

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

Pursuant to the Internet Corporation for Assigned Names and Number's (ICANN) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*.

Gulf Cooperation Council ("GCC"))

Gulf Cooperation Council Building)

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(Claimant))

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And)

**Internet Corporation for Assigned Names)
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(Respondent))

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ICDR Case No. 01-14-0002-1065

**INTERIM DECLARATION ON EMERGENCY REQUEST
FOR INTERIM MEASURES OF PROTECTION**

**John A.M. Judge
Emergency IRP Panel
12 February 2015**

I. INTRODUCTION

1. The Claimant Gulf Cooperation Council (the “Claimant” or “GCC”) commenced this proceeding by filing a Notice of Independent Review with the International Centre for Dispute Resolution (“ICDR”) on December 5, 2014 in accordance with the Bylaws of the Respondent, the Internet Corporation for Assigned Names and Numbers (“ICANN”). The purpose of this filing is to review the approval by ICANN of a new generic top level domain (“gTLD”) for .PERSIANGULF and its proposed action to enter into a registry agreement with a third party for the award and operation of that top level domain under the New gTLD Program of ICANN. On the same day, December 5, 2014, the GCC also has sought emergency interim measures pursuant to the Rules of the (ICDR) for the appointment of an Emergency Arbitrator and also for an order compelling ICANN to refrain from taking any further steps to sign a registry agreement for .PERSIANGULF until the Independent Review Panel has been concluded.
2. Although the ICANN Bylaws and paragraph 12 of the Supplementary Rules for ICANN’s Independent Review Process expressly preclude the grant of emergency measures of protection, ICANN has consented to the appointment of an Emergency IRP Panellist and to the consideration and disposition of GCC’s Request for Emergency Measures in accordance with the Rule 6 of the ICDR Rules in effect June 1, 2014. By appointment dated 9 December 2014, John A.M. Judge was appointed by the ICDR as the Emergency IRP Panellist to consider the Claimant’s Request for Emergency Measures.
3. The applicant for the proposed gTLD .PERSIANGULF is a private Turkish company which is not a party to the Independent Review Process nor to this Request for Emergency Measures of Protection. However in resisting the application for emergency measures, counsel for ICANN advanced not only the interests of ICANN but also those of that applicant which is seeking to secure a registry agreement for the proposed domain in dispute.
4. The Emergency IRP Panellist has carefully reviewed the following written submissions, evidence and authorities filed by the Claimant and the Respondent:
 - a. The Notice of Independent Review and the accompanying Request for Independent Review Process, both dated 5 December 2014, with Annexes 1-34 (392 Pages) (the “Claimant IRP Request”) and the Expert Report of Steven Tepp filed by the GCC;

- b. The Request for Emergency Arbitrator and Interim Measures of Protection also dated 5 December 2014, with Annexes 1 - 18 (269 pages), filed by the GCC (the “Claimant ER Request”);
- c. ICANN’s Response to the Request for Emergency Relief dated 17 December 2014 with Annexes R-ER-1-18 (approximately 665 pages) (the “ICANN Response”);
- d. The Reply of GCC dated 22 December 2014 with the Witness Statement of Abdulrahman Al Marzouqi signed 22 December 2014, with attached letter exhibit (the “Claimant Reply” or the “Reply”);
- e. ICANN’S Cooperative Engagement Process provided by counsel for ICANN on 23 December 2014.

Oral submissions from counsel for each party were also received by way of telephone conference call on 23 December 2014.

5. Based on the review of these materials, filed, and the oral submissions, this Emergency Panellist is satisfied for the reasons more fully set out herein that interim relief is warranted and therefore hereby declares on an interim basis that ICANN shall refrain from taking any steps to sign a registry agreement for the new gTLD .PERSIANGULF, until further order by an Independent Review Panel to be constituted, such declaration being expressly conditional on the terms and conditions as set out in paragraph 96 hereof.

II. BACKGROUND FACTS

a. The Parties

6. The GCC is a political and economic alliance of six Arab nations whose members are: (1) United Arab Emirates; (2) Saudi Arabia; (3) Kuwait; (4) Qatar; (5) Bahrain; and, (6) Oman. All of the member states border on that body of water separating the Arabian peninsula and the geographic area of the Islamic Republic of Iran (“Iran”), an area formerly known as Persia. That body of water is referred to in these reasons by way of the neutral term the “Gulf”. Among other things, the GCC promotes common economic, cultural, religious and geographic beliefs shared by these Arab nations, including a belief that the proper name for the Gulf is the “Arabian Gulf”.

