

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
SUPPLEMENTAL BRIEF IN SUPPORT OF 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 Supplemental Request for Independent Review Process (“Supplemental IRP Request”) submitted by claimant Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (“Claimant”) on 6 January 2017.

ARGUMENT

1. In its Supplemental IRP Request, Claimant paints a grand conspiracy that was allegedly designed to block Claimant from operating the .ISLAM and .HALAL generic top-level domains (“gTLDs”). But an objective review of the documents on which Claimant relies and the evidence already in the record demonstrates that Claimant’s grand conspiracy theory is just that – an unsubstantiated theory.

2. For instance, Claimant asserts that the Governmental Advisory Committee (“GAC”) held a “secret, closed” meeting in Beijing, China to discuss Claimant’s applications for .ISLAM and .HALAL (the “Applications”). But Claimant fails to note that GAC meetings up to and including the Beijing meeting were usually limited to GAC members based on the GAC’s policy in existence at that time. Likewise, Claimant characterizes a meeting between ICANN Board members sitting on ICANN’s New gTLD Program Committee (“NGPC”) and GAC members in Durban, South Africa as another “secret” meeting because only those GAC members that had concerns with the Applications were present. Yet Claimant fails to recognize that the purpose of the meeting was to allow ICANN’s Board to understand the GAC’s concerns with the Applications, so it stands to reason that only those GAC members opposed to the Applications would attend the meeting. In its most outlandish claim, Claimant asserts that ICANN had additional secret meetings and communications with the Applications’ largest opponent, the Organisation of Islamic Cooperation (“OIC”), in order to assist the OIC in

obtaining the right to operate the .ISLAM and .HALAL strings itself. Claimant not only mischaracterizes these communications, but also ignores the fact that the referenced communications covered various topics and were between the OIC and ICANN staff members (not ICANN Board members), who had no involvement in evaluating the Applications. Moreover these ICANN staff members were specifically tasked with outreach to individuals, organizations, and governments in the Middle East at the time of their communications with the OIC, so it is no surprise that they communicated with the OIC over the years on a number of different issues. In fact, it would be odd and problematic if these employees had not communicated with organizations like the OIC.

3. There is nothing sinister about the way in which the Board evaluated and considered the Applications. Rather, the ICANN Board went to great lengths to understand the GAC's advice regarding these highly-sensitive Applications, the objectors' concerns with the Applications, and Claimant's plans for addressing those concerns. Ultimately, in an open and transparent fashion, the Board decided that Claimant must address and resolve the concerns voiced by the Muslim community before proceeding with the Applications. Contrary to Claimant's blatant mischaracterizations of ICANN's documents and actions, there was no conspiracy to derail the Applications.

4. The rest of Claimant's Supplemental IRP Request is a restatement of the same unsupported arguments that Claimant already presented to this Panel in its previous submission. For example, Claimant still contends that ICANN never identified the Applications' objectors, the scope of the objections, or how Claimant can resolve the objections, even though the Board's 7 February 2104 letter to Claimant makes all of this clear. Likewise, Claimant still claims that its Applications were "vetoed" by new policy when it is clear that the Applications are on hold,

based on established policy, until Claimant makes some effort to resolve the Muslim community's concerns with the .ISLAM and . HALAL strings, which Claimant has not done. And Claimant still contends that ICANN failed to provide Claimant with documents under ICANN's Documentary Information Disclosure Policy ("DIDP") despite the fact that there is no ICANN Board action at issue with respect to Claimant's DIDP request, ICANN staff's response to the DIDP request was fully appropriate, and Claimant's claims on this front remain untimely.

5. In sum, Claimant's Supplemental IRP Request is misleading, inaccurate, and fails to demonstrate that ICANN did anything other than comply with its Articles of Incorporation ("Articles"), Bylaws, and the New gTLD Applicant Guidebook ("Guidebook").

I. ICANN DID NOT SECRETLY CONSULT WITH GAC OBJECTORS.

6. Claimant argues that ICANN and the GAC conducted "secret" meetings regarding the Applications in violation of ICANN's Articles and Bylaws. Claimant mischaracterizes each of these referenced meetings and mischaracterizes ICANN's purpose and intent in engaging in discussions with members of the GAC. Claimant's conspiracy theories cannot withstand thorough review by this Panel, which requires a "careful assessment of the action itself, rather than its characterization by either the complainant or ICANN."¹

A. The GAC's Beijing Meeting Was Not a "Secret" Meeting.

7. Claimant asserts that the GAC's Beijing meeting, in which the Applications and many other topics were discussed, was the "only" GAC meeting "ever held with all sessions restricted to 'Members Only.'"² This claim is not only factually incorrect, it is also irrelevant to this IRP because the ICANN Board fully examined and discussed the GAC's advice from the Beijing meeting in an open and transparent manner.

¹ Resp. Ex. 25, at ¶ 17.

² Cl. Supp. IRP Request at Pg. 1.

8. First, up to and including the Beijing meeting, virtually all GAC meetings were limited to GAC members due to what the GAC viewed as an obvious and legitimate reason: these sessions included government representatives discussing and debating sensitive topics.³ Up until mid-2013, the GAC deemed the best way to engage in these discussions was by limiting the sessions to GAC members in order to promote the valid public interest policy of allowing fulsome discussions on sensitive and important topics.

