

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

Gulf Cooperation Council (GCC)

Contact Information Redacted

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

**THE GULF COOPERATION COUNCIL'S REPLY IN SUPPORT OF ITS
SUPPLEMENTARY REQUEST FOR INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

1. This Panel must answer two straightforward questions. *First*, whether the ICANN Board's decision to proceed with the .PERSIANGULF gTLD application violated a *single* ICANN Article, Bylaw, or Guidebook Procedure. *Second*, if so, whether that Board decision materially affected the GCC.

2. In its Supplementary IRP, the GCC highlighted just *some*¹ of the Board's violations resulting from its decision to proceed with the .PERSIANGULF gTLD application. There the GCC argued principally that the Board violated ICANN's: (i) Guidebook procedures by not consulting with GAC before following GAC's non-binding advice; and (ii) Articles and Bylaws by not providing a well-reasoned and supported rationale for that decision.²

3. In its Supplementary Response, ICANN concedes that its Board accepted GAC's advice *without* first consulting with GAC and that its Board *did not* provide a well-reasoned and supported rationale for its decision. With these concessions, the Board's decision to proceed with the .PERSIANGULF gTLD application unquestionably violated more than a single ICANN Article, Bylaw, or Guidebook procedure.

4. Yet, ICANN asserts cavalierly that it did nothing wrong. ICANN purports that it alone can create new rules by claiming that because GAC raised its non-consensus advice about the .PERSIANGULF gTLD application in GAC's Durban Meeting Minutes, and not in GAC's Durban Communiqué, the Board was free to (and did) disregard that advice. ICANN purports also that it alone can determine when an existing rule should be enforced by claiming that its Board can decide at its whim whether to consider ICANN's core values before making a decision, even though ICANN's Articles and Bylaws require the Board to consider the core values before making

¹ Ironically, in defending its failure to consult with GAC, ICANN admits to more violations. ICANN violated again at least Core Value Nos. 4, 8, and 11 by failing to review GAC's Durban Meeting Minutes *before* the Board decided to proceed with the .PERSIANGULF gTLD application.

² See the GCC's Supplementary IRP at ¶¶ 13-32.

any decision.³ And, ICANN purports that it alone can interpret whether a violation has occurred by demanding virtually unfettered discretion in its decision-making.⁴

5. Try as it might, ICANN cannot dissolve its Board’s violations. The Board failed to: (i) apply documented policies neutrally and fairly; (ii) seek and support broad and informed participation in its decision-making; and (iii) explain how or why it made its decision to proceed with the .PERSIANGULF gTLD decision.⁵ Therefore, even after its self-serving assertions that this Panel cannot substitute its own judgment for that of the Board, ICANN concedes reluctantly that this Panel can determine when, as here, that the Board’s decision violated an ICANN Article, Bylaw, or Guidebook procedure.⁶ Thus, the GCC requests that this Panel grant its IRP.

ARGUMENT

I. ICANN CONCEDES ITS BOARD VIOLATED AN ICANN ARTICLE, BYLAW, AND GUIDEBOOK PROCEDURE.

A. ICANN admits that its Board adopted GAC’s advice to proceed with the .PERSIANGULF gTLD without talking to GAC.

1. ICANN claims it can create rules to excuse its failure to follow the Guidebook’s procedures.

6. In its Supplementary IRP, the GCC argued that ICANN did not comply with the Guidebook’s procedures because its Board failed to consult with GAC over GAC’s concerns about the .PERSIANGULF gTLD application.⁷ ICANN does not dispute that when GAC offers non-consensus advice, the Guidebook directs the Board to enter into a dialogue with GAC.⁸ Nor can ICANN dispute that GAC’s Durban Meeting Minutes offer non-consensus advice: “The GAC

³ ICANN’s Bylaws, Art. I, § 2 [“Core Values”]; Articles at ¶ 4.

⁴ ICANN recycles also its now weakened defenses that the GCC has not been harmed and that the IRP is not timely. See ICANN’s Supplementary Submission Response (“SSR”) at ¶¶ 23-25 and ¶¶ 26-29.

