

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GULF COOPERATION COUNCIL,) ICDR CASE NO. 01-14-0002-1065
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S RESPONSE TO GULF COOPERATION COUNCIL'S
REQUEST FOR INDEPENDENT REVIEW PROCESS**

Jeffrey A. LeVee
Eric P. Enson
Rachel Zernik
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
Tel: +1 213-489-3939
Fax: +1 213-243-2539

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STANDARD OF REVIEW	3
ARGUMENT	4
I. THE GAC DID NOT ISSUE ADVICE EXPRESSING CONCERNS WITH THE .PERSIANGULF APPLICATION	4
II. THE BOARD INDEPENDENTLY AND TRANSPARENTLY REVIEWED THE DURBAN COMMUNIQUÉ AND THE .PERSIANGULF APPLICATION	7
III. CLAIMANT HAS NOT BEEN NEGATIVELY AND “MATERIALLY AFFECTED” BY THE Board’s DECISION TO PROCEED WITH THE APPLICATION	12
IV. CLAIMANT’S IRP REQUEST IS TIME-BARRED.....	14
V. ICANN IS ENTITLED TO ITS COSTS IF IT PREVAILS IN THIS IRP	15
CONCLUSION.....	16

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Supplementary Request for Independent Review Process (“Supplemental Submission”) filed by claimant Gulf Cooperation Council (“GCC” or “Claimant”) on 12 February 2016.

INTRODUCTION

1. Claimant’s Supplementary IRP Request, like its IRP Request, fails to assert a cognizable claim or demonstrate that ICANN’s Board acted in any way inconsistent with ICANN’s Articles of Incorporation (“Articles”) or Bylaws. Claimant objects to the .PERSIANGULF application (“Application”) because its member states, the Arab nations that border the Gulf, believe that the Gulf should be referred to as the “Arabian Gulf.” Claimant has had ample opportunity to express its concerns – it caused an “Early Warning” to be issued regarding the Application, raised the issue with ICANN’s Independent Objector, filed a formal Community Objection against the .PERSIANGULF application, and raised the issue with ICANN’s Governmental Advisory Committee (“GAC”). At each stage, Claimant’s concerns were considered through ICANN’s established procedures and processes. Ultimately, however, none of Claimant’s objections were successful.

2. Now, Claimant asks this Panel to disregard the independent judgment of ICANN’s Board allowing the Application to proceed. But as multiple IRP declarations have made clear, IRP panels are not to substitute their judgment for the independent judgment of ICANN’s Board.¹ To the contrary, “[t]he only substantive check on the conduct of the ICANN

¹ Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“*Booking.com* Final Declaration”) ¶ 108 (Cl. Ex. S-4); Final Declaration, *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604 (“*Merck* Final Declaration”) ¶¶ 18, 21-22 ([T]he Panel may not substitute its own view of the merits of the underlying dispute.”) (Resp. Ex. R-24); *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505 (“*Vistaprint* Final Declaration”) ¶ 124 (“[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”) (Cl. Ex. S-2).

Board is that such conduct may not be inconsistent with the Articles of Incorporation [(“Articles”)] or Bylaws.”² Here, nothing in Claimant’s Supplemental Submission demonstrates that ICANN’s Board acted inconsistently with ICANN’s Articles or Bylaws.

3. In between its repeated and chiding claims that ICANN is seeking to “evade accountability” and “hiding behind” the GAC, Claimant’s Supplemental Submission asserts two, new arguments, yet both are unsupported. First, Claimant claims that the GAC issued non-consensus advice against the .PERSIANGULF application proceeding, thereby requiring the ICANN Board to meet with the GAC and state the Board’s rationale for reaching the decision it made. In fact, however, the GAC advised the ICANN Board in the GAC’s official communication to the Board that the GAC “does not object” to the .PERSIANGULF Application proceeding. The minutes of that GAC meeting, on which Claimant so heavily relies, but which were not published a month after the Board made its decision,³ also state that the GAC did not object to the Application proceeding. Second, Claimant argues that the Board did not reach an independent decision permitting the .PERSIANGULF Application to proceed. This argument is completely belied by the ICANN Board meetings, the minutes of those meetings, and the materials evaluated by the Board at those meetings, which demonstrate that the ICANN Board exercised its independent judgment in allowing the Application to proceed. Moreover, the ICANN Board was under no obligation to reject the Application simply because Claimant – which had multiple opportunities to voice its concerns – continued to have objections to the Application.

