

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

**Gulf Cooperation Council (GCC)**

Gulf Cooperation Council Building  
King Khaled Road,  
Diplomatic Area 7153, Saudi Arabia

**(Claimant)**

v.

**Internet Corporation for  
Assigned Names and Numbers  
(ICANN)**

12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

**(Respondent)**

**ICDR Case No. 01-14-0002-1065**

**CLAIMANT GULF COOPERATION COUNCIL'S REPLY IN SUPPORT OF ITS  
REQUEST FOR EMERGENCY ARBITRATOR AND INTERIM MEASURES OF  
PROTECTION**

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## **I. INTRODUCTION**

1. Without emergency interim relief stopping ICANN from executing the registry agreement for the .PERSIANGULF gTLD, the GCC will be denied the right to have an ICANN Board action reviewed by an independent panel, a right established by ICANN's own Bylaws.

2. Hard-pressed to articulate why the GCC should be denied this right—especially when ICANN's failure to form a Standing Panel created the GCC's need for emergency interim relief—ICANN instead delves into a lengthy narrative about ICANN, including its origins, the history of the New gTLD Program, the Public Objection and Dispute Resolution Process, and the role of the Independent Objector. Ironically, after proselytizing about ICANN's purported commitment to accountability, ICANN embarks upon a misleading, detailed assessment of the merits of the GCC's IRP Request and why ICANN should not be held accountable for its September 10, 2013 Board action. Of course, the issue here is whether the GCC merits emergency interim relief, not whether ICANN believes its September 2013 Board action to process the .PERSIANGULF gTLD application violated its Bylaws or Articles of Incorporation.

3. When ICANN finally addresses the merits of the GCC's Request for Emergency Relief, it misunderstands the issues, misstates the applicable law, and offers no credible reason why emergency interim relief should not be granted. Under ICANN's own Bylaws, the GCC has a right to have ICANN's September Board decision reviewed by an independent panel. The GCC will lose this undisputed right if emergency interim relief is not granted.

## **II. THE GCC SATISFIES THE STANDARD FOR EMERGENCY RELIEF**

4. The emergency relief standard is undisputed: the GCC must demonstrate (1) urgency; (2) necessity; (3) the protection of an existing right; and (4) a reasonable possibility of success on the merits.<sup>1</sup> Knowing that these first three elements are readily met, ICANN focuses

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<sup>1</sup> ICANN's Response to the GCC's Request for Emergency Relief ("ICANN's Response") at ¶¶ 3-4.

the bulk of its Response on challenging whether the GCC has established a reasonable possibility of success on its IRP Request. ICANN's challenges are meritless.

**a. The GCC Has Established a Reasonable *Possibility* of Success on its IRP Request.**

5. The standard of proof for interim relief is lower than the standard of proof required for a full evaluation of the merits of the GCC's IRP Request.<sup>2</sup> At this stage, the GCC must therefore only show that there is a reasonable *possibility* that it will prevail on its IRP Request.<sup>3</sup> Consistent with its scheme to evade accountability, ICANN primarily advances three separate, yet equally incredulous, reasons why the GCC cannot meet this minimal showing.

**i. The GCC's IRP Request is not Time-Barred.**

6. ICANN's initial attempt to evade accountability relates to its misguided allegation that the GCC's IRP Request is time-barred because the GCC did not file its IRP Request within 30 days of ICANN's September 2013 Board action to proceed with the .PERSIANGULF gTLD application.<sup>4</sup> ICANN accuses the GCC of waiting silently before filing its IRP Request in December 2014. Conveniently, ICANN ignores the GCC's near 15-months-long effort, beginning in September 2013, to resolve the issues created by ICANN's improper Board action to proceed with the .PERSIANGULF gTLD before the GCC filed its IRP Request.<sup>5</sup>

7. Indeed, as ICANN well knows, after learning of the September 2013 ICANN Board action to proceed with the .PERSIANGULF gTLD application, the GCC initiated a

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<sup>2</sup> See ¶ 49 of Annex 15 to the GCC's Request for Emergency Relief (*[DotConnectAfrica v. ICANN, ICDR Case No. 50 117 T 1083 13, Decision on Interim Measures of Protection (May 12, 2014)]*).

