

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)**

**Independent Review Panel**

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS**  
**Pursuant to the Bylaws of the Internet Corporation for Assigned Names and**  
**Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the**  
***Supplementary Procedures for ICANN Independent Review Process***

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<b>Gulf Cooperation Council (GCC)</b>	)	)
Claimant	)	
and	)	
<b>Internet Corporation for Assigned Names</b>	)	<b>ICDR Case</b>
<b>and Numbers (ICANN)</b>	)	<b>No. 01-14-0002-1065</b>
Respondent	)	

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**FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS PANEL AS TO  
COSTS**

Independent Review Panel

Lucy Reed, Chair  
Anibal Sabater  
Albert Jan van den Berg

## I. INTRODUCTION

1. The Independent Review Panel, in our Partial Final Declaration of 19 October 2016 (“**Partial Declaration**”), declared the Claimant Gulf Cooperation Council (“**GCC**”) to be the prevailing Party. We found that the action of the Respondent Internet Corporation for Assigned Names and Numbers (“**ICANN**”) with respect to the application by Asia Green for the generic Top-Level-Domain name (“**gTLD**”) “.persiangulf” was inconsistent with several Articles of Incorporation and Bylaws of ICANN. We further recommended, pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD. At the Parties’ request, we postponed final submissions and the decision as to costs.
2. This Final Declaration awards all costs to the GCC as the prevailing Party, for the reasons set forth below.

## II. THE APPLICABLE STANDARD

3. Starting first with the applicable standard, it is undisputed that all costs of the Independent Review Process (“**IRP**”), which include the fees and expenses of the Panelists and the ICDR as the IRP Provider, are to be awarded to a prevailing claimant except in extraordinary circumstances, taking into account the reasonableness of the parties’ positions and their contribution to the public interest. This standard appears in both Article 11 of the ICANN Supplementary Procedures and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.<sup>1</sup>

Article 11 of the ICANN Supplementary Procedures provides:

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<sup>1</sup> In extraordinary circumstances, Article 11 of the ICANN Supplementary Procedures envisions allocation of up to half of the total costs to the prevailing party while Article IV, Section 3, paragraph 18 of the ICANN Bylaws may limit that allocation to the IRP Provider administrative costs. Neither Party has argued for such a limitation here.

*The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*

*In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*

Article IV, Section 3, of the ICANN Bylaws provides, in relevant part:

*18.... The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

4. The issue for decision, therefore, is whether the circumstances here are extraordinary and hence warrant allocating up to half of the total IRP process costs to the GCC despite its status as prevailing Party.

### **III. THE PARTIES' POSITIONS**

#### **A. The Claimants' Position**

5. The GCC submits that no extraordinary circumstances exist. In short, the GCC argues that ICANN's position "*was anything but reasonable*" throughout its treatment of the ".persiangulf" application, citing the Panel's conclusion that ICANN's actions were "*unduly formalistic and simplistic*" (Partial Declaration, para. 126). Nor, argues the GCC, did ICANN's position contribute to the public interest, because the ICANN Board "*picked a side on a decades-long divisive Gulf naming dispute and its treatment of the .PERSIANGULF gTLD application was, as this Panel declared, 'essentially oblivious to the well-known geo-political sensitivities associated with that dispute'*" (Partial Declaration, para. 141).

## **B. The Respondent's Position**

6. ICANN submits that the GCC should bear its own costs because this IRP was extraordinary, for three main reasons. First, both sides presented “*reasonable and thorough positions on novel issues of geopolitical sensitivity*”. Second, the Parties’ briefing of these issues served the public interest. Third, the GCC failed to engage in ICANN’s Cooperative Engagement Process before initiating the IRP, and so failed to narrow the issues and reduce the costs.

## **IV. THE PANEL’S ANALYSIS AND DECISION**

7. Having considered the Parties’ submissions against the background of the overall record and the Partial Declaration, the Panel cannot find any extraordinary circumstance warranting deviation from the undisputed standard that all IRP process costs go to the GCC as the prevailing Party. As this conclusion is based on the unique circumstances of this case, we did not find the IRP precedents cited by the Parties – also based on unique circumstances – helpful. Our analysis can be brief.
8. First, we weigh the reasonableness criterion in the GCC’s favour. While ICANN is correct that both sides put forth thorough reasons for their positions, we state and explain in our Partial Declaration why the ICANN Board did not act reasonably in allowing the “.persiangulf” application to proceed without at least entering into a dialogue with the Government Advisory Council to discuss member concerns. We found “*simply no evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns*” (Partial Declaration, para. 138) and, absent any independent investigation, the only possible conclusion was that the ICANN Board’s position was “*simplistic and formalistic*” (Partial Declaration, para. 126) rather than reasonable.
9. Second, we do not consider that the public interest criteria favors either side’s position in relation to costs. The GCC is correct that we found ICANN to be “*essentially oblivious to the well-known geo-political sensitivities associated with the name ‘Persian Gulf’*”

(Partial Declaration, para. 141). However, it is important to recall that our mandate was to review the Board's process and not the merits of the “.persiangulf” application. The Parties' agreement that the geopolitical issues associated with “Persian Gulf” are themselves extraordinary does not make the ICANN Board process issues extraordinary. We do not see that the GCC contributed to the broader public interest by prevailing in this process review or that the ICANN Board failed to benefit the public in taking the stance it took. The public interest factor, to us, is neutral.

10. This is not the case with ICANN's third argument, which faults the GCC for not first invoking the Cooperative Engagement Process and thereby narrowing issues and reducing costs. In this situation where ICANN is not the prevailing Party as addressed in the second paragraph of Article 11 of the ICANN Supplementary Procedures, it is unclear whether this argument goes to the reasonableness or public interest factor, but the outcome would be the same. In our jurisdictional analysis in the Partial Declaration, we found that “*ICANN explicitly and implicitly cooperated in a shadow conciliation process*” (Partial Declaration, para. 87), which obviously proved unsuccessful. There is no reason to believe that a formal Cooperative Engagement Process would have been any more successful than this informal conciliation process proved to be, or that it would have reduced the GCC's ultimate costs.

11. In sum, in the absence of any extraordinary circumstances, the GCC is entitled to reimbursement of its full costs in relation to the IRP process. This includes the administrative expenses of the ICDR, the Independent Review Panel panelists' fees and expenses, and the emergency IRP panelist's fees and expenses. ICANN did not contest the GCC's claim for the fees and expenses of the emergency IRP panelist in addition to this Panel's fees and expenses and the ICDR administrative expenses.

12. As per the last sentence of Article IV, Section 3, paragraph 18 of the ICANN Bylaws, each Party shall bear its own expenses, including legal representation fees.

## **V. DECLARATION AS TO COSTS**

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. There are no extraordinary circumstances to justify allocating less than full costs to the Claimant GCC as the prevailing Party, under Article 11 of the ICANN Supplementary Procedure and Article IV, Section 3, paragraph 18 of the ICANN Bylaws.
2. The Respondent ICANN is to bear the totality of the GCC's costs in relation to the IRP process, including: (a) the ICDR administrative expenses of \$7,500.00; (b) the Independent Review Panel panelists' fees and expenses of \$ 150,273.30; and (c) the emergency IRP panelist's fees and expenses of \$50,575.00. Accordingly, ICANN shall reimburse the GCC the sum of \$107,924.16 upon demonstration by GCC that these incurred costs have been paid.
3. This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Final Declaration of this IRP Panel.

15 December 2016

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Date



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Lucy Reed, Panelist – Chair

15 December 2016

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Date



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Anibal Sabater, Panelist

15 December 2016

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Date



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Albert Jan van den Berg, Panelist