

**EXPERT REPORT OF STEVEN TEPP IN SUPPORT OF THE GCC'S REQUEST
FOR INDEPENDENT REVIEW**

CASE No. EXP/423/ICANN/40

I. SUMMARY OF OPINIONS

1. My name is Steven Tepp. I am President and CEO of the consultancy, Sentinel Worldwide. I am also a Professorial Lecturer in Law at the George Washington University Law School in Washington, D.C.

2. The law firm of Akin Gump Strauss Hauer & Feld LLP has engaged me for my expert review and opinion in the matter of ICANN Case No. EXP/423/ICANN/40 (“the Case” or “this Case”), which concerns the application for the generic Top-Level Domain (“gTLD”) .PERSIANGULF. Specifically, I have been asked to evaluate whether ICANN acted consistently with its Articles of Incorporation, Bylaws, and the gTLD Applicant Guidebook by approving for registration the .PERSIANGULF gTLD. My conclusion is that the registration of the .PERSIANGULF gTLD was not consistent with ICANN’s Bylaws, Articles of Incorporation or gTLD Applicant Guidebook and that the improper registration of the .PERSIANGULF gTLD has materially affected the GCC. Consequently, in my expert opinion, the GCC’s request for Independent Review is well-founded and the .PERSIANGULF gTLD should not proceed and no further action should be taken in this Case.

3. To arrive at my opinions, I reviewed the filings from this Case, the relevant ICANN rules and guidelines, communiqués and other documents from the

Government Advisory Committee (“GAC”)¹ addressing this and similar cases, topical scholarly writings, and international agreements. I have also consulted colleagues in the U.S. government and other governments.

II. BACKGROUND AND QUALIFICATIONS

4. For nearly the past two decades, I have been at the forefront of legislation surrounding the Internet and resulting public policy issues. I began my career in the mid-1990s as an attorney for the U.S. Senate Judiciary Committee, on the Chairman’s staff. In that role, I handled intellectual property and other issues at the dawn of the Internet age as the U.S. Congress and courts grappled with emerging issues presented by new developments online. While there, I assisted with the policy review underlying the Digital Millennium Copyright Act and the Anti-Cybersquatting Consumer Protection Act.

5. After working at the U.S. Senate Judiciary Committee, I worked as a senior attorney at the U.S. Copyright Office for nearly 12 years. My domestic responsibilities included drafting advisory briefs to U.S. courts and advising the U.S. Congress on cutting-edge issues arising from the intersection of intellectual property and Internet-based services, such as balancing domain name owners’ obligations to protect their subscribers’ privacy while still cooperating in reducing IP theft on their servers.

6. My work at the U.S. Copyright Office also included extensive international engagements. I was deeply involved in crafting the U.S. proposals regarding intellectual property and Internet issues for its free trade agreements, such as balancing the need for accurate Internet traffic data with bandwidth-saving techniques,

¹ “GAC” refers to the Governmental Advisory Committee. GAC provides advice to ICANN on public policy issues, especially where ICANN’s activities or policies may affect national laws or international agreements.

while also preserving methods to reduce online IP violations. Then, I negotiated those provisions in the context of free trade agreements with Australia, Chile, Oman, Peru, and Singapore.

7. While at the U.S. Copyright Office, I also participated in meetings of multilateral institutions including the World Intellectual Property Organization (“WIPO”) and the World Trade Organization (“WTO”). I was also the Copyright Office’s lead for bilateral engagement with countries in the Asia-Pacific region and later with the Western Hemisphere. Through those responsibilities I also was deeply involved in the implementation of the WIPO Internet Treaties in a variety of national laws. Altogether, my government service totaled approximately 15 years.

8. Subsequent to the U.S. Copyright Office, I joined the U.S. Chamber of Commerce, Global Intellectual Property Center, where I served as Chief IP Counsel. In that role, I continued my involvement with the latest Internet issues through legislative, administrative, and judicial processes, including proposals involving deep analysis and discussion of DNS stability, Internet traffic flows, and cybersecurity issues. I was also immersed in public policy issues such as the public interest in avoiding deception of Internet users and the implications of distant operators of domain names that created consumer confusion. I also continued my international work, including assisting the Supreme People’s Court of China as it considered and issued its Internet Judicial Interpretation, which included balancing enforcement of IP online with the legitimate needs of Internet service providers. Also during my time at the Chamber of Commerce, I worked on issues of Internet governance, including participation at ICANN regarding the

need for proper safeguards against abuse during the new gTLD rollout and improved accuracy of the Whois Database.

