>8</sup> technical expert advisors,<sup>9</sup> and a group of community members who participate in ICANN’s processes.

6. One of ICANN’s Advisory Committees is the GAC. Membership in the GAC is open to all national governments and distinct economies as recognized in international fora. The importance of the GAC’s advice to ICANN is built into ICANN’s Bylaws:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.<sup>10</sup>

### II. THE NEW GTLD PROGRAM

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<sup>4</sup> ICANN Bylaws, Art. I, § 1 (Resp. Ex 2).

<sup>5</sup> *Id.*, Art. V.

<sup>6</sup> *Id.*, Art. VII.

<sup>7</sup> *Id.*, Arts. VIII-X.

<sup>8</sup> *Id.*, Art. XI.

<sup>9</sup> *Id.*, Art. XI-A, § 2.

<sup>10</sup> *Id.*, Art. XI, § 2.1.j.

7. In its early years, and in accordance with its Core Values, ICANN focused on increasing the number of companies that could sell domain name registrations to consumers. ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs. In 2000, ICANN approved seven gTLDs to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet and its DNS. In 2004 and 2005, ICANN approved a handful of additional TLDs.

8. The New gTLD Program (“Program”) constitutes ICANN’s most ambitious expansion of the Internet’s naming system, by far. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs. The Program is implemented through the Guidebook, which sets forth the procedures as to how new gTLD applications are evaluated. In developing the Program with the ICANN community over years, many versions of the Guidebook were prepared, distributed for public comment, and then revised. That process repeated many times until ultimately, ICANN went forward with the Program based on the version of the Guidebook last published on 4 June 2012. The Program has been a great success: ICANN received 1,930 gTLD applications, and more than 800 new gTLDs have been added to the Internet, with hundreds more to come.<sup>11</sup>

9. The Guidebook confers upon the Board ultimate discretion over the Program:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.<sup>12</sup>

**A. GAC Advice On New gTLDs**

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<sup>11</sup> See Program Statistics (Resp. Ex. 4), <https://newgtlds.icann.org/en/program-status/statistics>.

<sup>12</sup> Guidebook § 5.1 (Resp. Ex. 5).

10. Pursuant to the Guidebook, all applications for new gTLDs are made available for public comment at the outset of the application’s life cycle.<sup>13</sup> Concurrent with the public comment period, the GAC may issue “Early Warning” notices concerning particular applications.<sup>14</sup> An Early Warning notice is not an official GAC statement against an application, but indicates to the applicant that one or more governments view the application as potentially problematic.<sup>15</sup> Applicants are advised that a GAC Early Warning raises the likelihood that the application could be the subject of GAC advice against it at a later stage in the process.<sup>16</sup>

11. The Guidebook also sets out a process whereby the GAC may issue advice to the ICANN Board concerning any application. The process is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. Pursuant to Module 3.1 of the Guidebook, GAC advice may take several forms. First, Part I of Module 3.1 states that the GAC may issue “consensus advice” that an application should not proceed, which “will create a strong presumption for the ICANN Board that the application should not be approved.”<sup>17</sup> Second, and most pertinent to the instant proceedings, pursuant to Module 3.1, Part II of the Guidebook, the GAC may issue non-consensus advice indicating “that there are concerns about a particular application.”<sup>18</sup> If the GAC issues non-consensus advice against an application, *the ICANN Board “is expected to enter into dialogue with the GAC to understand the scope of the concerns”* and “provide a rationale for its decision.”<sup>19</sup> Third, pursuant to Module 3.1, Part III of the Guidebook, the GAC

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<sup>13</sup> *Id.*, § 1.1.2.3.

<sup>14</sup> *Id.*, § 1.1.2.4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*, § 3.1(I).

<sup>18</sup> *Id.*, § 3.1(II)

<sup>19</sup> *Id.* (emphasis added).

may issue advice to ICANN “that an application should not proceed unless remediated[,]”<sup>20</sup> which “will raise a strong presumption for the Board that the application should not proceed unless” the applicant implements a remediation method outlined in the Guidebook.<sup>21</sup>

12. The GAC has generally provided its advice to ICANN in the form of communiqués associated with one of ICANN’s public meetings, such as the “Beijing Communiqué,” which is advice from the GAC borne out of the GAC’s meeting at the ICANN Public Meeting in Beijing in April 2013.<sup>22</sup>

13. The New gTLD Program Committee (“NGPC”) of the ICANN Board was tasked with evaluating and responding to GAC advice on gTLD applications as well as communicating with the GAC regarding its advice.<sup>23</sup> Throughout the Program, the NGPC issued “scorecards” relating to GAC advice, which tracked the GAC’s advice and ICANN’s responses.<sup>24</sup>

#### **B. The Dispute Resolution Process And The Independent Objector**

14. Another mechanism that may affect an application is the dispute resolution procedure, which is triggered by a formal objection by a third party. In addition, a formal objection may be filed by the Independent Objector (“IO”).<sup>25</sup> The IO is tasked with filing certain objections to “highly objectionable” applications to which no formal objection has been filed.<sup>26</sup>

15. Governments, as well as other entities and individuals, may formally object to a gTLD application as well.<sup>27</sup> As is relevant here, an established institution associated with a

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<sup>20</sup> *Id.*, § 3.1(III).

<sup>21</sup> *Id.*

<sup>22</sup> Cl. Annex 9.

<sup>23</sup> See Board Resolution 2012.04.10.02 (Resp. Ex. 6), <https://features.icann.org/2012-04-10-establishment-new-gtld-program-committee>. Accordingly, any advice to the ICANN Board is advice to the NGPC, and if Board action is required, action by the NGPC may be considered Board action for purposes of these proceedings.