⁵ The Board’s decision violated, among other things, ICANN’s **diligence-related obligations** [Core Value No. 4 (failing to seek and support broad, informed participation at all levels of decision making) and Core Value No. 11 (failing take into account governments’ recommendations)]; **fairness-related obligations** [Core Value No. 8 (failing to make decisions by applying documented policies neutrally and fairly)]; and **transparency-related obligations** [ICANN’s Bylaws, Art. III, § 1 and Articles, ¶ 4 (failing to operate in an open and transparent manner)].

⁶ ICANN’s SSR at ¶ 5; see also the GCC’s Supplementary IRP at Annex S-4 [Booking Declaration] at ¶ 108.

⁷ The GCC’s Supplementary IRP at ¶ 20.

⁸ ICANN’s SSR at ¶ 10.

finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was clear that there would *not be consensus* on an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of *GAC members from UAE, Oman, Bahrain and Qatar that this application should not proceed due to lack of community support and controversy of the name.*⁹

7. Rather than concede it failed to follow the Guidebook's procedures, ICANN instead goes to great lengths to justify why in this instance its Board could disregard GAC's non-consensus advice, including by arguing incredibly that GAC's Durban Meeting Minutes do not reveal that *GAC did not reach a consensus.*¹⁰

8. *First*, ICANN claims that only GAC's advice in a *communiqué* is relevant and that the Board can ignore GAC's advice outside of a *communiqué*.¹¹ Since there is no rule to support this claim, ICANN relies incorrectly on Principle 51 of GAC's Operating Principles for support.¹² Not surprisingly, Principle 51 is inapplicable. Principle 51 in no way limits GAC's exchange of advice to a *communiqué*. It states only that: “[a]fter a *private meeting* has been held, the Chair *may* issue a *communiqué* to the *Media*, such *communiqué* having been approved by the GAC beforehand.”¹³ ICANN claims further that GAC's Durban Meeting Minutes are insignificant because GAC's Meeting Minutes “are merely high-level summaries of what was discussed [by

⁹ GCC's IRP at Annex 34 [GAC Meeting Minutes-Durban, South Africa]. [Emphasis Added].

¹⁰ ICANN assumes improperly that GAC's non-consensus opposition translates somehow into consensus support for the .PERSIANGULF gTLD application, even though the term “Persian Gulf” is a hotly *disputed* name and has been for more than 50 years. ICANN's Board knows that GAC representatives include those from GCC member nations and Iran. For the Board to assume, without speaking to GAC, that GAC could reach a consensus on this application, especially while knowing that the GCC had a pending community objection against it, belies comprehension.

¹¹ ICANN's SSR at ¶ 9.

¹² *Id.* at ¶ 10. ICANN's Bylaws do not restrict the manner in which GAC may communicate to the Board either. The Bylaws allow GAC to put issues to the Board through comment or advice. *See* ICANN's Bylaws, Art. XI., § 2(1)(i) [Governmental Advisory Committee] (“The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.”).

¹³ *See* ICANN's SSR at Resp. Ex. R-25, [GAC Operating Principle 51]. [Emphasis Added]. The Board, seemingly unaware of the newly-created rule that only GAC's advice in a *communiqué* is relevant, reviewed also materials relating (other than the Durban Meeting Minutes) to GAC's Durban *Communiqué*.

GAC] and perhaps what was decided [by GAC].”¹⁴ Yet, GAC’s Durban Communiqué, an even higher-level summary of the GAC meeting, should be even less relevant.

9. **Second**, ICANN claims its failure to consider GAC’s Durban Meeting Minutes was inconsequential because GAC’s Durban Meeting Minutes and GAC’s Durban Communiqué are “completely consistent.”¹⁵ But ICANN premised entirely its ability to ignore GAC’s non-consensus advice on the .PERSIANGULF gTLD application because of the *inconsistencies* between GAC’s Durban Meeting Minutes and GAC’s Durban Communiqué; only GAC’s Meeting Minutes voiced GAC’s non-consensus advice about the .PERSIANGULF gTLD application. GAC’s Meeting Minutes and GAC’s Communiqué cannot be both consistent and inconsistent.

10. **Third**, ICANN claims that even if the Board should have considered GAC’s Durban Meeting Minutes, the Board could not have considered them because they were not available until November 2013, almost two months after the Board decided to proceed with the .PERSIANGULF gTLD application.¹⁶ But, by attempting to justify its failure to consult with GAC in violation of the Guidebook’s procedures, ICANN admits to conduct that further violated its Articles and Bylaws: the Board’s failure to exercise due diligence and care in having a reasonable amount of facts in front of them.¹⁷ Simply put, the Board should have known that in light of the ongoing Gulf naming dispute there could not have been a consensus amongst GAC.