9. In January 2013, I formed Sentinel Worldwide to provide expert counsel on the intellectual property and Internet issues that have dominated my career. Since then, I have been called as an expert witness in judicial, administrative, and legislative proceedings, including testifying before the Judiciary Committee of the U.S. House of Representative in July of this year. My work has included a continued focus on Internet issues, including the Internet Assigned Numbers Authority (“IANA”) transition and a variety of issues related to the protection and enforcement of IP online.

10. In addition to my current teaching position, I taught at the George Mason University Law School and the Georgetown University Law Center. Throughout my career I have spoken and written extensively on the latest issues of the intersection of intellectual property and the Internet. My latest academic work is a forthcoming (December 2014) article on the U.S. Supreme Court decision regarding the retransmission of television broadcast signals on the Internet. My curriculum vitae are attached for reference.²

III. INDEPENDENT REVIEW OF BOARD ACTIONS

a. Third Party Review Is Appropriate

11. The ICANN Bylaws provide for independent third-party review of a Board action when it is “alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”³

² See Annex 1 [Tepp CV].

³ ICANN Bylaws at Art. IV, § 3.1.

12. ICANN's Articles of Incorporation obligate it to operate "in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes. . . ."⁴

13. ICANN's Bylaws bear this out: "In performing its mission, ICANN's Bylaws instruct it to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making. . . ."⁵ The Bylaws also instruct ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process. . . ."⁶

14. Under its Bylaws, ICANN also is bound to make decisions by applying documented policies neutrally and objectively, with integrity and fairness. . . ."⁷

15. In this Case, as will be discussed below, ICANN has allowed the application for the string .PERSIANGULF to proceed in violation of its own documented policies, over the objection of the entities most affected, without due regard for the geographic and cultural sensitivities involved in the geographic name "Persian Gulf," and in conflict with principles of international law.

16. Therefore, I conclude in my expert opinion that Independent Review is appropriate in this Case.

⁴ ICANN Articles of Incorporation at Art. 4.

⁵ ICANN Bylaws at Art. I, § 2.4.

⁶ *Id.* at Art. I, § 2.7.

⁷ *Id.* at Art. I, §2.8.

b. The GCC Is An Affected Party

17. Any person who has suffered “injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation” may submit a request for such review.⁸

18. The very crux of the controversy in this Case is the disputed geographic name “Persian Gulf.” As will be discussed below in detail, the ICANN Board has moved forward on the application for .PERSIANGULF in spite of the fact that the GCC was not consulted by Asia Green as required by ICANN’s Applicant Guidelines. Several GCC countries issued an Early Warning through the GAC, and then filed a Community Objection, which was improperly denied, as will also be shown below. The GCC has thus suffered direct harm by the ICANN Board moving forward in this Case despite the absence of the consultation process to which it was entitled, and suffered reputational and other harm from the Board’s acceptance of the prejudicial and disputed geographic name “Persian Gulf.”

19. Therefore, I conclude in my expert opinion that the GCC is an “affected party” that may submit a request for independent review, and, as is discussed below in detail, that the .PERSIANGULF gTLD should not proceed and no other action should be taken on it.

IV. OVERVIEW OF ICANN RULES FOR GRANTING DISPUTED GEOGRAPHIC NAMES AS NEW gTLDs

20. Before the launch of the New gTLD Program, GAC reached consensus on certain principles specific to gTLDs. At that time, GAC stated its view that new gTLDs should respect “[t]he sensitivities regarding terms with national, cultural, geographic and

⁸*Id.* at Art. IV., § 3.2.

religious significance.”⁹ To protect such sensitivities, GAC concluded that “ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.”¹⁰ To this end, ICANN’s Applicant Guidebook indicates that in the case of geographic name gTLDs, it is the applicant’s responsibility and in the applicant’s interest to “identify and consult with the relevant governments or public authorities.”¹¹