<sup>3</sup> ICANN's Response at ¶ 42 ("to obtain the emergency relief the GCC seeks, the GCC must demonstrate a reasonable possibility of success on the merits of its IRP."). Consistent with its attempt to confuse, however, ICANN then announces that under the International Chamber of Commerce (ICC), the party seeking interim relief must demonstrate a *likelihood of success* on the merits. *Id.* at ¶ 43. The ICC rules are inapplicable; the parties agreed that only the 2014 ICDR Rules and ICANN's Supplementary Procedures will apply. Nonetheless, the GCC meets the likelihood of success on the merits standard too.

<sup>4</sup> *Id.* at ¶¶ 47-49.

<sup>5</sup> See generally Annex 1 to the GCC's Reply [Witness Statement of Abdulrahman Al Marzouqi in Support of the GCC's Reply].

resolution process with ICANN.<sup>6</sup> The resolution process centered on the GCC’s desire to reach a mutually acceptable resolution with ICANN and consisted of numerous meetings between representatives of the GCC and ICANN, including an in-person meeting with ICANN’s CEO Mr. Fadi Chehade earlier this year. At no point during the resolution process did ICANN indicate that the GCC would have to choose between trying to resolve the dispute and filing an IRP Request. In fact, after resolution talks began to stall in September 2014, one year after the ICANN September 2013 Board action, ICANN advised the GCC to consider filing a request for IRP.<sup>7</sup> Additionally, ICANN concedes that over the course of the resolution process—including just one week before the GCC ultimately filed its IRP—it informed the GCC that it could engage in the Cooperative Engagement Process before filing an IRP Request. Throughout the resolution process, both ICANN and the GCC understood that the GCC could file an IRP Request after the resolution process ended, notwithstanding the rule that an IRP Request is to be filed within 30 days of a Board action.

8. In addition to this mutual understanding, ICANN routinely extends the 30-day window to initiate an independent review when, as here, the parties participate in a resolution process. In *Booking.com v. ICANN*,<sup>8</sup> the claimant filed its IRP Request after resolution talks ended, which was more than 6 months after ICANN issued the challenged Board action.<sup>9</sup>

9. Similarly, ICANN filed its IRP Request after its resolution efforts ended. ICANN cannot now evade accountability by asserting that the GCC’s IRP Request is untimely, especially when the IRP timelines are extended to accommodate resolution talks.

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<sup>6</sup> See *id.* at ¶ 8.

<sup>7</sup> See *id.* at ¶ 16.

<sup>8</sup> See [<https://www.icann.org/resources/pages/irp-2012-02-25-en>] (at *Booking.com v. ICANN*, ICDR Case No. 50 117 T 0024714).

<sup>9</sup> See also [<https://www.icann.org/resources/pages/irp-2012-02-25-en>] (at *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604 (claimant Merck KGaA filed its IRP Request more than 30 days after the complained of ICANN Board action); *id.* at *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505 (claimant Vistaprint filed its IRP Request more than 30 days after the complained of Board action); *id.* at *DotConnectAfrica v. ICANN*, ICDR Case No. 50 117 T 1083 13 (same)].

**ii. Contrary to ICANN’s Assertion, the GCC Identified a Board Action that is Inconsistent with ICANN’s Bylaws and Articles of Incorporation.**

10. Not convinced that it can evade accountability by arguing the GCC’s IRP Request is time-barred, ICANN also claims that the GCC failed to identify a Board action on which an IRP Request could be based.<sup>10</sup> ICANN’s claim is specious.

11. The ICANN Board action in question is well-known to the parties: “the decision by ICANN to approve Asia Green’s application for the new gTLD <.PERSIANGULF>.”<sup>11</sup> Indeed, just **two paragraphs before** making this incredulous assertion, ICANN concedes that the Board action at issue is the New gTLD Program Committee’s decision to process the .PERSIANGULF gTLD application.<sup>12</sup> Try as it might, ICANN cannot evade accountability by advancing an admittedly false assertion.