11. ICANN attempts to excuse its failure under the Guidebook to consult with GAC by misapplying rules, mischaracterizing GAC’s Durban Meeting Minutes, and justifying its failure to exercise diligence. Even if such attempts could justify ICANN’s failure under the Guidebook, ICANN still cannot justify its failure under the Bylaws to consult with GAC.

¹⁴ ICANN’s SSR at ¶ 10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ICANN’s Bylaws, Art. IV, § 3(4) [“Independent Review of Board Actions”].

2. ICANN claims it can choose selectively when to honor its obligations under the Bylaws.

12. The DCA Panel declared that the ICANN Board breached its transparency obligations under its Bylaws when it simply adopted GAC's consensus advice to not proceed with the .AFRICA gTLD.¹⁸ The DCA Panel declared further that the Board is expected to, at a minimum, investigate the matter further before following GAC's non-binding recommendation and explain and disclose transparently its rationale.¹⁹ ICANN does not dispute this obligation.²⁰

13. ICANN instead attempts to evade this obligation by trying to distinguish DCA. Unlike here, where GAC gave *non-consensus* advice to the Board that it does not object to the .PERSIANGULF gTLD application proceeding, in DCA, GAC gave *consensus* advice to the Board that the .AFRICA gTLD application should *not* proceed. But, ICANN's transparency obligations arise when its Board makes a decision based on GAC's advice. The direction of GAC's advice (to proceed or not proceed with a particular gTLD application) does not dictate whether the Board should consult with GAC. If anything, the DCA Declaration applies more forcefully to the .PERSIANGULF gTLD application because of GAC's *non-consensus* advice, signaling to the Board the need to discuss GAC's concerns before the Board decides how to proceed.

14. Had the Board consulted with GAC, the Board would have known of the serious concerns raised by countries in attendance at both the Beijing and Durban GAC Meetings about the .PERSIANGULF gTLD application and the substantial community opposition to that application.²¹

B. ICANN admits it failed to explain how or why it came to its decision to proceed with the .PERSIANGULF gTLD.

15. ICANN understands that its Bylaws obligate its Board to act transparently, but misunderstands what that obligation requires. ICANN believes it can satisfy its transparency

¹⁸ See the GCC's Supplementary IRP at Annex S-5 [DCA Declaration] at ¶ 113.

¹⁹ *Id.* at ¶ 113 and ¶ 74.

²⁰ ICANN's SSR at ¶ 21.

²¹ The GCC's Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman AI Marzouqi] at ¶¶ 5 and 6.

obligations by reciting simply what it did without explaining how or why it decided to do it. To support its claim, ICANN notes several procedural steps. Its Board: (1) posted publicly on August 1, 2013 GAC's Durban Communiqué; (2) held on August 13, 2013 a Board meeting during which it discussed whether to respond to GAC's advice using a scorecard; and (3) held on September 10, 2013 a second meeting during which it purportedly reviewed GAC's Durban Communiqué and drafted a scorecard responding to the advice contained in that Communiqué.²²

16. ICANN believes that by participating in these procedural acts it is immunized from any wrongdoing. But, ICANN's participation in these acts reveals two things: (1) that the Board failed to exercise diligence by not reviewing GAC's Durban Meeting Minutes before following GAC's non-consensus advice; and (2) ICANN failed to explain *how* and *why* the Board decided to proceed with the .PERSIANGULF gTLD application. ICANN offers no evidence that the Board's decision reflected any assessment or application of the competing core values, or how that decision complied with ICANN's Articles or Bylaws.

17. Nothing ICANN cites suggests otherwise. The September Board Meeting Minutes do not address specifically the .PERSIANGULF gTLD application.²³ The "eight-page" Scorecard devotes a *single* row to the .PERSIANGULF gTLD that simply reiterates that GAC finalized its consideration of the .PERSIANGULF gTLD and that GAC does not object to it proceeding.²⁴ It does not say how or why the Board decided to proceed with the application.