<sup>24</sup> See GAC Advice ICANN New gTLDs (Resp. Ex. 7), <http://newgtlds.icann.org/en/applicants/gac-advice>.

<sup>25</sup> Guidebook, § 3.2.5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, §§ 3.2, 3.2.3.

clearly delineated community may file a “community objection” claiming there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>28</sup> Community objections are heard by independent, expert panels selected by the International Chamber of Commerce (“ICC”).<sup>29</sup>

### III. ICANN’S ACCOUNTABILITY MECHANISMS

16. The mechanisms through which ICANN achieves accountability and transparency are built into every level of its organization and mandate. As such, ICANN has established specific accountability mechanisms for review of ICANN actions.<sup>30</sup> For instance, ICANN’s Bylaws permit a party claiming to have been adversely and materially affected by a decision of ICANN’s staff or Board to request that the Board reconsider the decision (“Reconsideration Request”).<sup>31</sup> Reconsideration Requests are considered by ICANN’s Board Governance Committee (“BGC”). The BGC generally makes a final determination on Reconsideration Requests involving staff conduct, although it could make a recommendation on such matters to the Board for consideration, as it must for Reconsideration Requests involving Board conduct.

17. ICANN has also established the IRP, which may be invoked by parties claiming they were materially and adversely affected by a Board action alleged to be inconsistent with ICANN’s Articles or Bylaws.<sup>32</sup> Prior to initiating a request for IRP, claimants are urged to enter into a cooperative engagement process (“CEP”) with ICANN “for the purpose of resolving or

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<sup>28</sup> *Id.*, § 3.2.1.

<sup>29</sup> *Id.*, § 3.2.2. In order to succeed on a Community Objection, an objector must establish the following: (i) the community invoked by the objector is a clearly delineated community; (ii) community opposition to the application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string; and (iv) the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. *Id.*, § 3.5.4.

<sup>30</sup> *Id.*, Art. IV; *see also* ICANN Accountability Mechanisms Available to the ICANN Community (Resp. Ex. 8), <https://www.icann.org/sites/default/files/assets/accountability-mechanisms-5100x3300-19mar14-en.png>.

<sup>31</sup> Bylaws, Art. IV, § 2.2.

<sup>32</sup> *Id.*, Art. IV, § 3.

narrowing the issues that are contemplated to be brought to the IRP.”<sup>33</sup>

18. ICANN has also put in place a Documentary Information Disclosure Policy (“DIDP”) that permits parties to ask ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control[.]”<sup>34</sup> ICANN has developed a “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).<sup>35</sup> The DIDP Response Process provides that “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified [on ICANN’s website].”<sup>36</sup> ICANN reserves the right to withhold documents falling within any of the DIDP Conditions for Nondisclosure, which include: (i) “[i]nformation exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates [...]”; (ii) “[c]onfidential business information and/or internal policies and procedures.”<sup>37</sup> However, information that falls within any of the conditions set forth above may still be made public if ICANN determines that the public interest in disclosure outweighs the harm that may be caused by such disclosure.<sup>38</sup>

#### **IV. THE .HALAL AND .ISLAM APPLICATIONS**

19. In early-2012, AGIT applied for .ISLAM and .HALAL.<sup>39</sup>

20. On 20 November 2012, both of AGIT’s Applications received GAC Early

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<sup>33</sup> *Id.*, Art. IV, § 3.14.

<sup>34</sup> *Id.*

<sup>35</sup> See DIDP Response Process (Resp. Ex. 9), <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

<sup>36</sup> *Id.*; see also ICANN Documentary Information Disclosure Policy, Nondisclosure Conditions (Resp. Ex. 10), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>37</sup> ICANN Documentary Information Disclosure Policy, Nondisclosure Conditions (Resp. Ex. 10).

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

<sup>39</sup> Cl. Annex 1.

Warning notices from two GAC members: the United Arab Emirates (“UAE”);<sup>40</sup> and (ii) India.<sup>41</sup> Both members expressed serious concerns regarding a perceived lack of community involvement in, and support for, the Applications.

21. On 13 March 2013, the Telecommunications Regulatory Authority of the UAE filed community objections with the ICC to AGIT’s Applications (“Community Objections”).<sup>42</sup>

22. After a regularly-scheduled meeting, on 11 April 2013, the GAC issued its Beijing Communiqué, wherein it advised the Board that, pursuant to Section 3.1 of the Guidebook, some GAC members:

[H]ave noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.<sup>43</sup>

23. On 18 April 2013, ICANN published the GAC advice regarding the Applications.<sup>44</sup> Thereafter, on 4 June 2013, the NGPC adopted the NGPC Scorecard<sup>45</sup> setting forth the NGPC’s response to the portion of the GAC’s Beijing Communiqué regarding .ISLAM and .HALAL:

The NGPC accepts [the GAC] advice.... Pursuant to Section 3.1ii of the [Guidebook], the NGPC stands ready to enter into dialogue with the GAC on this matter. We look forward to liaising with the GAC as to how such dialogue should be conducted.<sup>46</sup>

24. On 18 July 2013, Board members and the relevant GAC members attended a

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<sup>40</sup> Cl. Annex 5, *also* <https://gacweb.icann.org/download/attachments/27131927/Islam-AE-23450.pdf>.

<sup>41</sup> Cl. Annex 5, *also* <https://gacweb.icann.org/download/attachments/27131927/Islam-IN-23459.pdf>.

<sup>42</sup> See Cl. Annex 8. UAE’s Community Objections asserted that there is “substantial opposition to [each] gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Guidebook, § 3.2.1.)

<sup>43</sup> See Cl. Annex 9 at Pg. 3, *also* <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.