7. ICANN is a California not-for-profit public benefit corporation formed in 1998 for the express purpose of promoting the public interest in the operational stability of the Internet by, inter alia, “performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system” (Exhibit R-ER-1, Articles of Incorporation, para. 3). According to ICANN’s Bylaws, Article 1 Section 1, its mission is “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operations of the Internet’s unique identifier systems” including the DNS.
8. ICANN is itself a complex organization which facilitates input from stakeholders around the world and acts, as submitted by counsel, “as a community of participants”. ICANN’s Articles of Incorporation further provide that in carrying out its mandate, ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities 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 that enable competition and open entry in Internet-related markets.” (Ex. R-ER-1, Articles of Incorporation, para. 4).

b. The Historical Name Dispute: “Persian Gulf” vs. “Arabian Gulf”

9. There has been a long standing dispute for more than fifty years between Arab states, many of which are in the GCC, and Iran, which is a non-Arab nation bordering the Gulf, over the proper name for the Gulf. Iran uses the term Persian Gulf while the Arab states refer to it as the Arabian Gulf.
10. This naming dispute is part of a broader series of historical differences and conflicts between Iran and one or more Arabian members of the GCC involving various matters of culture, religion, contested sovereignty of lands and islands, the use of commercial air space, participation in sporting events and even censorship of publications due to the use of one or other of the disputed terms to describe the Gulf. As a result of this history of disputes, the GCC and its members are extremely sensitive to use of the term “Persian Gulf” in virtually any context, including its use as a top level domain. Various examples of the ongoing dispute are more particularly described in the Claimant’s IRP Request at paras. 25-29.

11. ICANN does not dispute that the GCC holds strong beliefs in its position regarding this naming dispute. However, ICANN challenges the merits of GCC's position in this IRP proceeding and on this Request for Emergency Measures on numerous grounds discussed below.

c. ICANN's Structure and the New gTLD Program

12. **Organizational Structure.** As a not for profit corporation, the business and affairs of ICANN are controlled and conducted by the ICANN Board, like any other corporation (Bylaws Article II, Section 1). However, ICANN has created a complex organization and governing structure, quite unlike that of any private or public corporation. It is a structure which promotes diversity, inclusion and participation on a global basis not only through its Board and staff, but also through various Supporting Organizations and Advisory Committees (see the Bylaws, Articles V to XI).
13. One such committee is the Governmental Advisory Committee (the "GAC") consisting of members appointed by and representing governments from around the world to consider and to advise ICANN on internet related issues and concerns of governments, particularly where there is an interaction between ICANN policies and national laws and international agreements or on matters otherwise engaging other public policy issues (Bylaws, Article XI, Section 2). Members of the Claimant GCC are members of the GAC.
14. Since the deliberations and advice of the GAC at specific times play an important role in the narrative of events on this application, it is appropriate to clarify the function of the GAC in relation to ICANN. According to ICANN's Bylaws, the GAC itself does not act for or on behalf of ICANN. Instead, it acts as an important advisory resource for ICANN. The interaction between the GAC and ICANN, acting through its Board, is specifically addressed in various provisions of the Bylaws including Article XI 2.1 as follows:

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to

public policy issues falling within their responsibilities.

It is clear that the ICANN Board is not bound by the GAC Advice. However, it must consider it and provide an explanation if that advice is not followed.

15. While complex in its structure, ICANN also emphasizes and promotes accountability and transparency in its practices and decision making, objectives which are critical for its work in relation to the Internet and its global community of users and participants to ensure fairness in its procedures (see Bylaws Article III). Indeed, the Bylaws establish various procedures for the review of various actions or inactions of the ICANN Board. The Independent Review Process is one such process intended to facilitate the review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. It is this Independent Review Process (the "IRP") which has been invoked by the GCC. The material procedures and requirements for the IRP are reviewed more fully below.
16. **The New gTLD Program.** Historically, there have been a limited number of top level domain names, such as .com, .net and .org, as well as the country specific domains. As confirmed in the Articles of Incorporation, Article 3.(iii), the mandate of ICANN, pursued over many years, has been to develop procedures for expanding the number of top level domains and increasing the number of companies to act as registrars for the sale of domain name registrations. These efforts ultimately led to the introduction of the New gTLD Program to significantly expand the Internet's naming system and to thereby expand consumer choice and encourage competition and innovation. ICANN, with its community of supporting organizations and advisory committees, painstakingly developed through many iterations over time an Applicant Guidebook to set out the application instructions and procedures for the delegation of new generic domain names.
17. **GAC Input for the Applicant Guidebook.** As the Guidebook was under development, the GAC prepared its GAC Principles Regarding New gTLDs dated March 28, 2007 which set out certain GAC consensus advice to the ICANN Board on public policy principles to apply to the delegation of new gTLDs. The GAC recommended, inter alia, that the New gTLDs should respect the "sensitivities regarding terms with national, cultural, geographic and religious significance"(Claimant ER Request, Annex 1, Section 2.2.1.b). Furthermore, the GAC advised 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.” (Annex 1, Section 2.2.2). Finally, with respect to the implementation of these principles, the GAC advised that if “individual members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them” (Annex 1, Section 3.3). While these set out the expectations of the GAC, it must be recalled that the GAC serves only an advisory role and does not bind ICANN.