21. The latest GAC draft working paper has recently reaffirmed these imperatives and puts the highest priority on consensus in the context of geographic name gTLDs. That document repeats the common theme that “[t]he protection of geographic names should be [the] object of special concern within the new gTLD program.”¹²

22. That same document also repeats the principle that: “Geographic names should not be allowed to be registered as gTLDs, unless requested by the relevant communities where they belong or after a specific authorization given by the government or community to the applicant.”¹³

23. In sum, ICANN is obligated to act with special care and in concert with affected governments when considering gTLDs with national, cultural, and geographic significance. To do so, ICANN is required to consider the informed input of communities—whether directly from those communities or through GAC—affected by a proposed gTLD with national, cultural, or geographic significance, and must avoid place names without community authorization. ICANN also must adhere to such guidelines in

⁹ See Annex 2 [GAC Principles Regarding New gTLDs, March 28, 2007] at ¶ 2.1(b).

¹⁰ *Id.* at ¶ 2.2.

¹¹ ICANN *gTLD Applicant Guidebook* at § 2.2.1.4.2, available at <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

¹² See Annex 3 [“The protection of geographic names in the new gTLDs process,” vers. 3, August 29, 2014] at § 3.

¹³ *Id.*

a consistent manner to ensure the geographic, cultural, and national sensitivities of all those affected are recognized.

V. ICANN VIOLATED THESE RELEVANT GUIDELINES IN THIS CASE WHEN IT APPROVED THE .PERSIANGULF gTLD

a. .PERSIANGULF Is a Disputed Geographic Name that Has Proceeded in the Absence of Consultation and over the Objection of the Affected Governments

24. Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (“Asia Green”) applied for the gTLD .PERSIANGULF. Asia Green’s application uses the term “Persian Gulf” to refer to the body of water “in the southwest of the Asian Continent at 23 to 30 degrees northern latitude and 48 to 56 degrees longitude on the south side of the vast country of Iran, with a length of 1259 kilometers.”¹⁴

25. As is both obvious and confirmed by the Expert Determination arising from the GCC’s Community Objection during the .PERSIANGULF gTLD application process, “[t]he Persian Gulf is a geographical expression. It refers to a body of water separating the Arabian Peninsula from the landmass of Iran.”¹⁵

26. It is also generally recognized that there is an ongoing dispute between the Arabs and Persians over the correct name for the Gulf; the Arabs prefer the term “Arabian Gulf,” while the Persians favor “Persian Gulf.”

27. The .PERSIANGULF string raises several complicated and controversial issues because it bears a disputed geographic name and implicates Arabian communities that border the Gulf, not only Persian communities. During the .PERSIANGULF gTLD application process, four Arab countries issued an Early Warning through GAC, noting

¹⁴ See Annexes 4 and 5 [Asia Green’s Applications for .PARS and .PERSIANGULF, respectively] at 18A.

¹⁵ See Annex 6 [October 30, 2013 Expert Determination on .PERSIANGULF] at ¶ 32.

their “serious concerns toward .persiangulf” and their view that the gulf is properly known as the “Arabian Gulf.”¹⁶

28. What is not disputed in this Case is that Asia Green did not consult with the affected governments at any point in the application process. Asia Green’s .PERSIANGULF gTLD application argues vociferously that the body of water between the Arabian Peninsula and Iran should be called the “Persian Gulf.”¹⁷ The fact that Asia Green felt the need to make these arguments reveals that even before it submitted the application for the string .PERSIANGULF, Asia Green understood that applying that name to the geographic region was a highly contested matter. Through this Case, Asia Green is seeking to have ICANN take sides in a deep-seated and complex geographic controversy.

29. By approving the .PERSIANGULF gTLD, ICANN violated its own guidelines. First, Asia Green did not consult with the affected Arab communities as required by the Applicant Guidelines.¹⁸ In fact, the GCC and its member nations objected to the .PERSIANGULF gTLD application because it is a geographic name which they dispute.¹⁹ Absent approval by the relevant Arab community, the gTLD guidelines preclude ICANN from proceeding with the .PERSIANGULF gTLD.

30. Second, ICANN failed to heed informed input from the directly affected Arab communities and GAC. ICANN had received an Early Warning regarding the .PERSIANGULF application, as well as direct correspondence from governments of Arab Gulf nations. And the ICANN Board could not have approved a geographic name gTLD,

¹⁶ See Annex 7 [November 20, 2012 GAC Early Warning .PERSIANGULF].