4. Claimant’s IRP suffers from two additional – and fundamental – failings. First,

² *Booking.com v. ICANN* Final Declaration ¶ 108 (Cl. Ex. S-4).

³ See <https://gacweb.icann.org/display/gacweb/GAC+Announcement+Archive> (minutes of Durban meeting posted on 8 November 2013).

because Claimant waited over a year to assert its claims relating to the Board’s decision to allow the .PERSIANGULF Application to proceed, its claims are time-barred pursuant to ICANN’s Bylaws, which include a clear, thirty-day deadline for the filing of IRP requests. Second, Claimant cannot demonstrate, as it must, that it has been “materially harmed” by the Board’s decision to proceed with the .PERSIANGULF Application. ICANN respects Claimant’s concerns regarding the Application, but the fact that Claimant’s member states would prefer that there be no .PERSIANGULF gTLD does not mean that they will be materially harmed by the operation of that gTLD. For these reasons, and as discussed further below, Claimant’s IRP Request should be denied.

STANDARD OF REVIEW

5. It is indisputable that ICANN’s Bylaws explicitly define the criteria that IRP panels must apply when evaluating the actions of ICANN’s Board. Specifically, IRP panels must focus on:

- a. Did the Board act without conflict of interest in taking its decision?
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁴

This standard means, according to the *Vistaprint* IRP Panel, that an IRP panel is “neither asked to, nor allowed to, substitute its judgment for that of the Board.”⁵ Likewise, the *Merck* IRP Panel declared that “it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.”⁶ And according to the panel in the *Booking.com* IRP:

⁴ Bylaws, Art. IV, § 3.4 (Cl. Ex. R-1).

⁵ *Vistaprint v. ICANN* Final Declaration ¶ 124 (Cl. Ex. S-2).

⁶ *Merck v. ICANN* Final Declaration at ¶ 21 (Resp. Ex. R-24).

[T]here can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws—or, the parties agree, with the Guidebook.⁷

ARGUMENT

I. THE GAC DID NOT ISSUE ADVICE EXPRESSING CONCERNS WITH THE .PERSIANGULF APPLICATION.

6. As ICANN has explained in its prior briefs, the Guidebook provides for three specific types of GAC advice regarding objections to, or concerns with, new gTLD applications.⁸ First, the GAC may provide ICANN's Board with consensus advice that a particular application should not proceed. This creates a strong presumption for the Board that the application should not be approved.⁹ Second, the GAC may offer non-consensus advice that it has concerns about a particular application. With such non-consensus advice, the ICANN Board is expected to enter into a dialogue with the GAC to understand the scope of its concerns and then provide a rationale for the Board's ultimate decision.¹⁰ Third, the GAC may advise ICANN that an application should not proceed unless remediated. This raises a strong presumption for the Board that an application should not proceed unless remediated.¹¹

7. In its Supplemental Submission, Claimant argues that the GAC provided the ICANN Board with non-consensus advice expressing concerns about the .PERSIANGULF Application, thus requiring the Board to enter a dialogue with the GAC to understand the scope

⁷ *Booking.com v. ICANN* Final Declaration ¶ 108.

⁸ *See, e.g.*, IRP Response ¶¶ 8-13.

⁹ Guidebook § 3.1(I) (Cl. Ex. R-2).

¹⁰ *Id.* § 3.1(II).

¹¹ *Id.* § 3.1 (III).

of those concerns.¹² This is not accurate.

8. The GAC's final consideration of the .PERSIANGULF Application occurred during the GAC's 17 July 2013 meeting in Durban, South Africa ("Durban Meeting"). Afterwards, the GAC issued its official statement arising out of its Durban meeting – the Durban Communiqué – stating that the GAC had finalized its review of the .PERSIANGULF Application and that the GAC "*does not object*" to the Application proceeding.¹³

9. In the Durban Communiqué, there is no mention of concerns or objections to the Application, none whatsoever. And this is what makes the GAC's advice on .PERSIANGULF very different from the GAC's advice on .ISLAM and .HALAL, with which Claimant has tried to equate the advice on .PERSIANGULF. When the GAC communicated advice to the ICANN Board regarding .ISLAM and .HALAL in the Beijing Communiqué, the GAC referred to Module 3.1 part II of the Guidebook, which is the portion that relates to non-consensus advice regarding concerns about an application, and provided the Board with the following advice: "The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. 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."¹⁴ There was no similar GAC advice or statement about .PERSIANGULF in the Durban Communiqué.