9. The documents that Claimant submits with its Supplemental IRP Request merely indicate that the GAC's policy with respect to its meetings evolved somewhat in *mid-2013* to allow non-members to attend certain GAC meetings.⁴ Indeed, in Claimant's Annex 21, which is a transcript of a 10 May 2013 interview of the GAC Chair, Heather Dryden, Ms. Dryden states that in order to give the community "the benefit of seeing exchanges among colleagues in the GAC which were really substantive and interesting," the GAC decided to make certain, future GAC sessions "more open."⁵

10. The fact that the GAC changed its policies regarding future meetings does not demonstrate that all previous meetings were inappropriate. Instead, the change in policy evidences nothing more than a new approach adopted by the GAC to enhance the community's insight into the GAC's processes and meetings. This evolving approach by the GAC demonstrates a concerted effort on its part to take community sentiment into account and a commitment to enhancing transparency where possible. As such, the GAC's Beijing meeting was a routine meeting of the GAC. There was nothing "secret" about it, as Claimant contends.

³ Ms. Dryden explains the purpose of the closed session as follows: "[B]ecause of the sensitive nature of some of the discussions [] some GAC members felt it would have been a bit too difficult to accomplish our work." Cl. Annex 21.

⁴ Cl. Annex 20 ("Since mid-2013, GAC meetings have been open, except for Communiqué drafting sessions . . . that [are] only accessible to GAC members and their advisors, as well as GAC support staff and Secretariat.")

⁵ Cl. Annex 21.

11. Second, the manner in which the GAC conducted its Beijing meeting is wholly irrelevant to this IRP. What is relevant to this IRP is how the ICANN Board responded to and evaluated the GAC advice that resulted from the GAC's Beijing meeting. As set forth below, the Board responded to the GAC's advice with the due diligence required by the Articles, Bylaws and Guidebook, and the Board evaluated the GAC's advice in an open and transparent manner that was fully consistent with ICANN's Articles and Bylaws as well as the Guidebook.

B. The Durban Meeting Was a Legitimate and Proper Dialogue Between the ICANN Board and Concerned GAC Members as Mandated by the Guidebook.

12. Claimant's arguments regarding the 18 July 2013 meeting in Durban, South Africa are also inaccurate. Claimant describes this as another "secret" meeting, this time between ICANN Board members and GAC members. Claimant also claims that this meeting was somehow inappropriate because the entire GAC did not participate and certain ICANN Board members disagreed on how to proceed with the meeting.⁶ Despite Claimant's claims to the contrary, this 18 July 2013 meeting was entirely consistent with ICANN's Articles, Bylaws and the Guidebook.

13. As a starting point, the Guidebook provides that where the "GAC advises ICANN that there are concerns about a particular application," which the GAC did with respect to the Applications, the "ICANN Board is *expected* to enter into a dialogue with the GAC to understand the scope of its concerns."⁷ The Guidebook does not specify how the ICANN Board must meet with the GAC, and/or what GAC members are required to attend. Rather, the Guidebook leaves room for the ICANN Board to develop an organic and ongoing process in order to understand the GAC's stated concerns about an application.

⁶ Cl. Supp. IRP Request at Pgs. 2-5.

⁷ Guidebook, § 3.1(III), (Resp. Ex. 5).

14. The ICANN Board did just that when it met with concerned GAC members in Durban, on 18 July 2013. Upon receiving the GAC’s Beijing Communiqué and learning that GAC members had concerns regarding the Applications, the ICANN Board determined that the best way to engage in the dialogue required by the Guidebook was to host a meeting with “any members of the GAC that want to be there.”⁸ Prior to the meeting, ICANN confirmed that “this will not be a meeting of the GAC”; rather, it is “[a] dialogue with the GAC to understand their concerns.”⁹ The meeting was designed for “any members of the GAC that want to be there,” with the understanding that those GAC members that had “a direct interest in these strings” were most likely to attend.¹⁰ Notably, the GAC’s Chair, Heather Dryden, commented that “[t]he alternative would be for the whole GAC to read the written advice out loud verbatim in a meeting with the NGPC but [she suspected] that this would be less useful for all concerned.”¹¹ It was also planned to be open to the public and recorded.¹² Accordingly, the explicitly-stated purpose of the meeting was to obtain information in a manner that would enable the ICANN Board to understand the GAC members’ concerns, as required by the Guidebook.

15. The recording of the meeting lends further support to its legitimacy. At the start of the meeting, Ms. Dryden reiterated that the purpose of the dialogue was to allow GAC members to express and explain their concerns, which they proceeded to do.¹³ It was also emphasized during the meeting that it was *not* a decision-making meeting, but rather a dialogue

⁸ Cl. Annex 22 at ICANN_AGT00000086.

⁹ *Id.*

¹⁰ *Id.* at ICANN_AGT00000085-86.

¹¹ *Id.*

¹² Cl. Annex 22 at ICANN_AGT00000086, ICANN_AGT000000168; *see also* Cl. Annex 23.

