

**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)**

(Respondent)

ICDR Case No. 01-14-0002-1065

**CLAIMANT GULF COOPERATION COUNCIL'S SUBMISSION ON COSTS AS THIS
INDEPENDENT REVIEW PANEL REQUESTED IN ITS PARTIAL FINAL
DECLARATION**

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INTRODUCTION

1. The GCC's submission on costs presents a single, straightforward question: Do *extraordinary circumstances* exist that warrant this Panel to depart from the undisputed standard that the GCC—as the party prevailing—*shall* ordinarily be reimbursed the fees and expenses it was forced to incur to prevent further action on the .PERSIANGULF gTLD?¹ The GCC submits that the answer to this question is a resounding no. Extraordinary circumstances simply do not exist.

2. For extraordinary circumstances to exist, this Panel must consider the circumstances of the proceedings, including both (1) the reasonableness of ICANN's position and (2) that position's contribution to the public interest.²

3. But ICANN's position throughout these proceedings was anything but reasonable. Instead, it was as this Panel described “unduly formalistic and simplistic.”³ ICANN insisted that by following blindly GAC's advice, it donned a cloak of unaccountability that allowed it to ignore compliance with ICANN's well-settled Core Values that mandate fairness, transparency, and diligence. ICANN maintained this insistence even after the DCA Panel rejected a near-identical position that ICANN took in another IRP; the DCA Panel declared that “it would have expected the Board to, at a minimum, investigate the matter further before rejecting [the gTLD application].”⁴

4. Even if ICANN's insistence could somehow be deemed reasonable, ICANN's position throughout these proceedings did not contribute to the public interest. ICANN's Board

¹ See ICANN's Supplementary Procedures at ¶ 11 [Costs]. While the Panel notes correctly that the parties disagree whether the procedural rules governing this IRP include ICANN's Bylaws, this disagreement is moot for purposes of this motion because ICANN's Supplementary Procedures and Bylaws are virtually identical; each provide that the prevailing party shall be awarded its costs absent extraordinary circumstances. Compare ICANN's Bylaws Art. IV. § 3(18) with ICANN's Supplementary Procedures at ¶ 11 [Costs].

² ICANN's Supplementary Procedures at ¶ 11 [Costs].

³ October 19, 2016 Partial Final Declaration of the Panel of the Independent Review Process Panel [“Partial Final Declaration”] at ¶ 126.

⁴ GCC's Supplementary IRP at Annex S-5 [DCA Declaration] at ¶ 113.

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.”⁵

5. Because no extraordinary circumstances exist to warrant this Panel’s departure from the established baseline rule that the prevailing party is entitled to its costs, the GCC requests respectfully that this Panel declare that ICANN must pay the entirety of the GCC’s administrative and arbitrator fees and expenses (currently \$112,429.19) that the GCC incurred to prevent ICANN from signing the registry agreement for the .PERSIANGULF gTLD application.

ARGUMENT

I. THIS PANEL CAN AND SHOULD AWARD THE GCC ITS COSTS INCURRED TO STOP ICANN FROM SIGNING THE REGISTRY AGREEMENT FOR THE .PERSIANGULF gTLD APPLICATION.

a. This Panel resoundingly rejected ICANN’s position in these proceedings.

i. ICANN claims unreasonably it did not have to consult with GAC.

6. The first step to determine whether extraordinary circumstances exist to warrant a departure from the undisputed standard to assign costs⁶ to the non-prevailing party is to consider whether ICANN’s position in these proceedings is reasonable. ICANN’s position is encapsulated by *two excuses* on which it relies to justify its claim that the Board’s decision to proceed with the .PERSIANGULF gTLD application did not violate any of ICANN’s Bylaws or Articles. Neither is reasonable.

⁵ Partial Final Declaration at ¶ 141.

⁶ Costs include both the ICDR’s fees and expenses, **and** the panelists’ fees and expenses, including the emergency panelist. *See* ICDR Rules at Article 34 [Costs of Arbitration] (stating that costs include fees and expenses of arbitrators and administrator); *see also* GCC’s Supplementary IRP at Annex S-5 [DCA Declaration] at ¶ 146 (awarding DCA as the prevailing party the fees and expenses of the: (1) panelists; (2) ICDR; and (3) emergency panelist); ICANN’s Response to GCC’s Supplementary IRP at Exhibit R-24 [Merck Declaration] at ¶ 69 (awarding ICANN as the prevailing party (1) the administrative fees and expenses of the ICDR and (2) the compensation and expenses of the panelists).