18. The gTLD Application Guidebook version 2012-06-04 (the “Guidebook”) is the final version material to the application for and evaluation of the requested domain .PERSIANGULF as well as for the objection procedures which may be taken to the delegation of a proposed domain.

d. The Application for .PERSIANGULF and the Opposition of the GCC

19. On July 8, 2012, the Turkish company, Asia Green IT System Bilgisayar San. ve. Tic. Ltd. Sti (“Asia Green”) applied for the registration of the gTLD .PERSIANGULF in accordance with the Guidebook. The founders of Asia Green are said to be of Persian origin (see Claimant Request for Interim Measures at p. 34 of 269; Annex 3, Asia Green application at page 4 of 50). The purpose of the gTLD .PERSIANGULF is said to provide a forum for serving people of Persian descent and heritage who are living around the world (see Asia Green application at page 5 of 50) and who share common business, cultural and religious interests in the Middle East and Persia specifically.
20. Asia Green also applied for the new gTLD .PARS. The term Pars refers to the ancient country located in southwestern Iran, and in particular Fars province, which is regarded as the cultural capital of Iran and is the original homeland of ancient Persians (Claimant Application, Annex 18, Application for PARS, page 5 of 53). The application for .PARS is essentially the same as that for .PERSIANGULF. Asia Green has in fact been granted the gTLD for .PARS and a registry agreement was signed in early September 2014 for the operation of the .PARS registry and the sale of domain names under that gTLD.
21. While the Asia Green application for .PARS proceeded without objection or opposition, the opposite is true of the .PERSIANGULF application. The GCC has opposed the .PERSIANGULF application consistently since the fall of 2012 throughout the application process.

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.
23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:
- a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;
 - b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).
 - c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

the gTLD domain may be explicitly or implicitly targeted(Guidebook at Article 3.2.1);

- d. **Independent Objection.** The Independent Objector is a person appointed by ICANN with significant experience in the Internet community who exercises independent judgement in the public interest in determining whether to file and pursue a Limited Public Interest Objection or a Community Objection to an application (Guidebook, Module 3, Articles 3.2.1; 3.2.2.3; 3.2.2.4; 3.2.5).
- e. **Mandatory Government Support for certain Geographic Names.** If the proposed domain is a geographic name, as defined in the Guidebook, then the applicant must also file documented support from or non-objection by the relevant or affected government. Such geographic names are narrowly defined to include capital city names, sub-national place names, such as a county, province or state, and certain UNESCO and UN designated regions or sub-regions. However, geographic names which do not fall within these express designations or narrow definitions do not require documented support or non-objection by the relevant government. If there is any doubt, the Guidebook further suggests that the applicant consult with the relevant government and public authority to enlist support or non-objection prior to submission. (Guidebook, Article 2.2.1.4.2)

In the event that an application successfully completes these stages, the application transitions through the delegation process which includes certain testing and technical set up and the negotiation and execution of a registry agreement.

24. The Asia Green application for .PERSIANGULF engaged all of these objection procedures, save the need for obtaining prior government support from affected governments. In that regard, it cannot be disputed that .PERSIANGULF is not within the definition of designated geographic names under the Guidebook. Therefore, Asia Green was not required to obtain the written support from the Claimant or its member states. It is also undisputed that Asia Green did not in fact consult with the Claimant or its members, whether there was any obligation to do so or not. The evidence does show that the Claimant or its member states have consistently opposed the application for .PERSIANGULF and clearly would not have supported the application if consulted.