¹³ Representatives from Malaysia, Turkey, the UAE, and Iran each explained their concerns regarding Claimant’s applications. *See* Cl. Annex 23.

to obtain information about the Applications.¹⁴ ICANN Board members not only invited GAC members to express their concerns, but also asked questions of the objecting members about the Applications to better understand the objections.¹⁵

16. Thus, there was nothing secretive, conspiratorial or inappropriate about the 18 July 2013 meeting with Board members and concerned GAC members. The meeting was to permit the ICANN Board to exercise its due diligence and to better understand GAC members' concerns with the Applications. For that reason, ICANN Board members met with, listened to, and questioned the GAC members that had expressed concerns. Further, the ICANN Board has no power, in its Articles, Bylaws or elsewhere, to require that all GAC members attend this kind of meeting with the ICANN Board, and the Guidebook certainly does not require it.

17. Likewise, Claimant's argument that there was disagreement among ICANN Board members on the way this meeting should proceed does not advance Claimant's position. First, Claimant relies on its Annex 22 to support this contention, but Annex 22 is a collection – created by Claimant for use in this IRP – of distinct emails among distinct individuals about several, different topics.¹⁶ In many instances, it is unclear from this amalgamation of email strings precisely what is being discussed and whether the discussions relate to the Applications at all. Second, as set forth above, while the Guidebook provides that the ICANN Board must engage in a dialogue with the GAC after receiving non-consensus advice, the Guidebook does not provide how the Board is required to do so, leaving it to the discretion of the Board. Thus, there is nothing surprising or sinister about ICANN Board members expressing their individual

¹⁴ Cl. Annex 23.

¹⁵ One ICANN Board member asked the concerned GAC members to explain their concern regarding .halal. See Cl. Annex 23.

¹⁶ Cl. Annex 22 (*Compare ICANN_AGIT00000085-87 with, ICANN_AGIT00000088 with, ICANN_AGIT00000090-91 with, ICANN_AGIT_000000159 with, ICANN_AGIT_000000168 and, ICANN_AGIT_000000174-76.*).

views as to the best way to conduct this dialogue with the GAC, and the existence of these types of discussions among ICANN Board members does not constitute some kind of concession that the Board is violating its Articles, Bylaws or Guidebook in selecting one method in lieu of another. Third, while there may have been some disagreement among Board members as to how the Board should proceed, each of these distinct email strings makes clear that the Board's purpose was not to engage in a "secret meeting" with a small subset of the GAC, but rather to enter into the dialogue prescribed by the Guidebook in order to better understand the GAC's concerns. The best way to do this, according to the ICANN Board, was to discuss these concerns with the very GAC members that had expressed such concerns. Accordingly, ICANN's Board members explicitly followed the Guidebook in entering into a dialogue with the GAC in the most efficient and useful manner.

18. Finally, Claimant's argument that the ICANN Board violated ICANN's Core Value No. 9 by not meeting with Claimant's CEO while in Durban is unconvincing. The Guidebook is clear that the ICANN Board is required to meet with GAC members regarding GAC advice, not individual applicants regarding GAC advice. Nor does the Guidebook, or any Article or Bylaws provision, require the Board to accept an invitation to meet with an applicant on that applicant's request, let alone an invitation offered just days before the Durban meeting was set to commence. Indeed, in a document not referenced by Claimant in its Supplemental IRP Response, the Chair of ICANN's NGPC, Cherine Chalaby, explained to Claimant's CEO why the NGPC members were "not in a position to accept [Claimant's] invitation to meet privately during the upcoming ICANN meeting in Durban."¹⁷ As Mr. Chalaby explained in his 11 July 2013 email to Claimant's CEO: "ICANN's public meetings are very busy and the

¹⁷ Resp. Ex. 31.

schedule is filled with open and transparent session for discussion of issues of community concern. As members of the NGPC it is generally best if we hear your views during a public session rather than in a private meeting.”¹⁸ Mr. Chalaby concluded his message to Claimant’s CEO by inviting him “to attend the public meetings and share [his] views at the appropriate opportunities.”¹⁹ Nevertheless, it appears that Claimant did not seize that opportunity. Moreover, while ICANN Board members may not have met with Claimant’s CEO in Durban, the Board considered all relevant information in evaluating the Applications including the additional information that Claimant provided after the Durban meeting, the GAC advice, and the objectors’ points of view.²⁰ Thus, ICANN’s Board fully complied with Core Value No. 9 by listening to Claimant’s position at various points in the process.

C. **Communications with the OIC Constitute Permissible Outreach Efforts by ICANN Staff and Not Some Sort of Conspiracy.**

19. Claimant next asserts that ICANN “held additional, secret meetings with the OIC to advise it how to further object to Claimant’s applications.”²¹ In support, Claimant refers to two sets of emails in which ICANN staff members communicated with the OIC regarding various issues, including the Applications.²² As with its other conspiracy claims, in pursuing this theory, Claimant distorts ICANN’s documents, and overlooks ICANN staff members’ roles and responsibilities.

20. First, it is critical to note that the discussions Claimant relies upon in Annexes 26

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See* Resp. Ex. 16 and 17; *see also* Resp. Ex. 32.

²¹ Cl. Supp. IRP Request at Pg. 5.

²² Cl. Annex 26 and 28.

and 28 all involved ICANN *staff* members,²³ not Board members. These staff members had no decision-making authority with respect to the Applications.