7. ICANN's *first excuse* is that its Board followed GAC's advice to the letter, and the Board therefore had no obligation to enter into a dialogue with GAC before deciding to allow the .PERSIANGULF gTLD application to proceed.⁷

8. This defense, however, necessarily requires an unreasonable interpretation of the Guidebook. It is undisputed that under the Guidebook, GAC's advice can take only one of three forms.⁸ GAC can advise ICANN that: (1) it is GAC's *consensus* that an application should *not* proceed; (2) there are *concerns* about an application, after which the Board is *expected* to enter into a dialogue with GAC to understand those concerns; or (3) an application should *not* proceed unless remediated.⁹ GAC's Durban Communiqué, however, states only that GAC "does not object" to the .PERSIANGULF gTLD application proceeding.¹⁰

9. To be sure, GAC's statement in the Durban Communiqué does not fall exactly into any of those three prescribed forms. But in no way does that statement reflect any advice, consensus or otherwise, that the application should not proceed, leaving only the second form of prescribed GAC advice. If anything, that alone should have signaled ICANN's Board to consult with GAC. Instead, ICANN's Board, without reason, treated that statement from the Durban Communiqué as consensus advice and allowed the application to proceed without consulting GAC. As this Panel proclaimed: "It is undisputed, and we agree, that the GAC did not issue [consensus advice] against the '.persiangulf' application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board."¹¹

⁷ Partial Final Declaration at ¶ 116.

⁸ Guidebook at § 3.1 [GAC Advice on New gTLDs].

⁹ *Id.* at § 3.1 [GAC Advice on New gTLDs] (emphasis added).

¹⁰ GCC's IRP at Annex 24 [GAC Communiqué-Durban, South Africa].

¹¹ Partial Final Declaration at ¶ 124 (emphasis in original).

10. ICANN’s position is all the more unreasonable because it means that ICANN’s Board did not even review GAC’s Meeting Minutes before making its decision. GAC’s Meeting Minutes state unequivocally that there are “opposing views” regarding the .PERSIANGULF gTLD application and that “there would not be a consensus.”¹²

11. Undeterred by the unequivocally contradicting Meeting Minutes, ICANN makes several attempts to diminish their significance, but each attempt is equally unreasonable. To begin, ICANN claims that GAC Principle 51 mandates that GAC can only convey advice through a Communiqué, thereby rendering GAC’s Meeting Minutes irrelevant to whether the Board was obligated to enter into a dialogue with GAC before making its decision. ICANN’s interpretation of Principle 51 is unreasonable, however, as Principle 51 speaks to a Chair’s authority to issue a Communiqué to the Media following a meeting. This Panel rejected outright ICANN’s argument that GAC may only provide official advice to the Board through a Communiqué.¹³

12. Next, ICANN claims that even if the Meeting Minutes are somehow relevant, it could not have looked at them because they were not posted until *after* the Board’s September 2013 decision. This Panel rejected this excuse as unreasonable. It is “equally difficult to accept that the Board – as part of basis due diligence – would not have asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.”¹⁴

13. Ultimately, ICANN claims any failure to look at those Meeting Minutes was inconsequential because the advice GAC conveys in the Communiqué and the Meeting Minutes

¹² GCC’s IRP at Annex 34 [GAC Meeting Minutes-Durban, South Africa].

¹³ Partial Final Declaration at ¶ 132.

¹⁴ *Id.* at ¶ 134.

are consistent.¹⁵ But this requires yet another unreasonable interpretation because the Meeting Minutes unequivocally indicate opposition from GAC members.¹⁶ This Panel of course rejected that argument too.¹⁷

14. This Panel derided ICANN’s defense—that ICANN’s procedures only require it to consider the Communiqué—as simplistic and formalistic.¹⁸ A simplistic and formalistic position cannot be and should not be considered reasonable.

ii. ICANN unreasonably claims it made an independent and transparent decision.