¹⁷ See Annex 5 [Asia Green’s Application for .PERSIANGULF] at 18A.

¹⁸ ICANN *gTLD Applicant Guidebook* at § 2.2.1.4.

¹⁹ See Annex 7 [November 20, 2012 GAC Early Warning .PERSIANGULF].

which the Expert Determination found was present in this Case, in the absence of relevant government support, without violating the terms of the Applicant Guidebook.²⁰

31. Third, ICANN failed to act neutrally or consistently with past practice. In other contexts, including the applications for .HALAL, and .ISLAM, ICANN has refused to allow a gTLD lacking community support to proceed absent GAC consensus.

32. In the instances of .HALAL, and .ISLAM, objections were raised and the GAC communicated these objections to ICANN, in the absence of GAC consensus, by noting that: “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.”²¹

33. Objections were also raised to the .PERSIANGULF string, but consensus opposition by the GAC was blocked by a majority Persian nation. So, like .HALAL, and .ISLAM, no consensus opposition could be filed. Despite the opposition, and in a striking departure from the way in which it had handled .ISLAM and .HALAL, the GAC simply (and misleadingly) advised that it “does not object to [it] proceeding.”²² Yet, the absence of consensus opposition in this Case does not reflect consensus support. On the contrary, it shows a controversy even deeper than other opposed strings, such that it divided the GAC itself.

34. My discussions with government colleagues confirm the understanding that GAC operates on a consensus basis and does not provide advice in the absence of consensus. So how can it be appropriate that an unresolved controversy within the GAC was reported as “no objection”? This was inaccurate and misleading.

²⁰ ICANN *gTLD Applicant Guidebook* at § 2.2.1.4.2.

²¹ See Annex 8 [GAC Communique-Beijing, April 11, 2013] at § IV.1.a.

²² See Annex 9 [GAC Communique-Durban, July 18, 2013] at § IV.1.3.

35. In this Case, the usual sensitivities to geographic names are exacerbated by the decades of controversy over the proper name of the gulf. Moreover, it should not be lost that the gulf area is one of the world's most volatile regions. There is good cause for the highest level of sensitivity in this Case.

36. In my expert opinion, I conclude that proceeding with the Asia Green application for a geographic name gTLD in the absence of consultation with the affected governments and over their vocal and repeated objections violated ICANN's documented policies.

b. Proceeding on the Asia Green Application Is Inconsistent with Principles of International Law

37. Rules against false designation of origin are well established in international law. The Paris Convention includes a prohibition providing for the seizure of goods "falsely indicated" as having been produced in a "locality," "region," or country.²³ That provision was subsequently incorporated into the TRIPS Agreement.²⁴

38. Even broader prohibitions are provided by the Madrid Agreement, which prohibits "false" and "misleading" indication of origin²⁵ and applies the prohibition beyond the making on the product itself and to "signs advertisements. . . or any other commercial communication."²⁶

39. The imperative of accurate attribution of source is also found in the principles of international trademark law and geographical indications.²⁷ These include,

²³ Annex 10 [Paris Convention for the Protection of Industrial Property (1967)] at Art. 10.

²⁴ Annex 11 [Trade Related Aspects of Intellectual Property (1994)("TRIPS Agreement")] at Art. 2.

²⁵ Annex 12 [Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (1967)] at Art 1(1).

²⁶ *Id.* at Art. 3*bis*.

²⁷ Annex 11 [TRIPS Agreement] at Art. 16 & Art. 22.

but are not limited to the consumer benefit from accurate identification of source and consumer protection from false designations of origin.

40. When a geographic name sought as a gTLD is also a trademark, and the applicant for the string is not the right holder, the two fields may intersect. The controversy surrounding the .amazon and .patagonia applications are examples of such intersection.²⁸ These issues are discussed in depth in the comments of the Intellectual Property Constituency presented at the recent Los Angeles meeting.²⁹

41. In this Case, neither Asia Green nor the GCC Community Objectors have alleged intellectual property rights in the term “Persian Gulf,” so these complications are not present in this Case.