21. Second, there is no indication that these communications had anything to do with the Board’s decision to place the Applications on hold. Indeed, the communication identified in Annex 28 occurred almost two months *after* the Board had already caused the 7 February 2014 letter to be issued explaining why the Applications were put on hold. Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC’s GAC membership or the OIC’s failed community objection against the Applications.

22. Third, the ICANN staff members involved in these communications with the OIC were doing precisely what their roles within ICANN require: Middle East outreach. For example, Baher Esmat, who communicated with the OIC in Annex 26, is ICANN’s Vice President of Stakeholder Engagement to the Middle East, which necessarily requires communications with and outreach to the Middle East.²⁴ His biography explains that he is “[a] keen facilitator of collaboration and dialogue between ICANN and the broader Internet community,” particularly in the Middle East region.²⁵ Likewise, Fahd Batayneh and Tarek Kamel, both of whom were involved in the meeting portrayed in Annex 28, are specifically responsible for ICANN’s engagement with Middle Eastern governments and organizations.²⁶

Thus, a key aspect of these ICANN staff members’ responsibilities is outreach and dialogue with

²³ See Resp. Exs. 33, 34, 35, which list Baher Esmat as the Vice President of Stakeholder Engagement to the Middle East, Fahd Batayneh as the Stakeholder Engagement Manager to the Middle East, and Tarek Kamel as the Senior Adviser to the President and Senior Vice President of Government and IGOs Engagement, all ICANN staff positions.

²⁴ Resp. Ex. 33.

²⁵ *Id.*

²⁶ Fahd Batayneh is responsible for outreach to the Middle East specifically, as the Stakeholder Engagement Manager to the Middle East. Similarly, as the Senior Adviser to the President and Senior Vice President of Government and IGOs Engagement, Tarek Kamel is responsible for outreach to intergovernmental organizations and is also “well known for his support of the Multistakeholder governance model of the Internet.” See Resp. Exs. 34, 35.

stakeholders in the Middle East, which necessarily includes the OIC. As such, it is expected that these ICANN staff members would engage in communications with the OIC, particularly under circumstances where the OIC expressed discontent with, or objections to, ICANN procedures.

23. Fourth, the communications contained in Annexes 26 and 28 were not contrary to Jamie Hedlund’s advice on interactions between ICANN Board members and government officials, as Claimant claims.²⁷ Mr. Hedlund’s advice to ICANN Board members related to communications between Board members and governments during the ICANN Public Meeting in Durban in no way prohibited or discouraged communications between the OIC and ICANN staff members responsible for outreach to the Middle East. Conducting public outreach in communicating with the OIC both fits expressly within these ICANN staff members’ job descriptions and does not contravene Mr. Hedlund’s advice to ICANN Board members.

24. Finally, Claimant’s argument that ICANN “secretly” agreed with the OIC that the OIC is the only appropriate operator of the .ISLAM and .HALAL strings²⁸ is as unsupported as it is preposterous. Claimant bases this frivolous claim on the OIC’s question to ICANN staff members regarding whether the OIC could obtain the right to operate .ISLAM and .HALAL.²⁹ ICANN staff members explicitly and correctly replied “never outside the process.”³⁰ It is unclear how ICANN’s articulation that the OIC cannot obtain the rights to operate .ISLAM and .HALAL without proceeding through the formal process—advice that ICANN staff members would logically provide to any questioning entity—constitutes a secret agreement with the OIC. Nor does Claimant offer any evidence or suggestion as to why or how ICANN staff

²⁷ Cl. Annex 27.

²⁸ Supplemental IRP Request at Pg. 7.

²⁹ Cl. Annex 28 at ICANN_AGIT00000129.

³⁰ *Id.*

members would seek to reserve .ISLAM and .HALAL for the OIC. In short, Claimant's unsupported and bad-faith claims of collusion with the OIC should be disregarded entirely.

II. THE *DCA* IRP AND *DOT REGISTRY* IRP ARE IRRELEVANT TO THIS MATTER.

25. After exhausting its attempts at mischaracterizing ICANN documents, Claimant moves on to distort declarations by other IRP panels in different IRPs. Claimant argues that two IRP Panel declarations, *DCA Trust v. ICANN* IRP (“*DCA* IRP”)³¹ and *Dot Registry v. ICANN* IRP (“*Dot Registry* IRP”),³² are analogous to the present situation. They are not.

26. In the *DCA* IRP, the Board was perceived as not having sufficiently investigated the rationale for GAC *consensus* advice that a particular application should not proceed.³³ In contrast, the GAC advice in this matter was *non-consensus* advice, for which the ICANN Board “is expected to enter into dialogue with the GAC to understand the scope of concerns[.]”³⁴ As discussed above, the Board did just that. After the GAC issued its non-consensus advice, the Board engaged in a dialogue, not a secret meeting, with the GAC regarding the significant concerns that certain GAC members had expressed about the Applications in order to better “understand the scope of concerns.”³⁵ Put another way, the present case does not concern perceived inaction by the Board following GAC consensus advice (as in the *DCA* IRP), but rather it involves required Board action following receipt of GAC non-consensus advice, as set forth in the Guidebook. The *DCA* IRP is therefore inapposite.

27. In the *Dot Registry* IRP, the Board was perceived as failing to exercise due diligence in evaluating the work of the ICANN staff and the Economist Intelligence Unit

³¹ Supplemental IRP Request at Pgs. 7-9.