15. ICANN’s *second defense* to the GCC’s claim that the Board did not make an independent and transparent decision to proceed with the application is equally unreasonable.

16. ICANN recites a series of routine steps its Board took to support its position that its Board’s decision was independent and transparent. Specifically, ICANN claims that the Board independently and transparently evaluated the .PERSIANGULF gTLD application by positing publicly the:

- a. Durban Communiqué;
- b. Board meeting records discussing each item in the Durban Scorecard responding to the GAC’s advice; and
- c. Resolution adopting the unanimous voting based on the Durban Scorecard.¹⁹

17. After reviewing these steps, this Panel declared: “At the end of the day, there is *simply no evidence*—or even the slightest indication—that the Board collected facts and engaged with the GCC’s serious concerns before resolving to allow the persiangulf application to

¹⁵ *Id.* at ¶ 133.

¹⁶ GCC’s IRP at Annex 34 [GAC Meeting Minutes-Durban, South Africa].

¹⁷ Partial Final Declaration at ¶ 133.

¹⁸ *Id.* at ¶ 126.

¹⁹ *Id.* at ¶ 118.

proceed.”²⁰ Indeed, this Panel noted that: (i) “...there was **no** discussion of **any** factors whatsoever in that decision;”²¹ (ii) the Board’s decision-making process was virtually nonexistent;²² and (iii) the Board’s decision lacked even a modicum of independent investigation.²³ In his Emergency Declaration, the emergency panelist also concluded that based on a careful review of the Bylaws and evidence there are “serious questions about the decision making process of the ICANN Board under the Bylaws in connection with the approval of the application for .PERSIANGULF as a new gTLD.”²⁴

18. Concluding that by simply following the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and two-sentences from the Scorecard that the Board made an independent and transparent decision is unreasonable. This Panel characterized these steps as “empty;”²⁵ hardly the kind of steps that would satisfy the Board’s obligations of transparency and independent investigation.

19. Unsurprisingly, this Panel declared the Board’s “routine treatment of the non-routine ‘.persiangulf gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name ‘Persian Gulf.’”²⁶

²⁰ *Id.* at ¶ 138 (emphasis added).

²¹ *Id.* at ¶ 142 (emphasis in original).

²² *Id.* at ¶ 143.

²³ *Id.* at ¶ 139.

²⁴ February 12, 2015 Interim Declaration on Emergency Request for Interim Measures of Protection [“Emergency Interim Declaration”] at ¶ 73.

²⁵ Partial Final Declaration at ¶ 138.

²⁶ *Id.* at ¶ 141.

20. Hard-pressed to demonstrate reasonableness,²⁷ ICANN may argue that extraordinary circumstances nonetheless exist to warrant departure from the baseline rule to award costs to the GCC. For instance, ICANN may claim that the circumstances of this case are extraordinary because GAC's advice in the Durban Communiqué did not follow one of the three prescribed forms, or that the Durban Meeting Minutes were not available until *after* the Board's decision.

21. But these facts do not rise to the level of extraordinary. If anything, these facts highlight the Board's unreasonableness: The Board failed to consult with GAC before making its decision even though GAC's advice did not take one of the three prescribed forms and the Board did not have access to GAC's Durban Meeting Minutes. Extraordinary circumstances are rare and exist only in unusual instances.²⁸

b. ICANN's position did not contribute to the public interest.

22. The second factor to determine whether extraordinary circumstances exist is whether ICANN's position contributed to the public interest. It did not. Prior IRP panels have relied on this public interest exception to relieve a non-prevailing party from paying costs, but those situations were unique and those proceedings conferred a benefit to the public.

²⁷ To argue that ICANN has been reasonable, ICANN may point to its counsel's cooperation throughout the proceedings, including counsel's agreement to appoint an emergency panelist. But the cost-shifting standard focuses on the reasonableness of the conduct giving rise to the IRP, not counsel's conduct during the IRP. Otherwise, nothing would deter ICANN from advancing patently unreasonable positions to force a claimant to file an IRP and then avoid reimbursing the claimant's costs by having its counsel act in a cooperative manner.