10. Faced with this reality, Claimant argues that the minutes from the GAC's Durban Meeting express non-consensus advice regarding concerns about the Application because the

¹² Supplementary Submission ¶¶ 18-20.

¹³ Durban Communiqué at 4 (Cl. Ex. Annex-24).

¹⁴ Beijing Communiqué at IV.1.a.i.ii (Cl. Ex. Annex-23).

minutes note the opinion of a handful of GAC members that the .PERSIANGULF Application should not proceed.¹⁵ This argument also fails. First, the minutes of a GAC meeting are not an official statement of the GAC to the ICANN Board. The GAC’s official statements of advice to the Board are communicated through communiqués, not minutes of its meetings, which are merely high-level summaries of what was discussed and perhaps what was decided.¹⁶ Second, the minutes from the GAC’s Durban meeting were not approved or posted by the GAC until 7 November 2013, well after the Board’s consideration of the Dublin Communiqué, on 10 September 2013. Third, and most importantly, the Durban Meeting minutes are completely consistent with the advice contained in the Durban Communiqué. The Durban Meeting minutes clearly state that “[t]he GAC 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.*”¹⁷

11. In sum, although the Durban Communiqué is the GAC’s official communication of advice, the minutes from the GAC’s Durban Meeting are consistent with that advice – the GAC did not object to the .PERSIANGULF Application proceeding. Neither document communicates non-consensus advice regarding concerns with the Application or non-consensus advice against the Application proceeding. Thus, nothing in the Guidebook required ICANN’s Board to stall the processing of the Application in order to consult the GAC or anyone else, as Claimant claims.

¹⁵ Supplementary Request ¶ 18.

¹⁶ GAC Operating Principle 51 (Resp. Ex. R-25).

¹⁷ GAC Meeting Minutes, 13-18 July 2013 at 2 (emphasis added) (Cl. Annex-34).

II. THE BOARD INDEPENDENTLY AND TRANSPARENTLY REVIEWED THE DURBAN COMMUNIQUÉ AND THE .PERSIANGULF APPLICATION.

12. In the alternative, Claimant argues that the ICANN Board failed to independently and transparently exercise its own judgment with respect to the .PERSIANGULF Application.¹⁸ This claim, however, is contradicted by the significant evidence demonstrating that the Board did independently consider the Durban Communiqué as well as the Application, and then transparently communicated the Board’s decision on the Application.

13. First, on 1 August 2013, ICANN publicly posted the Durban Communiqué and opened a 21-day period for impacted applicants to provide comments to the Board.¹⁹

14. Thereafter, on 13 August 2013, the Board held a meeting to discuss and consider, among other things, “a plan for responding to the GAC’s advice on the New gTLD Program, transmitted to the Board through its Durban Communiqué.”²⁰ During this meeting, the Board discussed the Durban Communiqué and whether to respond to the GAC advice through the use of a scorecard, as the Board had done previously, but the Board agreed to defer any action or decision with respect to the Durban Communiqué until the applicant-comment window closed.²¹

15. Next, the Board evaluated the Durban Communiqué again during its 10 September 2013 meeting. During this meeting, the Board reviewed the Durban Communiqué and a draft scorecard responding to the advice contained in the communiqué. Moreover, the Board was presented with materials relating to the Durban Communiqué, the draft scorecard and the applicant responses to the Durban Communiqué. The minutes from the NGPC’s meeting clearly indicate that the Board had “discussion of each of the items on the proposed scorecard to

¹⁸ Supplementary Request ¶¶ 21-32.

¹⁹ See <https://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>

²⁰ NGPC Resolution No. 2013.09.10.NG03 (Resp. Ex. R-17).