18. ICANN claims boldly (and falsely) that the "rationale" explains the Board's decision-making, but it states only that the Board considered: (i) the applicant comments submitted; (ii) GAC's Durban Communiqué; and (iii) the procedures established in the

²² ICANN's SSR at ¶¶ 13-15.

²³ ICANN's Response at R-20 [Minutes of the 10 September 2013 Meeting of the New gTLD Program Committee].

²⁴ *Id.* at R-18 [Annex 1 to NGPC Resolution No. 2013.09.10.NGO3]. ICANN intimates misleadingly that the Board prepared a detailed eight-page analysis explaining why it chose to follow GAC's non-binding advice. The scorecard, however, devotes a single-row to the .PERSIANGULF gTLD application that repeats merely what GAC said about it in the Durban Communiqué, promises to continue to process the application in accordance with Guidebook procedures, and notes the then-outstanding Community Objection.

Guidebook.²⁵ None of these acts reveals anything more than what was already known—GAC advised ICANN of its concerns, but ICANN did not consult with GAC or explain how or why it reached its decision to proceed with the .PERSIANGULF gTLD application.

19. The Bylaws require that “[a]ny ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.”²⁶ ICANN violated this requirement, and this violation is dispositive.²⁷

II. THE GCC WAS MATERIALLY AFFECTED BY THE BOARD’S DECISION TO PROCEED WITH THE .PERSIANGULF gTLD.

20. In its Supplementary IRP, the GCC argued principally that the Board’s decision to proceed with the .PERSIANGULF gTLD application denied the GCC its right to due process and discriminated against the GCC.²⁸ The Board’s decision denied the GCC its right to due process by depriving the GCC of a fair, transparent, and impartial gTLD process. The GCC’s gTLD process differed from what is set forth in ICANN’s publicly available rules governing the evaluation of new gTLD applications. It also discriminated against the GCC by treating it unfairly and differently than other Internet community members, and gTLD applicants, including the applicant for .ISLAM and .HALAL.

21. In its Supplementary Response, ICANN brings two meritless reasons why the GCC has not suffered harm. *First*, ICANN continues to rely on the Independent Objector (IO) and Independent Expert (IE) to reprocess its claim that the GCC has not been materially affected by the Board’s decision.²⁹ But the IO and IE were tasked to determine whether the GCC will suffer

²⁵ *Id.* at R-17 [NGPC Resolution No. 2013.09.10.NGO3].

²⁶ ICANN’s Bylaws, Art. I, § 2 [“Core Values”]; Articles at ¶ 4.

²⁷ *See* the GCC’s Supplementary IRP at Annex S-5 [DCA Declaration] at ¶¶ 116 and 117.

²⁸ *Id.* at ¶ 42.

²⁹ ICANN’s SSR at ¶ 23.

material *detriment* from the *operation* of the .PERSIANGULF gTLD application. This Panel, conversely, must determine only whether GCC has been materially *affected* by the Board’s September 2013 decision to proceed with the .PERSIANGULF gTLD.³⁰ ICANN melds improperly the “material harm” and “materially affected” standards and purports to require the GCC to prove with certainty that a future event will cause it harm presently. Whether or how the operation of the .PERSIANGULF gTLD will impact the GCC, however, is irrelevant to whether the Board’s September 2013 decision to approve the .PERSIANGULF gTLD materially affected the GCC.

22. **Second**, ICANN claims that because the GCC has participated in the “gTLD objection process,” it cannot now argue that the process was unfair.³¹ Not only is this argument nonsensical—participation in a process does not render automatically that process fair—but it is irrelevant to harm too. The relevant standard mandates harm resulting from a *Board* action. That the GCC participated in other “gTLD objection processes” such as a GAC Early Warning or Community Objection does not mean that it cannot also be materially affected by a *Board* decision. The GCC’s participation in those other objection processes, and the Board’s knowledge of it, however, is relevant to evidence further the Board’s lack of diligence and transparency in deciding to proceed with the .PERSIANGULF gTLD application.

III. THE GCC’S IRP IS TIMELY.

23. In its Supplementary IRP, the GCC argued that ICANN extended through its words and conduct the GCC’s deadline to file its IRP.³² In its Supplementary Response, ICANN ignores its words and conduct and recycles reluctantly its argument that the GCC’s IRP is time-barred.³³ ICANN’s time-bar argument is reduced to two meritless assertions.³⁴

³⁰ ICANN’s Bylaws, Art. IV, § 3(2) [“Independent Review of Board Actions”].