- 25. GCC Letters of Opposition.** In October 2012, representatives of the governments of the UAE, Bahrain, Qatar and Oman sent separate but similar letters to the Chair of ICANN and to the Chair of the GAC objecting to the delegation of .PERSIANGULF as a new gTLD on two grounds. First, the proposed domain referred to a geographical place whose name was disputed in light of the historical naming dispute over the Gulf. Second, the use of the proposed name targeted countries and communities bordering the Gulf (including the six member states of the GCC) which were not consulted about and did not support the use of this proposed domain, thereby confirming the absence of any community consensus for its use (Claimant ER Request, Annexes 8,9,10 and 11). Therefore, on these basic grounds, the governments objected to the delegation of the proposed domain.
- 26. GAC Early Warning.** On November 20, 2012, the governments of the UAE, Bahrain, Oman and Qatar issued a GAC Early Warning objecting to the delegation and recommending that Asia Green withdraw the application for the same reasons as had been set out in the October letters of objection (Claimant ER Request, Annex 12)
- 27. Review by the Independent Objector.** In December 2012, the Independent Objector completed a review of the naming dispute and the public comments against the .PERSIANGULF gTLD, concluding that an objection on either the limited public interest ground or the community objection procedure was not warranted (ICANN Response, Annex R-ER-5). With respect to the limited public interest ground, the Independent Objector noted that there were no binding international legal norms to settle the issue. Resolutions of the United Nations Conference on the Standardization of Geographical Names urge countries sharing a geographical feature to agree on a name, failing which the separate names used by each country should be accepted. As for the Community Objection, while accepting that there was a clearly delineated community implicitly targeted by the application and that a significant portion of that community opposed the application, the Independent Objector considered it “most debateable” that the gTLD would “create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community”, that is the Arab communities, which was the threshold requirement under the Guidebook for the launch of an independent objection (ICAAN Response, Exhibit R-ER-5). In the view of the Independent Objector, the new gTLD should neither solve nor exacerbate the naming dispute. Instead it was appropriate to adapt to the *status quo* by taking no

position. He noted the GCC could file its own objection and could apply for the gTLD .ARABIAN GULF. Therefore, the Independent Objector considered it inadvisable to file an objection.

28. GCC's Community Objection. On 13 March 2013, the GCC filed a Community Objection to the .PERSIAN GULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)

29. GAC Advice under the Guidebook for Pending Applications and GCC Objections. As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIAN GULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.

30. At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIAN GULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).

31. In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIAN GULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

Ex. R-ER-6) which annexed to it a table referred to as a “Scorecard” (ICANN Response, Ex R-ER-7), recording the NGPC Response to each item raised by GAC in the Beijing Communique. With respect to .PERSIANGULF, the NGPC accepted the GAC advice and it was noted in the Scorecard that the advice would not toll or suspend the processing of any of the applications.

32. At the July 13-18 Durban GAC Meeting, the GAC gave further consideration to .PERSIANGULF application , among others. This GAC meeting has generated two documents which contain conflicting information on the deliberation over .PERSIANGULF. The Claimant has relied upon the GAC Meeting Minutes, (Claimant ER Request, Annex 14 in which the discussion was recorded as follows:

“The 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.** 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. [emphasis added]

33. ICANN contrasts this language with the GAC Durban Communique which is received as the official document providing GAC Advice to the ICANN Board. This Communique (Claimant IRP Request, Annex 24) provides that “The GAC has finalized its consideration of the following strings, and **does not object to them proceeding:** ... ii. persiangulf (application number 1-2128-55439”. This language suggests that there was in fact a consensus of the GAC members not to object to the application.

34. The Claimant’s Reply Witness Abdulrahman Al Marzouqi attended the Durban meeting as the representative of the UAE and his evidence makes clear, at paragraphs 5, 6 and 7 of his Statement, that there was no consensus reached whatsoever, whether to support the application or to oppose it. The position taken by the Iranian representative and the opposing position taken Mr. Al Marzouqi for the UAE, apparently shared by others, prevented any consensus on any position regarding .PERSIANGULF. The general discord over geographic names was also reflected in the recommendation in the Durban Communique calling for further collaboration with GAC in refining the Applicant Guidebook for future rounds regarding the protection of terms with national, cultural, geographic and religious significance in accordance with the 2007 GAC Principles referenced above.

35. ICANN Board Response and Notification September 2013. The Durban Communique was relied upon by the NGPC of the ICANN Board as the formal statement of advice from the GAC to ICANN. Therefore, the NGPC noted and considered that GAC advice and responded to it by way of resolution and an attached “Scorecard” as follows:

“**ICANN will continue to process the application** in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.” (emphasis added)

This NGPC resolution and the Scorecard were posted online on September 12, 2013 and the minutes and related materials were posted on 30 September 2013 (the “NGPC Resolution and Scorecard”). It is this decision to “continue to process the application” which is said to be the action of the ICANN Board to approve the delegation of .PERSIANGULF and which therefore triggered the 30 period for filing a Request for an IRP. However, with the community objection still pending, the evidence is not clear as to the exact status of the application approval at that time. The ICANN Board and the NGPC did not and presumably would not unequivocally approve the delegation while the community objection was still pending.