<sup>44</sup> Where GAC Advice is received by the Board concerning an application, ICANN is required to: “[P]ublish the advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.” (Guidebook, § 3.1.)

<sup>45</sup> Cl. Annex 9; 4 June 2013 Annex 1 to NGPC Resolution No. 2013.06.04.NGO1 (Resp. Ex. 11), <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-cl-annex-1-04jun13-en.pdf>.

<sup>46</sup> Cl. Annex 9, NGPC Scorecard, Pg. 3.

meeting in Durban, South Africa to understand the scope of the GAC’s concerns regarding the Applications.<sup>47</sup> While AGIT claims this was a “secret” meeting, *AGIT’s current Chief Operating Officer was present at this meeting.*<sup>48</sup>

25. On 25 July 2013, the State of Kuwait sent a letter to ICANN expressing its support for UAE’s Community Objections and identifying concerns that AGIT did not receive the support of the community, that the Applications are not in the best interest of the Islamic community, and that the strings “should be managed and operated by the community itself through a neutral body that truly represents the Islamic community such as the Organization of Islamic Cooperation.”<sup>49</sup>

26. On 4 September 2013, the Lebanese GAC representative wrote to the NGPC Chair objecting to the Applications, stating that the “operation of these TLDs must be conducted by a neutral non-governmental multi-stakeholder group representing, at least, the larger Muslim community.”<sup>50</sup>

27. On 4 November 2013, the Secretary General of the Organisation of Islamic Cooperation (“OIC”) wrote to the GAC Chair that, as an “intergovernmental organization with 57 Member States spread across four continents” and the “sole official representative of 1.6 billion Muslims,” the OIC opposed the operation of the .ISLAM and .HALAL strings “by any entity not representing the collective voice of the Muslim people.”<sup>51</sup>

28. On 24 October 2013, the ICC panel (“Panel”) considering the UAE’s Community

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<sup>47</sup> See Cl. Annex 12, 7 February 2014 Letter at Pg. 1.

<sup>48</sup> See Shahram Soboutipour Biography (Resp. Ex. 12), <https://www.icann.org/profiles/shahram-soboutipour> (noting that he has been AGIT’s COO since January 1, 2015).

<sup>49</sup> 25 July 2013 Letter from Kuwait Minister of Communications to ICANN (Resp. Ex. 13), <http://www.icann.org/en/news/correspondence/al-qattan-to-icann-icc-25jul13-en.pdf>.

<sup>50</sup> 4 September 2013 Letter from Lebanese GAC Representative to NCPC Chairman (Resp. Ex. 14), <http://www.icann.org/en/news/correspondence/hoballah-to-chalaby-et-al-04sep13-en.pdf>.

<sup>51</sup> Cl. Annex 10, *also* <http://www.icann.org/en/news/correspondence/crocker-to-dryden-11nov13-en.pdf>.

Objections rendered two Expert Determinations (“Determinations”) denying those objections.<sup>52</sup>

29. On 11 November 2013, the ICANN Board Chair sent a letter to the GAC Chair referencing the OIC’s 4 November 2013 letter and stating, “[n]ow that the objection proceedings have concluded, the NGPC must decide what action to take on these [.ISLAM and .HALAL] strings. Before it does so, it will wait for any additional GAC input during the Buenos Aires meeting or resulting GAC Communiqué. The NGPC stands ready to discuss this matter further if additional dialog would be helpful.”<sup>53</sup>

30. On 21 November 2013, the GAC issued its Buenos Aires Communiqué, stating:

[The] GAC took note of letters sent by the OIC and the ICANN Chairman in relation to the strings .islam and .halal. The GAC has previously provided advice in its Beijing Communiqué, when it concluded its discussions on these strings. The GAC Chair will respond to the OIC correspondence accordingly, noting the OIC’s plans to hold a meeting in early December. The GAC chair will also respond to the ICANN Chair’s correspondence in similar terms.<sup>54</sup>

31. On 29 November 2013, the GAC Chair responded to the ICANN Board Chair, confirming that the GAC has concluded its discussion on AGIT’s Applications and stating that “no further GAC input on this matter can be expected.”<sup>55</sup>

32. On 4 December 2013, AGIT wrote to the ICANN Board Chair, proposing certain governance mechanisms for the .ISLAM and .HALAL strings, noting:

At the core of this governance mechanism is the Policy Advisory Council (PAC) contemplated for each TLD. PACs will be deployed for both .ISLAM and .HALAL. They will serve as non-profit governing boards made up of leaders from many of the world’s various Muslim communities, governments, and organizations. The PACs will oversee policy development for the TLDs, to ensure they are coherent and consistent with Muslim interests. AGIT has invited the

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<sup>52</sup> Cl. Annex 8.

<sup>53</sup> Cl. Annex 10.

<sup>54</sup> Buenos Aires Communiqué, Pg. 4 (Resp. Ex. 15), [https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2).