³² Supplemental IRP Request at Pgs. 7-9, & fn.11.

³³ See generally Cl. Annex 11.

³⁴ Guidebook § 3.1, (Resp. Ex. 5).

³⁵ *Id.*

(“EIU”) in determining that Dot Registry’s applications did not pass the community priority evaluation (“CPE”) process.³⁶ The *Dot Registry* IRP is distinguishable from the present case for two main reasons. First, the CPE process is entirely different from the process by which the Board considers GAC advice, setting forth different requirements with which the ICANN Board and staff members are to adhere and rendering any analysis of Board action distinct in the two matters. Second, the ICANN Board in this case explicitly demonstrated the information on which it relied in placing Claimant’s Applications on hold, thereby debunking any argument that the Board did not have a reasonable amount of information on which to base its decision. The Board received the GAC non-consensus advice, met with the concerned GAC members to ascertain the scope of their concerns, reviewed correspondence from the objectors and from Claimant, and then provided a clear rationale for its decision. Notably, in its 5 February 2014 NGPC Scorecard and its 7 February 2014 letter to Claimant, ICANN provided the basis for placing Claimant’s Applications on hold.³⁷ ICANN explained that “[s]ome GAC members have raised sensitivities to the applications,” and the “GAC members concerned have 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.”³⁸ ICANN further advised Claimant that “a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM,” and identified four distinct entities who objected and their stated reasons for objecting.³⁹ There is little doubt as to the reasons the ICANN Board placed Claimant’s Applications on hold, which eliminates any potential argument that the Board did not exercise

³⁶ Cl. Annex 29 at Pg. 60.

³⁷ Cl. Annex 12.

³⁸ *Id.*

³⁹ *Id.*

due diligence in having a reasonable amount of information on which to base its decision.

28. Accordingly, both the *DCA* IRP and the *Dot Registry* IRP are irrelevant, and Claimant's analogy to these decisions provides no support for its IRP request.

III. ICANN CONSIDERED ADVICE FROM BOTH APPOINTED EXPERTS AND THE GAC.

29. Claimant next argues that ICANN “wholly-disregard[ed]” the expert panels' determinations regarding the Community Objections to the Applications and, in so doing, violated ICANN's Core Values.⁴⁰ Claimant's position is wrong for at least two reasons.

30. First, Claimant's argument conflates two distinct and separate processes by which concerned entities can submit objections to applied-for gTLDs. The Community Objection process is a method by which an entity can submit a formal objection to an applied-for gTLD based on that entity's identification with the community implicated by the applied-for gTLD.⁴¹ A Community Objection “allows a party with standing to have its objection considered before a panel of qualified experts.”⁴² GAC advice, on the other hand, is a process by which any GAC member may raise concerns about applied-for gTLDs to the GAC as a whole, which may then in turn issue advice to the ICANN Board.⁴³ These processes are separate and distinct from one another and provide different methods by which an objecting entity can alert ICANN as to concerns with a particular application.

31. Second, nowhere in the Guidebook does it guarantee that an application will automatically proceed to delegation upon prevailing in a Community Objection proceeding, as

⁴⁰ Cl. Supp. IRP Request at Pgs. 9-10.

⁴¹ Guidebook, §§ 3.2.2.4; 3.2.5, (Resp. Ex. 5).

⁴² *Id.* at § 3.2.

⁴³ *Id.* at § 3.1 (“The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the Board of Directors.”).

Claimant suggests. Any argument to the contrary misstates the provisions in the Guidebook. Accordingly, the ICANN Board acted in its discretion to place Claimant's Applications on hold after reviewing both the results of the Community Objection proceedings and the advice from the GAC.

IV. ICANN IDENTIFIED THE OBJECTORS' CONCERNS AND INFORMED CLAIMANT WHAT IT MUST DO TO RESOLVE THE CONCERNS BEFORE THE ICANN BOARD WOULD RESUME ITS CONSIDERATION OF THE APPLICATIONS.

32. In the rest of its Supplemental IRP Request, Claimant reverts to arguments and positions it already presented in this IRP. For instance, Claimant still claims that ICANN failed to identify the parties objecting to the Applications, the scope of the objections, and what Claimant was required to do before consideration of its Applications is resumed. These statements are inaccurate and misconstrue the ICANN Board's obligations in considering the Applications.

33. Upon receiving non-consensus advice from the GAC, the Board was required to do two things: "to enter into dialogue with the GAC to understand the scope of concerns"; and then to "provide a rationale for its decision."⁴⁴ The Board not only complied with these two requirements, it far exceeded them.

34. First, on 18 July 2013, the ICANN Board entered into a dialogue with concerned GAC members at a meeting in Durban, South Africa to discuss the scope of the GAC's concerns.⁴⁵ The dialogue allowed the ICANN Board to question the GAC members as to their concerns and allowed GAC members to further explain their objections.⁴⁶

35. Second, the ICANN Board sought to further understand the concerns by

⁴⁴ Guidebook § 3.1, (Resp. Ex. 5).

⁴⁵ See Cl. Annex 12.