²¹ Minutes of 13 August 2013 NGPC Meeting (Resp. Ex. R-26).

address the GAC's advice in the Durban Communiqué.”²²

16. Based on this analysis and discussion, all of the Board members present for the 10 September 2013 meeting unanimously voted in favor of a resolution (“10 September Resolution”) adopting the Durban Communiqué Scorecard (“Scorecard”). The eight-page Scorecard explained in detail the GAC's advice in the Durban Communiqué and how the Board was responding to that advice.²³ With respect to the .PERSIANGULF Application, the Scorecard correctly noted that the GAC had informed the Board that the GAC had “finalized its consideration of the [] string, and does not object to it proceeding.”²⁴ The Scorecard also indicated that the Board decided to direct ICANN staff to “continue to process the application in accordance with the established procedures in the [Guidebook],” but noted that community objections had been filed against the Application.²⁵ In addition, the 10 September Resolution adopting the Scorecard set forth the adopted resolution's text and explained the rationale for the Board's decision, including why the Board was addressing the issue and what materials were consulted, and provided links to a number of other related documents.²⁶

17. Moreover, as ICANN does with all Board actions like this, the Board's briefing materials, the Durban Communiqué, the applicant responses to the Durban Communiqué, the Board's 10 September Resolution, the Scorecard and the rationale for the Board's resolution were all publicly posted.²⁷

²² Minutes of 10 September 2013 NGPC Meeting (Resp. Ex. R-20).

²³ Annex 1 to NGPC Resolution No. 2013.06.04.NG01 (Resp. Ex. R-15).

²⁴ *Id.* at 4.

²⁵ *Id.*

²⁶ Rationale for NGPC Resolution. 2013.09.10.NG03 (Resp. Ex. R-17). During this period, Claimant did not submit any correspondence to the Board objecting to the .PERSIANGULF Application. Accordingly, there was nothing for the Board to review or consider in this respect. In any event, Claimant was given the opportunity to raise its concerns before the GAC, whose function it is to allow governments a voice in ICANN matters. The lack of GAC advice on the Application, clearly demonstrates that Claimant failed to convince the GAC to issue such advice.

²⁷ See <https://www.icann.org/resources/pages/2013-51-2012-02-25-en>.

18. All of this demonstrates that the Board independently evaluated, and exercised its own judgment regarding, the Durban Communiqué and the .PERSIANGULF Application, and that the Board did so in a open and transparent fashion, as required by ICANN’s Articles and Bylaws. The fact that Claimant is disappointed with the Board’s decision to proceed with the .PERSIANGULF Application does not support a claim in an IRP. As the *Booking.com* IRP Panel made clear: “So long as the Board acts without conflict of interest and with due care, it is entitled – indeed required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN.”²⁸ This is precisely what occurred with respect to the Board’s consideration of the .PERSIANGULF Application.

19. Claimant makes repeated claims in its Supplemental Submission that the Board “chose to ignore the scores of [Claimant’s] objections” when it reached its 10 September 2013 resolution.²⁹ This is not the case, for two reasons. First, between the time that the GAC issued its Durban Communiqué and the time the Board adopted the 10 September Resolution, Claimant did not submit any correspondence to, or otherwise contact, the Board regarding the .PERSIANGULF Application. Second, the Board did allow Claimant to voice its concerns with the Application by: (i) agreeing not to move beyond Initial Evaluation of the Application while the GAC debated the issue; and (ii) by allowing Claimant’s Community Objection to resolve before allowing the Application to move towards completion. Thus, Claimant’s objections were heard and they were heard in the two most appropriate forums – the GAC and the community objection process. The objections simply did not carry the day in these forums or with the ICANN Board, and they certainly should not in this IRP.

20. In its Supplemental Submission, Claimant also relies on the declaration of the

²⁸ *Booking.com* Final Declaration ¶ 108 (Cl. Ex. S-4).

²⁹ Supplementary IRP Request ¶¶ 24.