<sup>55</sup> Cl. Annex 10, *also* <http://www.icann.org/en/news/correspondence/dryden-to-crocker-29nov13-en.pdf>.

leading Muslim organisations, including the Organization for Islamic Cooperation (OIC), to become members of the PACs.<sup>56</sup>

33. Nevertheless, on 19 December 2013, the OIC sent a letter to the ICANN Board Chair, stating that the foreign ministers of the 57 OIC’s Muslim member states had unanimously adopted a resolution officially objecting to the operation of the .ISLAM and .HALAL TLDs “by any entity not reflecting the collective voice of the Muslim People[.]”<sup>57</sup>

34. On 24 December 2013, the Ministry of Communication and Information Technology of Indonesia sent a letter to the NGPC Chair “strongly object[ing]” to the .ISLAM string but “approves” the .HALAL string if operated “properly and responsibly.”<sup>58</sup>

35. On 30 December 2013, AGIT submitted a letter to the ICANN Board Chair challenging the nature and extent of the OIC’s opposition to AGIT’s Applications, reiterating its commitment to the proposed multistakeholder governance model of .ISLAM and .HALAL described in its 4 December 2014 letter, and requesting to proceed to the contracting phase.<sup>59</sup>

36. On 5 February 2014, the NGPC adopted an scorecard<sup>60</sup> stating:

The NGPC takes note of the significant concerns expressed during the dialogue, and additional opposition raised, including by the OIC, which represents 1.6 billion members of the Muslim community.<sup>61</sup>

37. In addition, the NGPC directed the transmission of a letter from the NGPC, via the ICANN Board Chair, to AGIT (“7 February 2014 Letter”).<sup>62</sup> The 7 February 2014 Letter

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<sup>56</sup> 4 December 2013 Letter from AGIT to Crocker (Resp. Ex. 16),

<https://www.icann.org/en/system/files/correspondence/abbasnia-to-crocker-04dec13-en.pdf>.

<sup>57</sup> Cl. Annex 13, *also* <http://www.icann.org/en/news/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf>.

<sup>58</sup> Cl. Annex 13, *also* <http://www.icann.org/en/news/correspondence/iskandar-to-chalaby-24dec13-en.pdf>.

<sup>59</sup> 5 February 2014 Approved Resolutions Meeting of the New gTLD Program Committee (Resp. Ex. 18), <http://www.icann.org/en/news/correspondence/abbasnia-to-crocker-30dec13-en.pdf>.

<sup>60</sup> 5 February 2014 Resolution (Resp. Ex. 18), <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-05feb14-en.htm#1.a.rationale>; 5 February 2014 Actions and Updates Scorecard (Resp. Ex. 19),

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-Cl. Annex-1-05feb14-en.pdf>.

<sup>61</sup> 5 February 2014 Action and Updates Scorecard (Resp. Ex. 19), Pg. 8.

<sup>62</sup> Cl. Annex 12, 7 February 2014 NGPC Letter to AGIT.

acknowledged AGIT's stated commitment to a multistakeholder governance model, but also noted the substantial opposition to AGIT's Applications.

Despite these commitments, a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM.... There seems to be a conflict between the commitments made in your letters and the concerns raised in letters to ICANN urging ICANN not to delegate the strings. Given these circumstances, the NGPC will not address the applications further until such time as the noted conflicts have been resolved.<sup>63</sup>

38. The 7 February 2014 Letter listed the Gulf Cooperation Council, the OIC, the Republic of Lebanon and the government of Indonesia as four parties that "all voiced opposition to the AGIT applications," and provided some detail as to the concerns of each.<sup>64</sup>

39. On 21 February 2014, AGIT initiated ICANN's informal dispute resolution process, the CEP, pursuant to Bylaws, Art. IV, §§ 3.14-17,<sup>65</sup> which did not resolve the dispute.

40. On 10 September 2015, AGIT filed a request under the DIDP ("DIDP Request"), which sought the disclosure of six categories of documents.<sup>66</sup> ICANN responded to the DIDP Request (the "DIDP Response") on 10 October 2015.<sup>67</sup> AGIT did not seek reconsideration of the DIDP Response.

## STANDARD OF REVIEW

41. The IRP is a unique, non-binding process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with

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<sup>63</sup> 7 February 2014 NGPC Letter to AGIT, at Pg. 2.

<sup>64</sup> *Id.*

<sup>65</sup> See Pending CEP and IRP Matters Archive (Resp. Ex. 20), <https://www.icann.org/resources/pages/cep-irp-pending-archive-2014-09-26-en>.

<sup>66</sup> See 10 September 2015 Asia Green IT System (AGIT) Letter to ICANN (Resp. Ex. 21), <https://www.icann.org/en/system/files/files/didp-request-20150910-1-asia-green-it-system-ltd-10sep15-en.pdf>.

<sup>67</sup> See Cl. Annex 19. The publicly available version of the DIDP Response includes one attachment, a letter ICANN noted had been inadvertently omitted from the correspondence page. See Resp. Ex. 22, *also* <https://www.icann.org/en/system/files/files/didp-response-attachment-20150910-1-asia-green-it-system-ltd-10oct15-en.pdf>.

ICANN's Articles or Bylaws.<sup>68</sup> The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Articles or Bylaws.<sup>69</sup> ICANN's Bylaws specifically define the standard of review applicable to this IRP Panel, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>70</sup>

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.<sup>71</sup>

42. ICANN has appointed the ICDR as ICANN's IRP Provider. ICANN's Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.<sup>72</sup>

43. Consistent with ICANN's Bylaws, the IRP Panel is to issue a written "declaration" designating, among other things, the prevailing party.<sup>73</sup> The Board will then give serious consideration to the IRP Panel's declaration and, "where feasible," shall consider the IRP Panel's declaration at the Board's next meeting.<sup>74</sup>

## ARGUMENT

44. AGIT argues that independent review is warranted because: (i) ICANN allegedly

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<sup>68</sup> Bylaws, Art. IV, §§ 3.1, 3.2.

<sup>69</sup> *Id.* Art. IV, § 3.4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Absent a governing provision in ICANN's Bylaws or the ICDR's Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR's Rules, the Supplementary Procedures shall govern. *Id.*, Art. IV, § 3.8; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process ("Supplementary Procedures"), § 2 (Resp. Ex. 23),

<https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>73</sup> Bylaws, Art. IV, § 3.18.