⁴⁶ Cl. Annex 23.

reviewing correspondence from the various objectors.⁴⁷

36. Third, ICANN included the opposition to these strings in its 5 February 2014 Scorecard, which identifies the UAE as an objector and notes “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.”⁴⁸

37. Fourth, ICANN provided a rationale for its decision and communicated that rationale directly to Claimant via its 7 February 2014 Letter. ICANN informed Claimant that there were multiple objectors to Claimant’s Applications despite Claimant’s allegations to the contrary.⁴⁹ ICANN then identified the objectors, described their individualized concerns, and provided the date of correspondence, permitting Claimant to access these letters directly from ICANN’s gTLD correspondence page:

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); 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.⁵⁰

38. ICANN also informed Claimant that “[t]he GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support” and it is “the

⁴⁷ See ICANN’s Response to IRP Req. ¶¶ 46-53.

⁴⁸ Cl. Annex 12 (Annex 1 at Pg. 8).

⁴⁹ Cl. Annex 12 at Pg. 2.

⁵⁰ *Id.*; see also Resp. Ex. 24.

view of these GAC members that these applications should not proceed.”⁵¹ The lack of community support for the Applications was one of the most critical concerns raised by the objectors.⁵² Claimant 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,⁵³ as Claimant has acknowledged.⁵⁴

39. Moreover, even though Claimant sought the support of the community (such as Saudi Arabia, the UAE, Malaysia, Morocco, Nigeria, the OIC, Pakistan, Senegal, among many others),⁵⁵ Claimant failed to obtain much support at all. Notably, in November 2013, the OIC Secretary General submitted a letter to ICANN on behalf of nearly **1.6 billion** members of the Muslim community to voice its concerns and opposition to Claimant’s Applications.⁵⁶ The OIC specifically 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.”⁵⁷ On 19 December 2013, the Secretary General of the OIC sent another 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.⁵⁸

40. Claimant’s belated arguments that it “did prove a great deal of community support”

⁵¹ Cl. Annex 12 at Pg. 1.

⁵² See, e.g., Cl. Annex 5.

⁵³ Cl. Annex 4; Cl. Annex 6.

⁵⁴ Cl. Annex 6 at Pg. 3. Similarly, in resolving the UAE’s Community Objections, the expert 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 ¶¶ 96-115; Resp. Ex. 36 (“[O]ur meeting with OIC Secretary seems to be the key to shaping our strategies and our success.”); Resp. Ex. 37.

⁵⁵ See Resp. Exs. 38, 39, 40, 41, 42, 43, 44, 45, and 46.

⁵⁶ Cl. Annex 10.

⁵⁷ *Id.*

⁵⁸ See Resp. Ex. 3; see also Cl. Annex 28 at ICANN_AGIT00000187 (“During the OIC meeting in Conakr yin late December 2013, the 57 member countries unanimously adopted a resolution against the current .islam and .halal applications. Even Iran was in favor of this resolution.”).

and that many countries with heavily Muslim populations have either not objected, or have withdrawn their objections,⁵⁹ is in stark contrast with the evidence – which includes objections from a large portion of the Muslim community.⁶⁰ As such, Claimant’s blanket statements do not outweigh the uncontroverted evidence that a significant portion of the Muslim community does not support the Applications.

41. Additionally, several of the objectors emphasized that “management and operation of these TLDs must be conducted by a neutral, non-governmental multistakeholder group.”⁶¹ While Claimant advised the ICANN Board of its “commitment” to a multistakeholder approach via its 30 December 2013 letter,⁶² and argues it had the requisite governance in place as of the 7 February 2014 letter,⁶³ Claimant has not provided any evidence that this issue has been disclosed to, or resolved with, the objectors or that any of the identified objectors have withdrawn their objections to the Applications.⁶⁴

42. In light of the conflicts between what Claimant was telling ICANN and what the objectors were telling ICANN, the ICANN Board advised Claimant as follows:

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.⁶⁵

43. This statement provided Claimant explicit instructions as to what it needed to do

⁵⁹ Supplemental IRP Request at Pgs. 11-12.

⁶⁰ Cl. Annex 12, 5 February 2014 NGPC Scorecard.

⁶¹ Cl. Annex 12 at Pg. 2.

⁶² Resp. Ex. 17.

⁶³ Cl. Supp. IRP Request at Pg. 11.

⁶⁴ As early as December 25, 2012, Claimant was aware the OIC would only support the Applications if they had a governance model that included the OIC, (*see* Resp. Ex. 36 and Resp. Ex. 43), but even as of June 2013 Claimant had not actually contemplated that. *See* Resp. Ex. 47.

⁶⁵ Cl. Annex 12, at Pg. 2.

for the Board to resume consideration of its Applications – resolve the conflicts with the objecting nations. Therefore, the ICANN Board not only met its obligations under the Guidebook, it exceeded these obligations and explicitly informed Claimant of the objectors’ identities, the nature of their objections, and what Claimant must do before the Board would resume consideration of the Applications.

44. Finally, Claimant’s document production in this IRP has confirmed that Claimant has done nothing to resolve the stated conflicts in ICANN’s 7 February 2014 letter. ICANN’s Request for Production to Claimant requested “[a]ll documents regarding *any effort by Asia Green to resolve the conflicts identified in Dr. Stephen Crocker’s 7 February 2014 letter* to Asia Green, including but not limited to internal documents and communications regarding the conflicts.”⁶⁶ Claimant’s document production, however, contained *no* documents demonstrating any outreach to any entity after 7 February 2014.