42. On the contrary, as is discussed above, the consumer and public interest policies that drive global standards of intellectual property are mutually reinforcing the conclusion that a distant applicant, purporting to speak on behalf of a disputed geographic name, should not be granted that controversial string.

43. Asia Green is a business based in Istanbul, Turkey.³⁰ Turkey, of course, is not a part of the Gulf region. Nonetheless, Asia Green asserts that it will “utilize its home market of Turkey as a leading source of registrants and sites”³¹ for the .PERSIANGULF gTLD.

44. Asia Green clearly envisions that at least some amount of the .PERSIANGULF gTLD will be for commercial communications, as it stated its belief that

²⁸ See Annex 8.[GAC Communique – Beijing, April 11, 2013].

²⁹ See *Summary of Intellectual Property Constituency Comments on “The Protection of Geographic Names in the New gTLDs Process,”* 14 Oct. 2014, available at:

<https://gacweb.icann.org/display/gacweb/Community+Input+-+The+protection+of+Geographic+Names+in+the+New+gTLDs+process>, (short link: <http://bit.ly/ZtiZqd>)

³⁰ See Annex 5 [Asia Green’s Application for .PERSIANGULF] at 2.

³¹ *Id.* at 18B.

the string will be a place for, “Middle Eastern internet users who seek a unique place to do gulf-related business. . .The .PERSIANGULF gTLD is capable of being used for sites focused on ecommerce. . . .”³² Little may those users know they are doing “gulf-related business” with companies and websites based in Turkey.

45. Even with regard to uses of the proposed .PERSIANGULF gTLD that are not related to the commercial sale of products, the principles of international law are at odds with Asia Green’s application. Indeed, Asia Green seeks to do much more than merely identify products as originating in the Gulf region; it purports to speak in the name of the entire community. But the reality is that Asia Green is neither located in the Gulf region nor does it seek to encompass the full range of views in that region.

46. In my expert opinion, I conclude that, in light of Asia Green’s distant location from the geographic region it purports to represent through the applied-for .PERSIANGULF gTLD, granting that string is inconsistent with both the letter and the principles of international law.

47. In my expert opinion and in light of the above discussion, I conclude that by allowing the .PERSIANGULF gTLD to move forward, ICANN has violated its own documented policies as well as principles of international law.

48. ICANN has further failed to seek consensus or respect geographic or cultural diversity in this Case. It has not ensured that those entities most affected can assist in the policy development process. And it has not applied its documented policies neutrally and objectively, with integrity and fairness. I therefore conclude further that ICANN’s actions in this Case are inconsistent with ICANN’s Articles of Incorporation and ICANN’s Bylaws, the relevant provisions of which are quoted above.

³² *Id.*

VI. THE IMPROPER GRANTING OF THE DISPUTED GEOGRAPHIC NAME gTLD HAS MATERIALLY AFFECTED THE GCC

49. The GCC has been harmed because of ICANN's violations. Absent ICANN's violations, ICANN would not be prepared to register .PERSIANGULF gTLD.

50. One way to establish harm is through "[e]vidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely ..."³³

51. Asia Green revealed its intent to maintain a bias in its future management of the string when it wrote that "it would not plan to sell .PERSIANGULF domain names to persons in the region 'who disavow the very name.'"³⁴ So, despite the fact that Arabs live in the region and thus are "incontestabl[y]" part of the gulf community,³⁵ Asia Green will deny domains to them unless they bow to Asia Green's contention. Asia Green could scarcely be clearer that it "does not intend to act in accordance with the interests of the community or of users more widely." This meets the standard of material detriment in the Applicant Guidebook.³⁶

52. A second way to establish harm is when the granting of the application would result in "[i]nterference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string."³⁷ Again, Asia Green's own admission that it will not operate the .PERSIANGULF gTLD in a way that respects, or even permits, the viewpoints of so many members of the Gulf community must surely interfere with the core activities of that community.

³³ ICANN, *gTLD Applicant Guidebook* at § 3.5.4.

³⁴ See Annex 6 [October 30, 2013 Expert Determination on .PERSIANGULF] at ¶ 22.

³⁵ *Id.* at ¶ 29.

³⁶ ICANN, *gTLD Applicant Guidebook* at § 3.5.4.