<sup>74</sup> *Id.*, Art. IV, § 3.21.

failed to disclose which parties raised objections to the Applications, the scope of those objections and how they might be remedied; (ii) AGIT allegedly addressed the objections; (iii) ICANN allegedly permitted non-consensus GAC advice to “veto” its Applications; (iv) ICANN allegedly contravened the requirement that ICANN provide clear criteria for evaluation of all applications; and (v) ICANN allegedly failed to provide AGIT with certain documents via the DIDP.<sup>75</sup> AGIT also takes issue with the lack of a standing IRP panel and ICANN’s view as to the effect of IRP final declarations as a general matter. Yet none of these claims are accurate or demonstrate a violation of the Articles or Bylaws by ICANN’s Board.<sup>76</sup>

**I. ICANN DISCLOSED THE OBJECTORS’ IDENTITIES AND CONCERNS, AS WELL AS WHAT AGIT MUST DO BEFORE ICANN WOULD RESUME ITS CONSIDERATION OF THE APPLICATIONS.**

45. AGIT claims that ICANN failed to identify the parties objecting to AGIT’s Applications, the scope of those objections, and what AGIT must do before ICANN would resume its consideration of the Applications. Not only is this argument inaccurate, it also fails to support independent review for a more fundamental reason: It misconstrues the nature of the Board’s obligations with respect to the Applications.

46. After ICANN received non-consensus advice from the GAC regarding the

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<sup>75</sup>In various footnotes, AGIT also argues that ICANN improperly treated the .ISLAM and .HALAL Applications differently than the applications for .KOSHER. See IRP Request fns. 17, 23, 34 & Annex 17. The NGPC properly treated these applications differently precisely because the .KOSHER application was NOT the subject of any GAC advice, unlike the Applications. As set forth above, the GAC’s Beijing Communiqué provided “non-consensus” advice to ICANN (Annex 9, Beijing Communiqué ¶ IV.1.a.ii). Pursuant to the Guidebook, “non-consensus” advice from the GAC regarding an application means that the “ICANN Board is expected to enter into dialogue with the GAC to understand the scope of the concerns.” (Guidebook, § 3.1(II).) Following receipt of such advice, ICANN’s did so. (See Cl. Annex 12, 7 February 2014 Letter from S. Crocker to M. Abbasnia.) In contrast, the GAC did not issue any advice with respect to the .KOSHER application. In sum, the .KOSHER application was properly treated differently from the Applications because the GAC viewed them differently, and no Article or Bylaws violation arises out of that differential treatment, which was in full accord with the Guidebook.

<sup>76</sup>AGIT very briefly argues that an IRP is warranted because the Board has “thus far treated both the .Islam and .halal applications precisely the same.” (IRP Request, fns. 10, 28, 34.) However, the two strings .HALAL and .ISLAM *must* be treated in the same way because the GAC advice concerning them is identical. In fact, AGIT has acknowledged the sensitive nature of both applications in its Response to GAC’s warnings (see Cl. Annex 6). Similarly, the independent expert appointed in the community objection proceedings accepted that the .HALAL application was sensitive and could not be divorced from the Muslim community (see Cl. Annex 8, §74).

Applications, the Board’s only requirement was “to enter into dialogue with the GAC to understand the scope of concerns” and then “provide a rationale for its decision.” The Board more than complied with this duty through several open, transparent and public steps.

47. First, on 18 July 2013, some NGPC members and the relevant GAC members attended a meeting in Durban, South Africa to discuss the scope of the GAC’s concerns regarding the Applications, as required by the Guidebook.<sup>77</sup> Although AGIT contends that this was a “secret” meeting in violation of ICANN’s core values,<sup>78</sup> in fact, *AGIT’s current Chief Operating Officer*, Shahram Soboutipour, attended the Durban meeting. There is no requirement that such a meeting be open to the public, yet it was, at least open to Mr. Soboutipour.

48. Second, in its 5 February 2014 Scorecard, the Board’s NGPC publicly identified some of the entities that had stated opposition to the Applications and their concerns.<sup>79</sup> In addition to identifying the UAE’s objections, the Scorecard states that “[t]he NGPC takes note of the significant concerns expressed during the dialogue, and additional opposition raised, including by the OIC, which represents 1.6 billion members of the Muslim community.”<sup>80</sup>

49. Third, the ICANN Board went further in its 7 February 2014 Letter to AGIT by referencing its meeting with the GAC and identifying objectors and their concerns:

a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. **The Gulf Cooperation Council** (25 July 2013: *applications not supported by the community, applicants did not consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC*); the **Republic of Lebanon** (4 September 2013: *management and operation of these TLDs must be conducted by a neutral, non-governmental multistakeholder group*);

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<sup>77</sup> See Cl. Annex 12, 7 February 2014 Letter at Pg. 1.

<sup>78</sup> IRP Request at 17.

<sup>79</sup> Cl. Annex 12.

<sup>80</sup> *Id.*

**the Organisation of Islamic Cooperation** (19 December 2013: *foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted*); and the **government of Indonesia** (24 December 2013: *strongly opposes approval of .islam*) all voiced opposition to the AGIT applications.<sup>81</sup>

50. The 7 February 2014 Letter also included the date of each objector’s letter, which permitted AGIT to consult the letter itself on ICANN’s public correspondence page, which included all four objections that the 7 February 2014 identifies.<sup>82</sup>

51. Fourth, as required by the Guidebook, the 7 February 2014 Letter also set forth the Board’s rationale for “not address[ing] the applications further,” which was that there were “conflicts” between the objections and AGIT’s claims that it had support for its Applications and had an appropriate a multi-stakeholder governance model in place.<sup>83</sup> Among other things, the objections raised concerns about any entity other than a regulatory body representing the collective and diverse voice of the Muslim community operating these TLDs.<sup>84</sup> While AGIT claimed that it would include the OIC in a Policy Advisory Council to operate .ISLAM and .HALAL,<sup>85</sup> AGIT had not provided the Board with any evidence of such an arrangement, and the OIC contradicted the claims. Accordingly, the ICANN Board could not reconcile AGIT’s claims and those of the objectors, and therefore exercised its discretion to place these Applications on hold.