45. In short, the ICANN Board provided Claimant with all of the information Claimant needed to understand and address the challenges associated with its Applications. Despite this information and direction, Claimant has made no efforts to advance its Applications.

V. ICANN HAS NEITHER CREATED A “NEW POLICY” NOR PERMITTED OBJECTORS TO VETO THE APPLICATIONS.

46. In its Supplemental IRP Request, Claimant also restates its claim that ICANN created new “policy” by placing the Applications on hold and by allowing objectors to allegedly “veto” the Applications.⁶⁷ ICANN has not created any new policy nor has it permitted objectors to veto the Applications, as Claimant claims. Rather, ICANN has expressly complied with the provisions in the Guidebook that confer upon the Board the discretion to consider individual

⁶⁶ Redfern Schedule ICANN Discovery Request at Pg. 4, Request No. 5, (Resp. Ex. 48).

⁶⁷ Cl. Supp. IRP Request at Pgs. 13-18.

applications and whether they are in the best interest of the Internet community. Specifically, Section 5.1 of the Guidebook provides:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. ***The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.*** Under exceptional circumstances, the Board may individually consider a gTLD application. For example, ***the Board might individually consider an application as a result of GAC advice on New gTLDs*** or the use of an ICANN accountability mechanism.⁶⁸

47. Here, the Board did not create new policy, but instead followed the Guidebook.

In doing so, the Board considered the Applications in light of objecting GAC members, Claimant’s representations, the results of the Community Objection proceedings, and correspondence from objecting governments and entities in order to determine whether continuing to process the Applications “would be in the best interest of the Internet community.”⁶⁹ ICANN’s reference to religious sensitivities, community support from the Muslim population, a neutral multi-stakeholder governance model, and conflicts between Claimant and the objectors delineates ICANN’s commitment to, and consideration of, the interests of the Internet community.

48. Moreover, Claimant cannot rely upon the delegation of .SHIA and .KOSHER as evidence that some “new policy” was applied to the Applications. Nor can it rely on the delegation of these strings as evidence that ICANN “has discriminated against [Claimant] as to these [A]pplications.”⁷⁰ To the contrary, for each of these applications the ICANN Board adhered to the policies and processes set forth in the Articles, Bylaws, and Guidebook. Any difference in treatment of the referenced applications was a result of the different circumstances

⁶⁸ Guidebook 5.1, (Resp. Ex. 5) (emphasis added).

⁶⁹ *Id.*

⁷⁰ Cl. Supp. IRP Request at Pg. 15.

surrounding each application. The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook. Importantly, Claimant was the entity that applied for .SHIA, and ICANN afforded it the right to operate the string. Claimant's applications for .ISLAM and .HALAL, on the other hand, were met with concern by various GAC members and subjected to non-consensus GAC advice, which explains and, in fact, requires different treatment by ICANN. Accordingly, the applications for .KOSHER and .SHIA were appropriately treated differently because the circumstances were different than that of the Applications. Therefore, the ICANN Board has clearly treated Claimant and each of its applications fairly and equitably by following ICANN's policies and procedures.

49. Likewise, Claimant's argument that Section 5.1 of the Guidebook is "illusory," in that it purportedly does not place any obligation on the Board to act or not act, is simply wrong.⁷¹ As an initial matter, Section 5.1 of the Guidebook places the "ultimate responsibility for the New gTLD Program" on the Board and vests the Board with the power to determine whether particular applications are in the best interests of the Internet community. Moreover, an IRP panel's "authority" does not "extend to opining on the nature of the policies or procedures established in the Guidebook."⁷² Further, Section 5.1 was adopted and approved by the Internet community, including Claimant. The Guidebook was drafted in conjunction with the ICANN community over multiple years. Many versions of the Guidebook were drafted, distributed for public comment, and then revised, a process that was repeated many times until the last Guidebook was published on 4 June 2012. Thus, the time for Claimant to complain about

⁷¹ Cl. Supp. IRP Request at Pgs. 16-18.

⁷² Resp. Ex. 26 at ¶ 110.

Section 5.1 as being illusory or otherwise impacting other processes in the Guidebook has long passed.

50. Claimant also incorrectly contends that Guidebook § 1.1.5, Scenario 4, somehow constitutes a “promise” to Claimant that its Applications would proceed to delegation if they prevailed in the Community Objections. As discussed above, prevailing in an objection proceeding does not guarantee that an application will proceed to delegation, particularly when another ICANN mechanism, such as GAC advice, is relevant to the application. Also, Section 1.1.5, Scenario 4 of the Guidebook is not any sort of promise by ICANN. Section 1.1.5 of the Guidebook is titled “Sample Application Scenarios,” and provides that “[t]he following scenarios briefly show a variety of ways in which an application *may* proceed through the evaluation process.”⁷³ The Guidebook provides that an applicant that falls within Scenario 4 “*can* enter into a registry agreement and the application *can* proceed toward delegation of the applied-for gTLD;”⁷⁴ nowhere does this provision mandate that an application *must* proceed. The purpose of this section is clear: it outlines sample circumstances to provide guidelines for involved applicants. It is not a guarantee and does not mandate strict adherence or construction by either the ICANN Board or applicants.