Emergency Panelist to imply that in order for the Board to demonstrate that it has exercised its independent judgment, it must explicitly identify the Core Values listed in ICANN’s Bylaws and explain how the Board balanced those Core Values. Yet it cannot be inferred that the Board failed to consider ICANN’s Core Values simply because the Board did not explicitly state how it did so. As it did when it responded to the Durban Communiqué, ICANN’s Board issues and publicly posts detailed rationales for the hundreds of resolutions it passes each year. It does not in every circumstance describe how exactly it has weighed each of the eleven Core Values, values which the Bylaws note are “deliberately expressed in very general terms,” are not “narrowly prescriptive” and are “statements of principle rather than practice.”³⁰ For this Panel to require the Board to have explicitly spelled out how the Core Values informed the Board’s decision making would run counter to the Panel’s obligation to respect the Board’s “exercise [of] its independent judgment in acting in what it believes to be the best interests of ICANN.”³¹

21. Similarly, Claimant’s Supplemental Submission invokes the IRP panel’s declaration in the *DotConnectAfrica Trust v. ICANN IRP* (“DCA IRP”).³² The situation in the DCA IRP, however, is not analogous to this matter. In the DCA IRP, the GAC provided the Board with consensus advice that a particular application for .AFRICA should not proceed. As previously noted, the Guidebook provides that such consensus advice should create a “strong presumption” that an application should not proceed. Accordingly, ICANN’s Board accepted the

³⁰ Bylaws, Art. I, § 2 (Resp. Ex. R-1).

³¹ *Booking.com v. ICANN* Final Declaration ¶ 108 (Cl. Ex. S-4). In this respect, ICANN also notes the impropriety of Claimant’s reliance on the “findings” of the Emergency Panelist. In fact, as the panelist himself noted, his declaration was made on the basis of a limited record and under time constraint. (Emergency Declaration ¶ 71). He also emphasized that he was not “engaging in an early determination of the merits.” (*Id.*) As such, the standard he applied was not whether the ICANN Board had acted contrary to the Articles or Bylaws, but whether there was a “reasonable possibility” that Claimant would be able to demonstrate as much. (*Id.* at ¶ 70.) Finally, ICANN notes that four final declarations have been issued by panels in IRPs (following full briefing and argument). Those declarations seriously undercut much of the Emergency Panelist’s analysis inasmuch as they confirm that IRP panels are not to substitute their judgment for the independent judgment of ICANN’s Board.

³² Supplementary IRP Request ¶¶ 27-32.

GAC's advice and ceased processing the .AFRICA application. The GAC had not provided a rationale for its advice (as no such rationale is required by the terms of the Guidebook), and the DCA IRP Panel perceived the Board as not having investigated that rationale. Here, in contrast, the GAC advised that it did not object to the .PERSIANGULF Application proceeding.

Moreover, after that advice was issued, the Board exercised its independent judgment in deciding to continue processing the .PERSIANGULF Application, as set forth above.

22. Finally, throughout its Supplemental Submission, Claimant repeatedly claims that the ICANN Board “approved” or “decided to grant” the .PERSIANGULF Application.³³ This is not so. What the Board decided in its 10 September Resolution was to allow the ICANN staff to “continue to process the application in accordance with the established procedures in the [Guidebook].” Up to this point, the processing of the Application had essentially been stayed based on the GAC's advice in the Beijing Communiqué that the GAC needed more time to consider the Application, along with several other applications (specifically, the Board directed staff not to proceed beyond Initial Evaluation of the Application). But once the GAC advised the Board in the Durban Communiqué that its analysis was complete and that the GAC “did not object” to the Application proceeding, the Board decided to return the Application to the process that is set forth in the Guidebook. Thus, the Board did precisely what it was required to do pursuant to the Guidebook by waiting for the GAC's advice, considering and accepting that advice, and then directing staff to continue processing the Application. There were no other procedural or substantive steps required of the Board either in the Guidebook or in the Articles and Bylaws, except for directing ICANN staff to monitor Claimant's Community Objection against the Application, which was later denied.

³³ Supplementary IRP Request ¶¶ 21, 23, 24, 26.