52. Indeed, the 7 February 2014 Letter explained what AGIT must do in order to address the Board’s concerns. Specifically, the Board informed AGIT that it must “resolve” the “conflicts” between the claims regarding the Applications’ proposed governance model and the

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<sup>81</sup> Cl. Annex 12, 7 February 2014 Letter at Pg. 2 (emphasis added) (the entities that raised objections are in **bold** and their concerns are in *italics*).

<sup>82</sup> *Id.*; gTLD Correspondence (Resp. Ex. 24), <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>83</sup> Cl. Annex 12, 7 February 2014 Letter at Pg. 2.

<sup>84</sup> Cl. Annex 4 (letter from AGIT to IO stating AGIT will approach OIC for support).

<sup>85</sup> Cl. Annex 6.

objectors' concerns. Put another way, the 7 February 2014 Letter made clear to AGIT that, as the proponent of the Applications, it was incumbent upon AGIT to resolve the conflict between AGIT's representation that it had resolved the objections, and the evidence to the contrary.

53. All of these steps – some of which go beyond the Board's mandate – clearly informed AGIT of the objectors' identities, the scope of their objections and what AGIT must do before the Board would resume consideration of the Applications.

54. As such, AGIT's claims of "secret" meetings and underhanded efforts to derail AGIT's Applications are simply false. As the panel noted in the *Merck KGaA v. ICANN* IRP proceeding, to assess whether Board action comports with ICANN's Articles and Bylaws "requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN."<sup>86</sup> Here, the Board did more than what was required and ensured that AGIT understood what parties had objected to its Applications, and why.

55. Finally, AGIT suggests that the Board is required to act as some sort of broker between AGIT and the objectors. Notably, however, AGIT fails to cite any Article or Bylaws provision, or any portion of the Guidebook that requires the ICANN Board to shepherd each application along in this manner. As the Board recognized, the parties best suited to resolve these objections are the applicants and the objectors themselves.

## **II. AGIT'S ASSERTION THAT IT HAS RESOLVED THE CONFLICTS ASSOCIATED WITH ITS APPLICATIONS IS NOT ACCURATE.**

56. Perhaps recognizing that it cannot credibly assert that it was not informed of the issues associated with the Applications, AGIT misrepresents that it has resolved the objections.

57. For instance, the lack of community support for the Applications was one of the

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<sup>86</sup> *Merck KGaA v. ICANN*, Final Declaration ¶ 17 (Resp. Ex. 25), <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>.

most critical concerns raised by the objectors.<sup>87</sup> AGIT acknowledged this concern and repeatedly represented that it would seek the support from the OIC, the entity generally deemed most representative of the Muslim community,<sup>88</sup> as AGIT has acknowledged.<sup>89</sup> To that end, AGIT proffered letters from individuals and associations who are ***not, in reality, affiliated with the OIC***.<sup>90</sup> For instance, AGIT has contended that support from the Islamic Chamber Research & Information Center (“ICRIC”) is equivalent to support from the OIC.<sup>91</sup> Yet, ICRIC is not an OIC affiliate, as the ICC Panel appointed to hear the Community Objections noted.<sup>92</sup>

58. More generally, AGIT also attests that it has made efforts to address the concerns raised by Lebanon and the OIC, such as proposing a multi-stakeholder governance model.<sup>93</sup> But AGIT has presented no evidence to ICANN (or this IRP Panel) that either has withdrawn its opposition to the Applications.

59. Similarly, AGIT misleadingly suggests that the IO “found” AGIT’s proposed governance model to be “as suggested by the government of Lebanon . . . and by the OIC[.]”<sup>94</sup> In fact, the IO merely indicated that the OIC is “better placed than the IO to file an objection” and it is because the OIC “is already fully aware of the controversial issues” that the IO did not feel the need to file an objection himself.<sup>95</sup>

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<sup>87</sup> See, e.g., Cl. Annex 5.

<sup>88</sup> Cl. Annex 4; Cl. Annex 6.

<sup>89</sup> Cl. Annex 6 at p. 3. Similarly, in resolving the UAE’s Community Objections, the Panel noted that the OIC was a critical entity that would serve as a barometer for whether there was substantial community support for or opposition to the Applications. Cl. Annex 8 ¶¶ 103-115; Cl. Annex 8 ¶¶ 96-108.

<sup>90</sup> See generally Cl. Annex 16.

<sup>91</sup> See Cl. Annex 8 ¶ 85.

<sup>92</sup> See Cl. Annex 8 ¶ 102; Cl. Annex 8 ¶ 94 (“the Respondent has failed to evidence that ICRIC is a subsidiary, an affiliate or is otherwise under the umbrella of the OIC. This is also confirmed by the fact that nowhere does the OIC refer to ICRIC as a subsidiary or an affiliate thereof. Nor does ICRIC hold itself out as a subsidiary or an affiliate of the OIC. On its part, HalalWorld is a mere affiliate of ICRIC and, for the same reasons, it cannot be considered as a subsidiary or an affiliate of the OIC.”).

<sup>93</sup> IRP Request at 16.

<sup>94</sup> *Id.*

<sup>95</sup> See Cl. Annex 3.