51. Finally, the Applications have not been vetoed either by the ICANN Board or by any objecting entities. As the ICANN Board explicitly informed Claimant via the 7 February 2014 letter, the Board will resume consideration of the Applications upon resolution of the noted conflicts.⁷⁵ ICANN is not required to act as a liaison between Claimant and those who objected to its Applications, and ICANN has already exceeded its obligations by advising Claimant

⁷³ Guidebook, § 1.1.5, (Resp. Ex. 5) (emphasis added).

⁷⁴ *Id.* (emphasis added).

⁷⁵ Cl. Annex 12.

regarding what is needed in order for ICANN to resume consideration of its Applications.

VI. ICANN’S DIDP RESPONSE CANNOT SUPPORT CLAIMANT’S IRP REQUEST.

52. Claimant continues to argue that the ICANN Board did not sufficiently respond to Claimant’s DIDP request; an argument that continues to suffer from several major flaws. First, Claimant overlooks the fact that the ICANN Board is not involved in responding to DIDP requests, and that an IRP only analyzes *Board* action.⁷⁶ ICANN *staff*, not the Board, is tasked with responding to DIDP requests, so any allegations regarding the DIDP response pertain to staff actions. Unlike other IRP claimants,⁷⁷ Claimant did not file a reconsideration request seeking the Board’s review of ICANN staff’s DIDP response, and as such, the DIDP response involved no Board action.

53. Second, any argument regarding the DIDP response is untimely. Under the Bylaws applicable to this IRP, a “request 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.”⁷⁸ Here, there are no Board meeting minutes that address the DIDP response, which lends further support that the DIDP response is not subject to review by the Panel. However, even assuming for the sake of argument that the deadline can be calculated as of the date of the challenged DIDP response, 10 October 2015, the deadline nonetheless passed before Claimant submitted its IRP Request, therefore rendering Claimant’s DIDP argument time-barred.

54. Third, even if ICANN’s response to the DIDP request was appropriate for review in this IRP, ICANN staff clearly complied with the standards applicable to DIDP requests. In

⁷⁶ Bylaws, Art. IV, § 3, (Resp. Ex. 2).

⁷⁷ See, e.g., Resp. Ex. 27.

⁷⁸ Bylaws, Art. IV, § 3.3, (Resp. Ex. 2) (emphasis added).

evaluating DIDP requests, ICANN staff is required to evaluate whether the information requested is appropriate for public disclosure or falls into one or more of the “Defined Conditions for Nondisclosure.”⁷⁹ In its DIDP response, ICANN explained that Claimant had requested certain information that, if publicly disclosed, could compromise the integrity of ICANN and/or the GAC’s deliberative process, which constitute two of the DIDP Defined Conditions for Nondisclosure.⁸⁰ Nevertheless, in response to each requested category, ICANN provided links to publicly available documents to direct Claimant to helpful, relevant information.⁸¹

55. Fourth, Claimant’s argument that ICANN’s production of documents in this IRP demonstrates that the same documents should have been produced in response to Claimant’s DIDP request is patently wrong and conflates two very different processes and standards. In addition to ICANN’s practice of making many documents public as a matter of course, ICANN’s DIDP allows community members to request that ICANN make public documentary information “concerning ICANN’s operational activities, and within ICANN’s possession, custody, or control” that is not already publicly available.⁸² In responding to a DIDP request, ICANN staff adheres to the “Process for Responding To ICANN’s [DIDP] Requests” and makes a determination whether the documents requested are appropriate for public disclosure or are subject to certain of the DIDP Conditions for Nondisclosure.⁸³ The standards and processes applicable to document requests propounded in an IRP are vastly different. Among other things, parties to an IRP frequently agree to levels of confidentiality for documents produced in an IRP,

⁷⁹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁸⁰ See generally Cl. Annex 19.

⁸¹ *Id.*

⁸² See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁸³ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

as the parties did in this IRP. No similar confidentiality protections are afforded to materials produced in response to a DIDP request that, by definition, is a request to make the requested documentary information public. In short, the two document processes serve completely different purposes, are subject to different parameters, and are not comparable. Thus, the fact that ICANN may have produced some documents in connection with this IRP that were not produced in response to Claimant's DIDP request says nothing about whether ICANN staff's response to the DIDP request was appropriate or not.

56. Fifth, Claimant's claim that ICANN improperly redacted certain documents produced in this IRP is baseless and not relevant to the ultimate issues in this IRP. ICANN was conservative in its redactions, seeking to protect personal information of ICANN employees and others as well as the disclosure of information totally unrelated to this IRP. If Claimant felt that ICANN's document production was inappropriate, Claimant should have raised the issue with ICANN's counsel or this Panel long ago.

CONCLUSION

57. For the foregoing reasons, the ICANN Board's conduct was consistent with ICANN's Articles and Bylaws. Accordingly, Claimant's IRP Request should be denied.⁸⁴

Respectfully submitted,

JONES DAY

Dated: February 3, 2017

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

Counsel for Respondent ICANN

⁸⁴ In this submission, ICANN does not address Claimant's rehash of its claims regarding the scope of relief that can be awarded in an IRP. Cf. Supp. IRP Request at Pg. 25. These issues have already been fully briefed by the parties in their previous submissions regarding the scope of this Panel's authority.