36. Community Objection and Expert Determination. The Community Objection proceeded from March 2013 to October 30, 2013 when Judge Stephen Schwebel issued his Expert Determination, dismissing the Objection of the GCC. It must be noted that the necessary elements in support of a Community Objection are different from those required on an IRP. More importantly, they are significantly different from the threshold tests on an application for emergency measures in the context of an IRP. Judge Schwebel found that the GCC had met three of the four necessary elements for a successful Objection. He found that the GCC did have standing as an institution created by treaty having an ongoing relationship with a clearly delineated community, that is Arab inhabitants of the six member states of the GCC. It was plain and obvious that there was substantial opposition by the Arab inhabitants and the community to the application. It was also concluded that the Arab inhabitants would be implicitly targeted by the .PERSIANGULF gTLD. However, Judge Schwebel found that the GCC failed to meet the fourth element in that the GCC did not establish that the targeted community would “suffer the likelihood of material detriment to their rights or legitimate

interests”, as required and defined under the Guidebook. Therefore, the objection was dismissed. He accepted that naming disputes such as that regarding the Gulf can be of high importance to States, “roiling international relations”. However, in his view, the impact of the application .PERSIANGULF was difficult to discern and “it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute”. Echoing the Independent Objector, he noted that the GCC was free to seek registration of the .ARABIANGULF. ICANN has repeated this argument in its Response although no such application for .ARABIANGULF has in fact been made by the GCC.

37. October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review. ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.

38. The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohammed Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

not been disputed that this letter was received by ICANN. No written response from Mr. Chehade or ICANN was adduced in evidence, either before or after the oral argument of this application. No written response is referenced by Mr. Al Marzouqi in his statement. Indeed, he suggests that the only response was a suggestion in September by his unnamed “ICANN counterpart” that the GCC *may* have to file a request for independent review.

39. By September 2014, the manner of dealing with certain geographic names remained a live issue. At that time, there was no evidence of a definitive statement from ICANN that a registry agreement was about to be signed for .PERSIANGULF. By contrast, Asia Green had apparently signed a registry agreement for .PARS by early September 2014, which agreement is posted by ICANN online. Some proposed changes to the Guidebook had also been tabled which would require the agreement of relevant governments to the delegation of geographic names as new domains. (Claimant IRP Request, Annex 1, “the protection of geographic names in the new gTLDs process, v.3 August 29, 2014). Although the Claimant attributed this proposal to ICANN (Claimant IRP Request at para. 1), it appears on review to be the work of a sub-working group of the GAC, and not of ICANN itself. The evidence is not clear on this point. In any event, it serves to illustrate that the use of geographic names remained a live issue within the ICANN community of committees while the delegation of .PERSIANGULF remained pending.
40. According to Mr. Al Marzouqi, the handling of geographic names was a topic of continued discussion in October 2014 at the ICANN meetings in Los Angeles, all without a resolution. Thereafter, he advised the GCC in November to proceed with the request for an IRP which it did on December 5, 2014. He also states that at no time during the resolution efforts from September 2013 to November 2014 was it suggested that the GCC would be time barred from proceeding with an IRP.

III. THE INDEPENDENT REVIEW PROCESS AND THE REQUEST FOR INTERIM MEASURES OF PROTECTION

41. ICANN attaches considerable importance to the principle of accountability and to that end has enshrined two important procedures in Article IV of its Bylaws to ensure accountability of decisions: 1. Reconsideration of a Board action; and, 2. Independent Review of a Board decision or action (ICANN Response, Exhibit R-ER-1). The first provides for a review or

reconsideration of any ICANN action by the Board itself for the benefit of any person or entity materially affected by that action. That procedure was not implemented by the GCC. The second is for an Independent Review by a third party of the Board decision or action alleged by an affected party to be inconsistent with the Articles or Bylaws. The Claimant chose to proceed with the Independent Review Process, rather than a Reconsideration, as it was entitled to do.

42. Bylaw Article IV, Section 3 sets out the detailed procedures for the IRP and the following requirements were urged as material to this application:

- a. A Request for IRP must be filed within 30 days of the posting of the Board meeting minutes said to demonstrate a violation of the Articles or Bylaws(Art. IV, Section 3.3);
- b. In comparing the contested action with the Articles or Bylaws, the IRP panel must apply a standard of review that is specifically and narrowly defined, to focus on the following three questions(Art. IV, Section 3.4):
 - i. Did the Board act without conflict of interest in taking its decision?
 - ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in from of them?
 - iii. Did the Board members exercise independent judgement in taking the decision believed to be in the best interests of ICANN?
- c. There shall be a standing panel of IRP panel members from which a panel can be readily constituted and all proceedings shall be administered by an international dispute provider (Art. IV, Section 3.6).
- d. The IRP Panel has specific and limited remedial authority (Art. IV, Section 3.11) to order, *inter alia*:
 - i. Summary dismissal for frivolous or vexatious requests;
 - ii. A declaration whether an action or inaction is inconsistent with the Articles or Bylaws; or,
 - iii. A recommendation to the Board to stay any action or decision until such time as the Board reviews and acts upon the IRP opinion.