60. In fact, in November 2013, the OIC Secretary General submitted a letter to ICANN to voice its concerns and opposition to AGIT’s Applications (of which ICANN informed AGIT).<sup>96</sup> The OIC indicated that it was ready “to engage and fully cooperate with the GAC of ICANN to find an appropriate solution,” and requested ICANN to consider the OIC’s letter as an “official opposition of the Member States of the OIC towards probable authorization by the GAC allowing use of these new gTLDs .Islam and .Halal by any entity not representing the collective voice of the Muslim people.”<sup>97</sup> On 19 December 2013, the Secretary General of the OIC sent a letter to ICANN, stating that the Foreign Ministers of the 57 Muslim Member States of the OIC had *unanimously* adopted a resolution officially objecting to the .ISLAM and .HALAL strings.<sup>98</sup>

61. AGIT has failed to demonstrate that the “conflicts have been resolved”<sup>99</sup> with respect to the OIC or any of the other objectors. It is for this reason that the Applications have not been permitted to proceed, and AGIT has identified no Board action that violates the Articles or Bylaws in connection with that determination.

### **III. THE APPLICATIONS HAVE NOT BEEN “VETOED.”**

62. Contrary to what AGIT suggests in its IRP, the applications have not been “vetoed.” To the contrary, the Board is exercising its discretion not to delegate the strings unless and until AGIT shows it has resolved the conflicts between its representations as to the strings’ operations and the Applications’ opponents’ concerns (including those raised by the OIC).

63. Moreover, AGIT ignores the fact that the Guidebook confers upon the Board ultimate discretion over the Program:

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<sup>96</sup> Cl. Annex 10.

<sup>97</sup> *Id.*

<sup>98</sup> See 19 December 2013 Letter from Organization of Islamic Cooperation to ICANN’s Steve Crocker (Resp. Ex. 3), <https://www.icann.org/en/system/files/correspondence/ihsanoglu-to-crocker-19dec13-en.pdf>.

<sup>99</sup> 7 February 2014 Letter.

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. *The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.* Under exceptional circumstances, the Board may individually consider a gTLD application. For example, *the Board might individually consider an application as a result of GAC Advice on New gTLDs* or of the use of an ICANN accountability mechanism.<sup>100</sup>

64. In other words, the Board has the authority to assess each new gTLD application on an individual basis, and has properly exercised that right here.<sup>101</sup>

65. AGIT claims that ICANN improperly “ignored the advice of experts” that rejected the UAE’s Community Objections and the IO’s decision not to object to the Applications, and in so doing violated several ICANN core principles. Yet prevailing in an objection proceeding does not mean an application will automatically proceed to delegation. No Guidebook or other provision promises as much, and AGIT’s statement that ICANN “cannot second-guess this expert finding”<sup>102</sup> and *must* permit the Applications to proceed to delegation is inaccurate.

66. In short, the Guidebook permits the Board the ultimate discretion over the Program, so the mere fact that the Applications have not been approved cannot comprise a violation of any Article or Bylaws provision.

#### **IV. ICANN HAS NOT CREATED ANY “NEW POLICY” WITH RESPECT TO THE APPLICATIONS.**

67. AGIT argues that in deferring the contracting process of the Applications, ICANN has “devised a secret and unique policy only for these applications” and therefore has violated the Bylaws regarding policy-making.<sup>103</sup> The only “policy” involved here is the policy that lead to the creation of the New gTLD Program and was implemented in the Guidebook itself. As set

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<sup>100</sup> Guidebook § 5.1.

<sup>101</sup> *Id.*

<sup>102</sup> IRP Request at 22.

<sup>103</sup> *Id.* at 23.

forth above, ICANN complied with all Guidebook provisions in taking the action it has taken with respect to the Applications. Specifically, the provisions relating to GAC advice and the Board's ultimate discretion over the New gTLD Program. As the final declaration in the *Booking.com v. ICANN* IRP stated, an IRP panel's "authority" does not "extend to opining on the nature of the policies or procedures established in the Guidebook."<sup>104</sup> When the relevant Guidebook "process was followed," no discrimination can have occurred, because it cannot be said that the applications were "treated differently than any other applied-for gTLD[.]"<sup>105</sup> In short, AGIT's disappointment that its Applications are not presently proceeding to delegation cannot be transformed into a policy violation. ICANN has made no new policy with respect to the Applications, but instead adhered to the Articles, Bylaws, and the Guidebook.

#### V. THE DIDP RESPONSE CANNOT SUPPORT AGIT'S IRP REQUEST.

68. The scope of an IRP is limited to *Board* action alleged to be inconsistent with ICANN's Articles or Bylaws.<sup>106</sup> Yet the ICANN Board plays no role in responding to DIDP requests. Rather, AGIT disagrees with ICANN *staff's* determinations that certain documents were subject to DIDP Defined Conditions for Nondisclosure, and that the potential harm from the release of such documents outweighs the public interest in disclosure.<sup>107</sup> Unlike other IRP claimants,<sup>108</sup> AGIT did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP Response. As such, the DIDP Response involved no Board action.

69. Moreover, AGIT's challenge to the DIDP Response is time-barred. A "request

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<sup>104</sup> *Booking.com v. ICANN*, Final Declaration ¶ 110 (Resp. Ex. 26), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

<sup>105</sup> *Id.* ¶ 140.

<sup>106</sup> Bylaws, Art. IV, § 3.

<sup>107</sup> IRP Request at 24-25.