III. CLAIMANT HAS NOT BEEN NEGATIVELY AND “MATERIALLY AFFECTED” BY THE BOARD’S DECISION TO PROCEED WITH THE APPLICATION.

23. An IRP is only available to those negatively and “materially affected” by an ICANN Board action or decision.³⁴ Two experts (in two separate expert determinations)³⁵ explicitly questioned whether Claimant could demonstrate a cognizable injury with respect to the .PERSIANGULF Application. Nevertheless, Claimant now argues that it has been “materially affected” because it has “suffered discrimination and been denied the right to a fair and impartial gTLD process.”³⁶ Claimant even goes so far to say, without any support or reticence, that ICANN has “align[ed] with Iran in the heated and hotly contested Gulf naming dispute.”³⁷

24. Although ICANN disputes that Claimant can have been “materially affected” by an alleged failure to be heard regarding the .PERSIANGULF Application, the record demonstrates that Claimant in fact took full advantage of the multiple avenues it was given to voice its concerns regarding the .PERSIANGULF Application. Claimant caused an “Early Warning” to be issued regarding the Application.³⁸ In the GAC, Claimant’s member States raised their objections to the .PERSIANGULF Application (resulting in the GAC initially asking ICANN not to proceed beyond initial evaluation of the .PERSIANFULF Application while it considered those objections, before ultimately determining not to object to the Application).³⁹

³⁴ Bylaws, Art. IV, § 3.2 (Resp. Ex. R-1).

³⁵ Independent Objector’s Determination (it was “most debatable” whether the GCC could demonstrate “a likelihood of material detriment”) (Resp. Ex. R-11); Determination on Community Objection ¶¶ 39-40 (Claimant’s argument that “allowing the existence of such a sensitive string without the endorsement of the Arabian gulf community . . . will allow the applicant to interfere with the core activities of the community” did not “provide or constitute proof that the Application if granted w[ould] create a likelihood of material detriment to the community of the [GCC].”) (Resp. Ex. R-12).

³⁶ Supplementary IRP Request ¶ 49.

³⁷ *Id.* ¶ 42.

³⁸ GAC Early Warning Regarding the Application (Resp. Ex. R-10).

³⁹ Annex 1 to NGPC Resolution 2013.06.04.NG01 at GAC Register #4 (Resp. Ex. R-15)

Claimant also filed a complaint with ICANN’s Independent Objector, as well as a formal Community Objection, both of which were carefully considered but overruled.⁴⁰ The fact that Claimant was ultimately unsuccessful in blocking an application with which it disagreed does not demonstrate that Claimant “suffered discrimination” or did not participate in a “fair and impartial gTLD process.” Claimant was afforded every opportunity to invoke the objection procedures in the Guidebook and the accountability mechanisms set forth in the Bylaws, including this IRP. Claimant was treated fairly and impartially through the ICANN processes and mechanisms in place. What Claimant seems to be requesting is extra deference from the ICANN Board because Claimant represents governments and those governments have deeply-held beliefs regarding the Application. Claimant’s members, however, failed to convince other governmental members of the GAC to agree with their views. That failure is evidence not of discrimination, but of a fair and impartial process.

25. There is no question that Claimant would prefer that the .PERSIANGULF gTLD not be delegated. Presumably, there are many individuals and organizations that would prefer certain gTLDs not be delegated or operated. This is clear in the many objections Claimant’s members have lodged as to other gTLD applications, such as .GAY, .BABY and .POKER.⁴¹ But this does not mean that any party that does not like a certain gTLD may file an IRP based on the mere displeasure with the existence of that gTLD. More specifically, Claimant’s ambiguous claims that a .PERSIANGULF gTLD “will promote Iranian beliefs . . . and falsely create the

⁴⁰ Expert Determination in ICC Case No. EXP/423/ICANN/40 (Resp. Ex. R-12); Independent Objector’s Comments Regarding the Application (Resp. Ex. R-11).

⁴¹ See <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6192> (objecting to .GAY); <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6050> (objection to .BABY); <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/6113> (objecting to .POKER).

perception that the Arab nations that reside in the Gulf accept the disputed name”⁴² does not demonstrate a cognizable harm that supports an IRP. As the expert who overruled Claimant’s Community Objection noted – if it wishes, Claimant can apply to operate a .ARABIANGULF gTLD in future application rounds.⁴³