**iii. ICANN Relies on a Misleading Recount of Events in an Attempt to Deny Its September Board Action Violated Its Bylaws and Articles of Incorporation and Caused the GCC Harm.**

12. ICANN’s final attempt to defeat the reasonable *possibility* standard is to deny any wrongdoing. ICANN’s main defenses are that it properly followed GAC advice,<sup>13</sup> and paradoxically, that it need not abide by GAC principles, and is thus immune from accountability.<sup>14</sup> In fact, it is unclear to which process ICANN must adhere, as ICANN asserts the IRP process is non-binding.<sup>15</sup>

13. ICANN’s defenses, however, are misleading.<sup>16</sup> For instance, ICANN claims it simply followed GAC’s advice that it “does not object” to the .PERSIANGULF gTLD application

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<sup>10</sup> ICANN’s Response at ¶ 50.

<sup>11</sup> See [*GCC v. ICANN*, ICDR Case No. 01-14-0002-1065, Procedural Order No. 1 (December 11, 2014)] at ¶ 8.

<sup>12</sup> ICANN’s Response at ¶ 48.

<sup>13</sup> *Id.* at ¶ 52.

<sup>14</sup> *Id.* at ¶ 53.

<sup>15</sup> *Id.* at ¶ 39.

<sup>16</sup> ICANN intimates that the GCC attempted to mislead this Panelist about what happened at the GAC meetings in Durban. The GCC made no such attempt. The GCC attached both the Durban Official Communique and the

proceeding.<sup>17</sup> ICANN, however, deceptively suggests that GAC’s lack of consensus opposition somehow translates into consensus support for the .PERSIANGULF gTLD. For those countries in attendance at the Beijing and Durban GAC meetings, no one can deny GAC’s grave concerns about the .PERSIANGULF string, the substantial community opposition and ICANN’s subsequent failure to react consistently and in line with its Bylaws.<sup>18</sup> ICANN also states that since “Persian Gulf” is not a defined geographic name under the ISO 3166-2 standard, ICANN need not respect GAC Principles or the concerns of relevant governments.<sup>19</sup> Again, ICANN’s assertion is misleading: it omits GAC’s recent proclamation that the current list of defined geographic names is limited and all geographic names should respect communities, regardless of whether they are defined.<sup>20</sup>

14. ICANN’s core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances; they are not narrowly prescriptive.<sup>21</sup> Thus, by approving the .PERSIANGULF gTLD, ICANN failed to heed informed input from the directly affected Arab communities;<sup>22</sup> failed to act neutrally or consistently by allowing a gTLD without community support to proceed absent GAC consensus;<sup>23</sup> and failed to operate fairly and consistently and in accord with international

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Durban Meeting Minutes to its Request for IRP (Annexes 24 and 34). The GCC’s failure to add the two words “Meeting Minutes” on a small subset of footnotes was inadvertent. Perhaps ICANN is so quick to jump to such a conclusion to detract from the numerous mistakes ICANN has already made in these proceedings alone, including calling this Panelist’s final decision a “determination” instead of “declaration,” and falsely stating that the Supplemental Rules require in-person meetings to occur in Los Angeles.

<sup>17</sup> ICANN’s Response at ¶ 52.

<sup>18</sup> See Annex 1 to the GCC’s Reply [Witness Statement of Abdulrahman Al Marzouqi in Support of the GCC’s Reply] at ¶¶ 5-6.

<sup>19</sup> ICANN’s Response at ¶ 53.

<sup>20</sup> See ¶ 3 of Annex 1 to the GCC’s Request for IRP [“The protection of geographic names in the new gTLDs process”] (“Although there are references that prevent the use of geographic names in new gTLDs included in the Applicant Guidebook, this list is limited and not sufficient to avoid the misuse of other geographic names and to protect the public interest in its entirety. It includes a limited amount of names and it does not protect in any way the diversity of places and geographic names that can be found all around the world.”)].

<sup>21</sup> ICANN’s Bylaws at Art. I, § 2.

<sup>22</sup> ICANN’s Bylaws at Art. I, §§ 2 (4) & 2 (11).