²⁸ October 17, 2006 Final Declaration, *Corn Lake, LLC v. ICANN* [ICDR Case No. 01-15-0002-9938] at ¶ 8.97; (available at <https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf>) (refusing to award costs to the prevailing party because "...this is a unique situation and peculiar to its own unique and unprecedented facts.").

23. For example, during the proceedings in the Little Birch IRP,²⁹ that panel relied on the public interest exception to spare Little Birch from having to pay ICANN's costs even though Little Birch was not the prevailing party. But that proceeding had a unique circumstance: counsel for claimant notified the Panel of a data breach and possible misappropriation of confidential business information by a Little Birch competitor.³⁰ Because of the Little Birch IRP, ICANN became aware of a possible data breach.

24. The proceedings in the Booking IRP³¹ were also unique. The Booking Panel relied on the public interest exception to save claimant Booking from having to pay ICANN's costs. The Booking Panel declared: "We consider that the extraordinary circumstances of case - in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN - warrants such a holding."³² Because of the Booking IRP, ICANN became aware of a need to reconsider some of its rules, which in turn will benefit the public.

25. By contrast, here, ICANN's position did not benefit the public.³³ If anything, ICANN's Board exacerbated the hotly contested dispute between Arab states and Iran over the Gulf's correct name by ignoring: (i) the very existence of this decades-long Gulf naming dispute; (ii) the GCC's repeated objections throughout the application process; (iii) its

²⁹ February 12, 2016 Final Declaration, Little Birch LLC, et al. v. ICANN, ICDR Case No. 01-15-0002-8061 ["Little Birch Declaration"] (available at <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>).

³⁰ Little Birch Declaration at ¶ 157.

³¹ GCC's Supplementary IRP at Annex S-4 [March 3, 2015 Final Declaration, Booking.com v. ICANN, ICDR Case No. 50-20-1400-0247 ["Booking Declaration"]].

³² Booking Declaration at ¶ 152.

³³ ICANN may argue that this IRP has benefitted the public by shedding light on the already well-known Gulf-naming dispute. The GCC of course disagrees. But even if true, ICANN cannot be allowed to rely on this position to avoid paying the GCC's costs. This would create a perverse standard that would allow ICANN to always escape the prevailing party's costs by simply arguing that the public learned from ICANN's position, regardless of the validity of that position.

obligations to consult with GAC; and (iv) the Independent Objector's cautionary statement that ICANN should not disrupt the status quo and take a position on the Gulf-naming dispute.³⁴

26. This Panel concluded that the Board's treatment of the .PERSIANGULF gTLD application was *essentially oblivious* to the well-known geo-political sensitivities associated with the name "Persian Gulf."³⁵

27. In sum, no extraordinary circumstances exist here to relieve ICANN from paying the administrative and arbitrator fees and expenses the GCC was forced to incur to stop ICANN from signing the registry agreement.

28. This includes the costs the GCC incurred in connection with its request for emergency relief.³⁶ Before the GCC filed its IRP, ICANN intended to sign imminently the registry agreement for the .PERSIANGULF gTLD.³⁷ Without emergency relief, ICANN could have and would have signed the registry agreement before the GCC's IRP was decided.³⁸ The GCC had to apply for emergency relief to obtain the relief it ultimately sought and that this Panel awarded: A declaration enjoining ICANN from signing the registry agreement.

CONCLUSION

29. Because there are no extraordinary circumstances to justify this Panel's departure from the undisputed standard that the prevailing party is ordinarily entitled to its costs, this Panel can and should declare that ICANN reimburse the GCC the entirety of the administrative and arbitrator fees and expenses it was forced to incur to prevent ICANN from signing the registry

³⁴ ICANN's Response at Ex. R-11 [IO's Comments on .PERSIANGULF].

³⁵ Partial Final Declaration at ¶ 141 (emphasis added).

³⁶ GCC's Supplementary IRP at Annex S-5 [DCA Declaration] at ¶ 146 (awarding DCA as the prevailing party the fees and expenses of the: (1) panelists; (2) ICDR; and (3) emergency panelist).

³⁷ Emergency Interim Declaration at ¶ 56.

³⁸ *Id.* at ¶ 59.

agreement. Currently, that amount is \$112,429.19. This Panel's award should include any additional fees and expenses that the GCC incurs until the conclusion of these proceedings.

Respectfully submitted,

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