³¹ ICANN’s SSR at ¶ 24.

³² The GCC’s Supplementary IRP at ¶¶ 33-38.

³³ ICANN’s SSR at ¶¶ 26-29.

³⁴ *Id.* at ¶ 26.

24. *First*, ICANN again manufactures a rule where one does not otherwise exist. It claims that the only way to extend the IRP filing deadline is through a specific form of the Cooperative Engagement Process. But there is no rule that a prospective claimant can extend the IRP filing deadline only by commencing this specific form of the Cooperative Engagement Process.³⁵ The sections of ICANN’s Bylaws that ICANN relies on to support these assertions merely identify the Cooperative Engagement Process, but they do not mention extending the IRP filing deadline.³⁶

25. The Emergency IRP Panelist already rejected this argument: “The availability of the Cooperative Engagement Process is **not the sole method for extending time for filing the IRP** and is **not determinative of this issue whether ICANN has extended the time** [sic] for the commencement of an IRP by reason of its conduct in connection with the undisputed efforts at resolution undertaken in 2014, especially the June 2014 meeting with the senior representatives of the organizations and the July 9 letter.”³⁷

26. *Second*, ICANN claims the GCC has not presented evidence that ICANN extended the IRP filing deadline. ICANN’s claim is wrong. The GCC provided the witness statement of Abdulrahman Al Marzouqi, the GCC’s representative for its dealing with ICANN regarding the .PERSIANGULF gTLD application, which details how ICANN extended the GCC’s deadline to file its IRP.³⁸ Additionally, over the course of the resolution process—including just before the GCC ultimately filed its IRP—ICANN informed the GCC that since resolution talks were not effective,

³⁵ ICANN’s claim that the GCC did not initiate the Cooperative Engagement Process presupposes that the sole method for trying to resolve a dispute prior to filing is to initiate the Cooperative Engagement Process by providing written notice to ICANN. *See* Annex S-10 [11 April 2013 Cooperative Engagement Process]. The GCC disagrees; a party *may* invoke the Cooperative Engagement Process by providing written notice to ICANN, but is not required to initiate the Cooperative Engagement Process in that manner. Indeed, ICANN is amenable to engaging in the Cooperative Engagement Process if requested orally by counsel. *See* Annex S-11 [December 19, 2014 email from E. Enson to K. Salour].

³⁶ ICANN’s Bylaws, Art. IV, § 3(14) and (15) [“Independent Review of Board Actions”].

³⁷ Emergency Interim Declaration at ¶¶ 84.

³⁸ The GCC’s Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman Al Marzouqi] at ¶¶ 8-19.

*it could engage in a type of Cooperative Engagement Process.*³⁹ ICANN cannot argue now that the GCC's IRP filing deadline passed when it advised the GCC that it could participate in a form of the Cooperative Engagement Process (notwithstanding that the GCC already did participate in a Cooperative Engagement Process),⁴⁰ a process which necessarily occurs *before* a claimant files an IRP.

CONCLUSION

27. ICANN concedes that its Board's conduct cannot violate a single ICANN Article, Bylaw, or Guidebook procedure.⁴¹ But by its own admission, the Board failed to consult GAC and failed to explain how and why it arrived at its decision to proceed with the .PERSIANGULF gTLD application. These acts violate more than one ICANN Article, Bylaw, and Guidebook procedure. And the Board's decision materially affected the GCC.

28. Unless this Panel grants the GCC's IRP, the Board's violations will go unchecked; ICANN will execute the registry agreement for the .PERSIANGULF gTLD; and the GCC will have been denied its right to a fair, transparent, and impartial gTLD process. Accordingly, the GCC requests respectfully that this Panel grants its IRP.

March 29, 2016

Respectfully submitted,



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³⁹ See Annex S-11 [December 19, 2014 email from E. Enson to K. Salour] [(“The reason this is important to ICANN is because ICANN representatives informed [sic] GCC representative, on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.”)].

⁴⁰ See The GCC's Request for Emergency Relief at Annex 1 [Wit. Stmt. of Abdulrahman AI Marzouqi] at ¶¶ 8-19.

⁴¹ ICANN's SSR at ¶ 5.