<sup>23</sup> *Id.* at Art. I, § 2 (8).

law by allowing Asia Green, a non-Gulf entity that admittedly sides with Iran on the Gulf-naming-dispute, to purportedly speak for the entire Gulf community.<sup>24</sup>

15. And the GCC has suffered harm as a result. Not only has the GCC already been discriminated against and denied the right to a fair and transparent process, Asia Green is not and will not act in the interests of the Arab community; Asia Green's operation of the .PERSIANGULF gTLD string will interfere with the core activities of the Arab community and damage the reputation of the Arab community as being falsely represented by Asia Green.

16. Because there is a reasonable *possibility* that an IRP Panel will find that ICANN's Board action is inconsistent with any one of the above-identified Bylaws and Articles of Incorporation, the GCC has more than surpassed the reasonable possibility threshold.

### **III. THE GCC DID NOT DELAY IN SEEKING EMERGENCY RELIEF**

17. ICANN argues that there is no urgency because the GCC waited over one year before seeking emergency relief.<sup>25</sup> ICANN's entire argument, however, is based on its mischaracterization of the GCC's Request for Emergency Relief. The GCC seeks emergency relief to prevent ICANN from signing the registry agreement while the GCC's IRP Request is pending. The GCC's need for emergency relief arose not from the September 2013 ICANN Board action, but from ICANN's indication that it will not wait for the GCC's IRP Request to complete before signing the registry agreement with Asia Green. The GCC promptly sought emergency relief once it learned that ICANN would not wait for an IRP Panel's decision.<sup>26</sup> The GCC therefore did not unreasonably delay before seeking emergency relief.

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<sup>24</sup> ICANN's Bylaws at Art. I, § 2 (3); Art. II, § 3; and ICANN's Articles of Incorporation at ¶ 4.

<sup>25</sup> ICANN's Response at ¶¶ 59-60.

<sup>26</sup> See Annex 1 to the GCC's Reply [Witness Statement of Abdulrahman Al Marzouqi in Support of the GCC's Reply] at ¶ 22.

#### IV. THE HARM THE GCC WILL SUFFER IN THE ABSENCE OF EMERGENCY RELIEF OUTWEIGHS THE HARM TO OTHERS

18. In its last effort to evade accountability, ICANN again puts the interests of Asia Green before the GCC's and contends that the harm Asia Green will suffer if emergency relief is granted outweighs any harm that the GCC will suffer if emergency relief is not granted.<sup>27</sup>

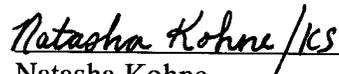
19. Specifically, ICANN argues, without any evidentiary support, that the time, money, and energy Asia Green invested in preparing and promoting their unspecified *applications* outweighs any harm to the GCC. ICANN offers no evidence to substantiate the time, money, or energy spent on any of its "applications," many of which have already been approved, and fails to apportion the time, money, and energy Asia Green purportedly spent on the .PERSIANGULF gTLD application. According to ICANN, Asia Green's nominal and unsubstantiated harm outweighs any harm to the GCC since the GCC cannot identify any.<sup>28</sup>

20. ICANN misunderstands the harm at issue. The harm that the GCC will suffer if its request for emergency relief is denied is the loss of the right to a meaningful independent review. ICANN can eviscerate the GCC's right to a meaningful independent review by signing the registry agreement before the independent review process is complete. This is the harm at issue; and it undoubtedly outweighs Asia Green's unsubstantiated losses.

21. Accordingly, the GCC's Request for Emergency Interim Relief should be granted.

Dated: December 22, 2014

Respectfully submitted,

  
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<sup>27</sup> ICANN's Response at ¶¶ 62-64.

<sup>28</sup> *Id.* Though ICANN contends that independent expert determinations are not the proper subject of an IRP, ICANN conveniently cites to the independent expert's determination on the GCC's Community Objection to support its claim that the GCC suffered no harm. *See id.* at ¶ 62. Of course, the GCC has been harmed by ICANN's improper September 2013 Board action (*see* ¶ 15, above).