IV. CLAIMANT’S IRP REQUEST IS TIME-BARRED.

26. As discussed in ICANN’s Response to Claimant’s IRP Request, Claimant has not presented evidence demonstrating that the thirty-day deadline to file its IRP Request was extended by ICANN’s informal discussions with Claimant about the Application. That deadline can be extended only by the commencement of the Cooperative Engagement Process (“CEP”), a formal ICANN conciliation process.⁴⁴ In fact, Claimant’s argument that ICANN is not entitled to its costs if ICANN prevails in this IRP because Claimant initiated conciliation talks after the IRP filing, rather than a CEP before the filing, clearly demonstrates that Claimant did not initiate a CEP extending the time to file an IRP request. Nor is there evidence of any other agreement purporting to extend that deadline. Claimant’s declarant, Abdulrahman Al Marzouqi (who represents the United Arab Emirates (“UAE”) on the GAC and in the UAE’s dealings with ICANN) does not claim that he sought an extension of time to file an IRP Request or that ICANN representatives told him that the deadline to file an IRP Request was extended, much less a written agreement extending the deadline.

27. Claimant’s deadline to commence a CEP or file an IRP expired on 30 October 2013, thirty-days after ICANN publicly posted the minutes and Board briefing materials from the 10 September 2013 ICANN Board meeting.

⁴² Emergency Request ¶ 25.

⁴³ Expert Determination in ICC Case No. EXP/423/ICANN/40 ¶ 42 Resp. Ex. R-12).

⁴⁴ Bylaws, Art. IV, §§ 3.14, 3.15 (Resp. Ex. R-1).

28. As it has previously explained, ICANN's assertion that Claimant's IRP Request is time-barred arises out of its duty to treat all IRP claimants in a manner consistent with ICANN's documented procedures. Claimant failed to follow those procedures and, for this reason, its claims should not be allowed to proceed.

29. Finally, Claimant argues that ICANN somehow waived the right to argue that Claimant's IRP Request was time-barred because the Board allegedly adopted the Emergency Panelist's interim declaration. This is not supportable. First, the Board did not "adopt" the Emergency Panelist's interim declaration. Instead, ICANN simply chose to halt the processing of the Application following the Emergency Panelist's interim declaration. Second, ICANN's abidance with an interim declaration does not mean that ICANN, or the Board, endorses or adopts such a declaration. Finally, the Emergency Panelist himself emphasized that he was not "engaging in an early determination of the merits" but rather, as GCC had urged he do, basing his declaration on a less rigorous standard of proof.⁴⁵

V. ICANN IS ENTITLED TO ITS COSTS IF IT PREVAILS IN THIS IRP.

30. Claimant devotes a substantial portion of its Supplemental Submission to arguing that ICANN is not entitled to costs even if ICANN is declared the prevailing party in this IRP. ICANN's Bylaws, pursuant to which IRPs were established, provide that "if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees."⁴⁶

31. As an initial matter, Claimant's concern with this issue constitutes a concession

⁴⁵ Emergency Declaration ¶ 71.

⁴⁶ Bylaws, Art. IV, § 3.16 (Resp Ex. R-1).

that it did not initiate a CEP in this case. As such, as discussed above, there is no basis for its argument that its deadline to file an IRP was tolled. Furthermore, ICANN's position with respect to costs is that the Bylaws provision regarding costs is controlling and that, because Claimant failed to engage in a CEP, ICANN is entitled to costs if ICANN is the prevailing party in this IRP. ICANN agrees, however, that this issue may be addressed later in this proceeding, when ripe for review.⁴⁷

CONCLUSION

32. The ICANN Board's conduct with respect to the .PERSIANGULF Application was consistent with ICANN's Articles and Bylaws. The GAC ultimately decided that it did not object to the .PERSIANGULF Application and ICANN's Board exercised its independent judgment in determining that, as a result, there was no basis not to proceed with the Application. Not only has Claimant failed to demonstrate that ICANN's Board violated the Articles and Bylaws, its IRP was submitted more than a year after the deadline to do so and does not identify any legally-recognized injury to Claimant if the .PERSIANGULF Application proceeds. Accordingly, Claimant's IRP Request should be denied.

Respectfully submitted,

JONES DAY

By: Eric P. Enson / PHE
Eric P. Enson

Dated: March 14, 2016

Counsel for Respondent ICANN

⁴⁷ Supplementary Request ¶ 62.