43. Prior to initiating a request for an IRP, a complainant is encouraged under the Bylaw to enter into a cooperative engagement process which is a voluntary ICANN process with the detailed

procedures being incorporated by reference into Bylaw Article IV, Section 3. These procedures include the tolling of the time for filing an IRP during each day of the cooperative engagement process up to fourteen days, unless a longer extension is mutually agreed in writing.

44. ICANN has also prepared the Supplementary Procedures for the IRP which confirmed the designation of the ICDR as the Independent Review Panel Provider. The ICDR Rules, together with the Supplementary Procedures and the Bylaws govern the IRP process. While the Supplementary Procedures expressly exclude the emergency measures of protection under the ICDR Rules (Paragraph 12, Supplementary Procedures), certain specified interim measures of protection may be recommended by an IRP Panel to the Board. These include a stay of any decision of the Board, such measure being consistent with those permitted under the Bylaw. As noted earlier, ICANN has agreed for the purposes only of this proceeding that an emergency arbitrator or panelist be appointed with the authority to issue an interim declaration to the ICANN Board as an emergency measure.

45. **Claimant's Position on Emergency Interim Measures.** The main submission put forward by the GCC in support of its request for emergency measures can be briefly summarized as follows:

- a. Article 6 of the ICDR Rules applies as no IRP panel has been appointed. Since ICANN is about to sign a registry agreement for .PERSIANGULF, the IRP Request will be rendered moot absent emergency interim relief (Claimant's ER Submission, para. 16);
- b. The four part test for establishing an entitlement to emergency interim relief have been met on the evidence, specifically:
 - i. *Urgency.* The GCC will be deprived of a meaningful independent review if ICANN signs the registry agreement.
 - ii. *Necessity.* There is no harm to either ICANN or to applicant, Asia Green, which outweighs the harm to the GCC absent any emergency interim measures. While Asia Green may be delayed in the processing of its pending application, such delay will cause no prejudice as Asia Green has the registry agreement for the .PARS gTLD which is intended to serve the

same market and constituency as it intends to target with .PERSIANGULF.

- iii. *Protection of an Existing Right.* GCC has a right to a meaningful IRP in accordance with the ICANN Bylaws which will be protected by the relief sought. That right will be useless without the emergency relief.
- iv. *A Reasonable Possibility of Success on the Merits of the IRP.* The GCC emphasized that the standard of establishing a “reasonable possibility of success” is a lower standard than a “reasonable likelihood” of success for the purpose of showing that ICANN acted in a manner inconsistent with numerous “guidelines”. In the Claimant IRP Request dated December 5, 2014, the GCC placed emphasis and reliance on the GAC Principles Regarding New gTLDs presented March 28, 2007 and certain other GAC advice arising from GAC meetings in 2013 which ICANN is said to have ignored (see also Claimant’s ER Request, paragraphs 21 – 25).

46. Respondent’s Position on Emergency Interim Measures. ICANN resists the application for interim measures essentially on the general ground that ICANN did everything it was required to do under the applicable Articles and Bylaws and that it properly followed the procedures contemplated in the Guidebook. ICANN also submitted three specific grounds for denying the requested relief which can be briefly summarized as follows:

- a. The GCC is not reasonably likely to succeed on the merits of the IRP for two basic reasons. First, the IRP Request was filed long after the expiry of the 30 day filing period for doing so and is therefore time barred. Second, no ICANN Board action has been identified by the GCC said to violate the Articles or Bylaws.
- b. The unreasonable delay of over one year by the GCC in bringing the Request in and of itself justifies the dismissal of the request and serves to underscore the lack of any urgency, necessity and harm to GCC.
- c. The GCC has no demonstrable harm which outweighs the harm to others like Asia Green which has invested time, energy and money in its application. The integrity of the application process for which ICANN is responsible will also be harmed. The GCC will not be harmed as it can easily apply for .ARABIANGULF in order to serve its communities.

ICANN also reviewed in detail the procedures to be followed under the Guidebook and Bylaws and, based upon a detailed review of the chronology, submitted that ICANN did everything required of it to consider the concerns raised by the GCC members. In so doing, it took no steps inconsistent with the Articles or Bylaws.