³⁷ *Id.*

53. For example, if an historical society located in the United Arab Emirates sought the domain “arabiangulf.persianguulf” for the purpose of offering historical evidence and arguments that “Arabian Gulf” is the appropriate name for the gulf, Asia Green’s application tells us they will refuse to register that domain because it “disavow[s] the very name” Asia Green believes is appropriate. Participation in the .PERSIANGULF gTLD will only be permitted upon acquiescence to Asia Green’s perspectives.

54. Harm may also be found from the “[n]ature and extent of damage to the reputation of the community represented by the objector that would result from the applicant’s operation of the applied-for gTLD string.”³⁸

55. The disconnect between Turkey as Asia Green’s location and the “leading source” of registrants and sites, and the distant geographic name it seeks as a gTLD, raises questions of reputational harm and the public interest. Specifically, operating the string .PERSIANGULF out of Turkey will be a source of confusion, misleading ordinary Internet users as to the true source of the content appearing across that gTLD.

56. The prejudicial use of the string .PERSIANGULF suggests a false unity of perspective, which also misleads the public. And, as discussed above, both the text of the application and Asia Green’s conduct suggests hostility to other perspectives. Those are precisely the perspectives of the GCC, which almost inevitably will suffer reputational harm from the one-sided nature of the views permitted on Asia Green’s .PERSIANGULF.

57. For these reasons, I conclude that the improper granting of the .PERSIANGULF gTLD to Asia Green causes a harm to the GCC because: (1) the applicant is not and will not act in the interests of the community; (2) the applicant’s operation of the applied-for gTLD string will result in interference with the core activities of the community;

³⁸ *Id.*

and (3) there is damage to the reputation of the Arab community that would be falsely represented by Asia Green.

VII. THE INDEPENDENT EXPERT THAT RULED ON THE GCC'S COMMUNITY OBJECTION FAILED TO PROPERLY CONSIDER THE ABOVE HARM

58. The Expert Determination found in favor of the GCC Community Objection in every respect except material detriment. But its discussion of material detriment is both incorrect and troubling. Specifically, it suggests that the solution to a disputed geographic name gTLD is not to halt the registration of that string, but is found in the availability of registering alternate and competing gTLDs, such as .ARABIANGULF.³⁹

59. This is a highly unsatisfactory suggestion. It is essentially a truism that for any gTLD, there exist a virtually infinite number of variations and alternatives. And so the availability of alternative and competing gTLDs is certainly not evidence that the disputed geographic gTLD itself does not create a material detriment, as that would undermine the possibility of material detriment in *any* case. That approach to assessing material detriment cannot be reconciled with the Applicant Guidebook's rules regarding material detriment.

60. Denying community objections to disputed geographic name gTLDs on the per se basis that alternatives are available transforms the gTLD process into a race to be the first filer. This will increase controversy by creating an incentive to file applications for controversial gTLDs by an interested party so as to capture the string. It also will necessitate wasteful defensive applications to prevent an adverse party from obtaining the string. Given the cost of pursuing gTLD applications, especially

³⁹ See Annex 6 [October 30, 2013 Expert Determination on .PERSIANGULF] at ¶ 42.

community-based applications and community objections,⁴⁰ it would be troubling indeed for a precedent to be created along these lines.

61. My recent conversations with government colleagues confirm this concern, particularly in light of the cost of applying for and operating gTLDs. Indeed, ICANN has examined the concerns about defensive applications in the gTLD process specifically.⁴¹ While consensus on the right safeguards against the need for defensive registration of gTLDs has not yet been arrived at, there is little or no suggestion that defensive registrations of gTLDs are good for anyone in the Internet community.

VIII. ICANN CAN AVOID UNNECESSARILY WEIGHING IN ON A POLITICAL ISSUE WITHOUT HARM TO ASIA GREEN

62. ICANN is not in the business of deciding winners and losers in geographic name disputes and it should decline the invitation to wade into this controversy, as it has in other geographic name controversies.

63. Fortunately, this Case can have two winners, not a winner and a loser. While the .PERSIANGULF application should not proceed and no other action should be taken on it, Asia Green has already had success in its application for the .PARS string, Pars being a term related to Persian ancestry.