<sup>108</sup> *See, e.g.*, ICANN's Response To Claimants Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, And Radix FZC's Request For Independent Review Process at Pgs. 22-23 (Resp. Ex. 27), <https://www.icann.org/en/system/files/files/icann-response-irp-request-redacted-17apr15-en.pdf>.

for independent review must be filed within *thirty days* of the posting of the minutes of the Board meeting . . . that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”<sup>109</sup> Here, the fact that no Board meeting minutes address the DIDP Response is more evidence that the DIDP Response is not subject to independent review. However, even if a deadline can be calculated from the date of the DIDP Response, which is dated 10 October 2015, AGIT’s 30-day deadline has passed.

70. In any event, the DIDP Request sought information the public disclosure of which could compromise the integrity of ICANN and/or the GAC’s deliberative process.<sup>110</sup> In response to each of requested category, ICANN provided links to publicly available documents.<sup>111</sup> ICANN staff determined that the all but the first category was subject to specified Conditions for Nondisclosure.<sup>112</sup> ICANN has the discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Conditions for Nondisclosure outweighs the harm that may be caused by such disclosure.<sup>113</sup> AGIT’s substantive disagreement with that determination is not a basis for independent review.<sup>114</sup>

## **VI. NO ARTICLE OR BYLAWS PROVISION SETS A DEADLINE FOR THE APPOINTMENT OF AN IRP STANDING PANEL.**

71. Article IV, Section 3, paragraph 6 of ICANN’s Bylaws provides, in pertinent part:

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<sup>109</sup> Bylaws, Art. IV, § 3.3 (emphasis added).

<sup>110</sup> See generally Cl. Annex 19.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>114</sup> Moreover, AGIT discusses document requests (not DIDP requests) at issue in other IRPs in a thoroughly misleading manner. For instance, in the IRP filed by claimant Corn Lake, the Panel denied the claimant’s request for a privilege log, and in ruling in ICANN’s favor on that issue, reminded ICANN that “No documents are to be withheld on the basis of confidentiality[.]” See (Resp. Ex. 28), <https://www.icann.org/en/system/files/files/irp-corn-lake-procedural-order-2-17nov15-en.pdf>. AGIT’s portrayal of this ruling as an “order[] to turn over” documents is pure fiction. See IRP Request at 24-25 & fn. 26. The other document request AGIT discusses is even farther afield: in the IRP filed by dot Registry, the Panel itself requested documents from ICANN. See (Resp. Ex. 29), <https://www.icann.org/en/system/files/files/procedural-order-3-04may15-en.pdf>. AGIT does not suggest how that unusual situation might have any bearing upon this IRP. See IRP Request at 25 & fn. 27.

There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN’s mission and work from which each specific IRP Panel shall be selected. . . . In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider . . . [.]

72. A standing panel is not yet in place to hear IRPs. However, the Bylaws provide that, if a standing panel is not in place when a particular proceeding is initiated, the proceeding will be considered by a one- or three-member panel in accordance with the ICDR’s rules.

Because ICANN’s Bylaws identifies how to select a panel when a standing panel is not in place, it is not accurate to state that ICANN has failed to follow its Bylaws on that account.

#### **VII. THE *DCA* IRP HAS NO RELEVANCE TO THIS MATTER.**

73. Also, in its IRP Request, AGIT argues that this IRP is analogous to the *DCA Trust v. ICANN* IRP, which concerned the .AFRICA string (the “*DCA* IRP”).<sup>115</sup> However, in the *DCA* IRP, the GAC issued *consensus* advice, which per the Guidebook “create[s] a strong presumption for the ICANN Board that the application *should not be approved*.”<sup>116</sup> The ICANN Board was perceived as having not investigated the rationale for that GAC consensus advice.<sup>117</sup> Here, in contrast, the GAC issued non-consensus advice, which requires the Board *only* to “enter into dialogue with the GAC to understand the scope of concerns[.]”<sup>118</sup> It is beyond question that the Board entered into a dialogue with the GAC regarding the scope of its members’ concerns about the Applications, notably at the 18 July 2013 meeting. After the Board concluded this dialogue, it was not required to do anything further (even though it did so).

74. In short, the *DCA* IRP is entirely irrelevant because it involves a different type of

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<sup>115</sup> IRP Request at 13-14, 26-27 & fn. 16.

<sup>116</sup> Guidebook § 3.1(I) (emphasis added).

<sup>117</sup> See *generally* Cl. Annex 11.

<sup>118</sup> Guidebook § 3.1(II).

GAC advice raising different concerns, and AGIT does not argue that the Board did not sufficiently engage with the GAC concerning its advice, unlike the claimant's position in *DCA*. As such, AGIT's arguments that *DCA* is dispositive, and generalized assertions regarding the precedential effect of IRP final declarations, do not advance AGIT's position.

#### **VIII. THE REQUESTED RELIEF IS NOT AVAILABLE UNDER AN IRP.**

75. AGIT asks that this IRP Panel "require[e] ICANN to issue the two TLD Registry Agreements to AGIT immediately."<sup>119</sup> Yet an IRP Panel is limited to "declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending that the Board stay any further action until it reviews the opinion of the IRP Panel.<sup>120</sup> As stated in *Vistaprint Limited v. ICANN*, an IRP panel "does not have authority to render affirmative relief requiring ICANN's Board to take . . . any action or decision."<sup>121</sup>

#### **CONCLUSION**

76. The ICANN Board's conduct was consistent with ICANN's Articles and Bylaws. Accordingly, AGIT's IRP Request should be denied.

Respectfully submitted,

JONES DAY

By: /s/ Eric P. Enson  
Eric P. Enson

Counsel for Respondent ICANN

Dated: February 1, 2016

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<sup>119</sup> IRP Request at 27.

<sup>120</sup> Bylaws, Art. IV, § 3.11.

<sup>121</sup> *Vistaprint Limited v. ICANN*, Final Declaration ¶ 149 (Resp. Ex. 30), <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf>.