47. Reply of the Claimant. In its Reply, the GCC addressed the key responding submissions of ICANN as follows:

- a. The ICANN decision and action in issue is well known and obvious – the decision to approve Asia Green’s application for the new gTLD .PERSIANGULF (GCC Reply, para 11).
- b. The IRP Request is not time barred as ICANN has by its conduct from September 2013 to November 2014 effectively extended the time for filing as a result of ongoing discussions between the GCC and ICANN to resolve the issue, some of which involved the most senior executives of both organizations. Informal discussions continued through September and October and it was suggested to GCC by an unnamed ICANN representative that it may have to file an IRP request to reach a resolution. Therefore, there was no unreasonable delay as the GCC then proceeded to prepare and to file the Request dated December 5, 2014(GCC Reply, para, 6-9,17).
- c. The GCC also asserted that ICANN’s action were inconsistent not only with the GAC advice previously identified, but also with certain specific core values of ICANN enshrined in Article 1, Section 1 of the Bylaws which are to guide decisions and actions of the Board, namely:
 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision making;
 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness;
 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.
- d. As to the balancing of the relative harm, whether the interim measures are granted or not, the GCC asserted that the harm to it by a denial of relief would be irreparable as it would

lose the valuable right to an independent review. By contrast, ICANN has offered no evidence of harm to it, nor to Asia Green, which would outweigh the harm to the GCC.

48. The positions of both parties were further developed and clarified in oral argument on the application heard by way of telephone conference call on December 23, 2014 which was approximately one and one half hours in duration.

IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION

49. Is the GCC entitled to an interim declaration by way of an interim measure of protection that ICANN refrain from signing a registry agreement for .PERSIANGULF pending the hearing of the GCC Request for an IRP? Specifically, on the limited evidence available, has the GCC satisfied the following tests proposed by the parties for the grant of interim relief:

- a. urgency;
- b. necessity;
- c. protection of an existing right; and,
- d. a reasonable possibility of success on the merits of the IRP?

V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION

50. The parties in their written and oral submissions have analogized the independent review process and this request for interim emergency measures within this IRP to an international arbitral proceeding under the ICDR Rules and the Supplementary Procedures. It is generally accepted that interim or provisional measures are intended and designed to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner. Interim measures protect both the rights of a party and the integrity of the dispute process. While some measures may be aimed at preserving evidence critical to the disposition of the main dispute, other measures are intended to preserve a factual or legal status quo to safeguard a right, the recognition of which is sought before the tribunal hearing the substantive merits of the particular dispute (see Gary Born, *International Commercial Arbitration*, Kluwer, 2009, Vol. II at p. 1944). The necessary elements of proof will differ depending on the nature of the interim emergency relief sought, whether to preserve evidence or to preserve the status quo. Here, the requested interim emergency measure is in the nature of injunctive relief to restrain

an action, the execution of a registry agreement, in order to preserve the status quo pending the completion of the IRP.

51. The ICDR Rules expressly provide the power to grant interim measures, such as injunctive relief, including on an emergency basis under Article 6 prior to constitution of a panel. That article applies here by express agreement. Such extraordinary relief prior to the determination of the substantive merits is discretionary and largely fact driven. The ICDR Rules and the Supplementary Procedures are silent as to the necessary tests to guide the exercise of discretion to award such relief. The parties have referred to numerous authorities, some diverging, on the appropriate factors to consider, particularly with respect to the extent of an assessment and consideration of the substantive merits of a case. These authorities include not only U.S. domestic court cases and international arbitral institutional rules and awards, but also a prior decision of another ICANN IRP panel under the ICANN Bylaws. Given the divergence between the parties on the applicable test for considering the substantive merits, it is appropriate to clarify and confirm the tests emerging from the authorities to guide the exercise of discretion in awarding any interim emergency relief.
52. The Claimant has relied heavily on the decision of the ICANN IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13 (12 May 2014) in which an IRP Panel gave relief on an application for interim measures based on a four part test requiring proof of: (1) urgency; (2) necessity; (3) protection of an existing right; and, (4) a prima facie case or reasonable possibility of success on the merits (See Claimant ER Request, Annex 15, Decision at para. 37). ICANN has not put the first three criteria in issue, though each merits some elaboration. With respect to the fourth criterion, ICANN appeared to have accepted the applicability of that element, but then argued that the GCC has no reasonable *likelihood* of success for specific reasons.
53. The Claimant has also adopted the argument, which found success in the *DotConnectAfrica* IRP Panel decision, that interim relief was warranted as ICANN had failed to establish a standing panel of IRP panellists, as required under the Bylaws. In that case, the failure to establish a standing panel delayed the constitution of a panel for the specific case and significantly impaired the ability of the claimant to seek timely relief. There, the Panel found that the need for interim relief arose directly from the failure of ICANN to scrupulously honour its own procedural Bylaws. That argument does not carry the same weight or force in

this case as ICANN has designated the ICDR as the provider of panellists to serve on the IRP panel and the ICDR has acted promptly and efficiently in constituting a panel.