64. The stated purpose of both .PARS and .PERSIANGULF is to reach out to Persian people around the world and to unify “their common cultural, linguistic and historical heritage.”⁴²

⁴⁰ See Annex 9 [GAC Communique – Durban, July 17, 2013].

⁴¹ See ICANN, “*Defensive Applications for New gTLDs: Summary and Analysis of Public Comment*,” 2012, available at: <https://www.icann.org/en/system/files/files/report-comments-new-gtlds-defensive-applications-14mar12-en.pdf>.

⁴² See Annex 4 and 5 [Asia Green’s Applications for .PARS and .PERSIANGULF, respectively] at 18A.

65. The .PARS gTLD presents none of the difficulties presented by .PERSIANGULF. It is not a geographic term. It is not controversial. It has support from the community to which it refers. And .PARS is more appropriate for Asia Green's stated goals of unifying Persians around the world.

66. The Expert Determination in this Case made this point quite forcefully: "[T]he question arises, why is not the domain named .PERSIANHERITAGE rather than .PERSIANGULF? If the objective is confined to persons of Persian origin, why choose a geographical name? Why choose the name of a body of water that indisputably is bound up with the heritage not only of persons of Persian derivation but millions of Arabs as well?"⁴³

67. The experience with the .ct and .cat gTLDs may be instructive here. The application in that instance came from a desire to serve the people of the Catalonia region. As the ICANN Board will recall, .ct was a controversial string, which generated opposition. In an effort to move forward productively, the applicants in that instance modified their proposed string to .cat, which was not controversial and was able to be issued.⁴⁴

68. Asia Green can sustain all its efforts to speak to and unify Persian people through the uncontested .PARS gTLD. It does not need the disputed and controversial .PERSIANGULF string to achieve its goals.

69. Rather than unnecessarily wading into multiple layers of controversy over the proper name of the gulf and the appropriateness of this geographic name as a gTLD, ICANN can allow Asia Green to undertake its efforts to speak to the Persian community

⁴³ See Annex 6 [October 30, 2013 Expert Determination on .PERSIANGULF] at ¶ 36.

⁴⁴ See Heather A. Forrest, *Protection of Geographic Names in International Law and Domain Name System Policy*, p. 29 (Wolters Kluwer Law & Business 2013).

through the more appropriate, and already issued, .PARS string, while halting the disputed .PERSIANGULF application.

IX. CONCLUSION

70. It is the source of some surprise that the gTLD .PERSIANGULF, which is at least as controversial as other geographic name gTLDs that did not progress, has moved forward. It appears that ICANN may have incorrectly relied on the lack of opposition from the GAC when there was, in fact, significant opposition. As this report has shown, the lack of consensus in the GAC is evidence of the level of controversy over the application.


71. In allowing the .PERSIANGULF gTLD to progress, ICANN has acted contrary to its Articles of Incorporation, its Bylaws, its Applicant Guidelines, GAC principles, and principles of international law.

72. ICANN also appears to have improperly relied on the flawed conclusion of the Expert Determination that there would be no material detriment from the issuance of .PERSIANGULF. However, as discussed above, there is ample evidence of material detriment to the GCC Community Objectors because: (i) Asia Green revealed its intent to maintain a bias in its future management of the string and therefore does not intend to act in accordance with the interests of the community or of users more widely; (ii) Asia Green's own admission that it will not operate the .PERSIANGULF gTLD in a way that respects, or even permits, the viewpoints of so many members of the gulf community interferes with the core activities of that community; and (iii) Asia Green's operation of the gTLD causes damage to the reputation of the community represented by the GCC Community Objectors.

73. One need not take an absolutist approach to geographic names to conclude that the .PERSIANGULF string should not proceed. It is a disputed geographic name that is opposed by much of the affected community. My conversations with government colleagues confirm these concerns and observations, as discussed above.

74. The right decision that the .PERSIANGULF string should not proceed, and no other action should be taken on it, does not create a precedent or absolute rule with regard to geographic names. On the contrary, it is the product of a unique consideration of the particular facts in this case, including the deep-rooted and long-standing controversy over the proper name for the Gulf and the availability of the .PARS string that already allows Asia Green to achieve its stated goals.

I hereby declare that I have prepared this Expert Report to the best of my knowledge and belief.



Steven Tepp