54. Here, the Request for an IRP was filed on December 5, 2014 and an IRP panellist was appointed on an emergency basis within four days, on December 9, 2014, with ICANN agreeing to the application of the ICDR Rules for emergency measures. A brief procedural hearing was held on the December 9 and the need for immediate emergency relief was then addressed but found unnecessary due to the undertaking of ICANN not to sign the registry agreement for .PERSIANGULF pending this application. The procedure for the appointment of the IRP panel or an Emergency Panel worked effectively and had no adverse impact whatsoever on the ability of the Claimant to seek effective interim relief. Interim emergency relief is not necessary or warranted based on this argument regarding the creation of the standing panel that found success in the *DotConnectAfrica* case. This case must be determined on the application of the generally accepted criteria for interim measures of protection.

a. Urgency or Irreparable Harm

55. The element of urgency imports the notion that the applicant will suffer imminent irreparable or serious harm if no interim relief is granted before the IRP hearing process is concluded at which time entitlement to relief for reparable or other harm may be finally addressed in the normal course (A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 4th ed. 2004, para. 7-29 and 7-30; Born, *supra*, page 1981 - 1982). Here, the GCC argues that its right to a fair and effective IRP process will be lost entirely if ICANN proceeds to sign a registry agreement for the disputed domain before the IRP proceeding can be held and completed. The relief sought by the GCC in its IRP Request expressly includes a declaration “requiring ICANN to refrain from signing the registry agreement [for .PERSIANGULF] with Asia Green or any other entity”(Claimant IRP Request, para. 75).

56. It is undisputed that ICANN intends to sign a registry agreement with Asia Green. ICANN’S undertaking to refrain from doing so is in place only pending the application for emergency measures and not until the final declaration in the IRP process. ICANN also intends to use its standard form registry agreement, a copy of which is available online. The registry agreement is for a term of ten years, subject to successive ten year renewals. As discussed

during oral argument, the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that the ICANN should not have signed that particular agreement. The execution of the registry agreement cannot be readily and lawfully undone.

57. While ICANN argues the absence of any harm to the GCC, irreparable or otherwise, by the delegation of the domain and the signing of a registry agreement, it does so principally in the context of two other elements for relief, namely necessity or the balancing of the harm and also the absence of any reasonable likelihood of success on the merits of the IRP. ICANN's position on these points is discussed in detail below under those particular elements.
58. ICANN also argues that any perceptions or adverse impact arising from the registration of .PERSIANGULF can be simply counteracted by registration of the gTLD .ARABIANGULF by the GCC. There are two difficulties with this argument for this application. First, it does not address the importance of the right to a fair and effective IRP process and the loss of that right. Second, it raises the issue of the existence and scope of any duty or obligation to mitigate on a party which may suffer irreparable harm by the actions of another. Should the GCC be required to undertake the effort, time and expense of applying for and operating a competing registry in an effort to counteract the impact of the disputed domain? In any event, would such a competing registry avoid or undo harm caused by the other? This issue will be also discussed in connection with the primary arguments of ICANN on the consideration of the merits of the IRP. Suffice it to say at this point that the option of GCC applying for .ARABIANGULF does not avoid the harm to the GCC in respect of the IRP process, absent any interim relief nor does it negate the harm arising from the delegation of .PERSIANGULF.
59. For this application, this Panel accepts that the right to an independent review is a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process. If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant's right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant's IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a declaration

that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.

b. Necessity or the Balancing of Harm

60. The test of necessity imports an assessment of the relative proportionality of harm suffered, that is, a consideration and balancing of the harm to the Claimant if the interim relief is not granted with the harm caused to the Respondent if the relief is in fact ordered. The irreparable harm to the Claimant is already described above.
61. In terms of potential harm arising from or caused by the grant of the requested declaratory relief, ICANN relies on harm to itself and also to the Applicant Asia Green. ICANN is rightly concerned about maintaining the integrity of the gTLD application process and processing the application quickly and efficiently. Beyond that, counsel candidly admitted, when asked in oral argument, that there will be little harm to ICANN itself in the event that interim emergency relief is granted. It can also be said that the integrity of the ICANN independent review process, to ensure accountability and transparency in decision making, is also an integral part of ICANN's application process which merits promotion and protection. While some prejudice by delay to the gTLD application may arise from the granting of the requested interim relief, that is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process. Furthermore, the delay in the IRP is likely to be far shorter than the delay to date in the processing of the application. It is not clear what has caused the delay from October 2013 to November 2014 in the decision to sign the registry agreement, other than, as suggested by counsel for ICANN, the routine processing of the application and the negotiation of the agreement. In any event, any harm to ICANN by the grant of interim relief does not outweigh the harm to the GCC through the deprivation of a meaningful IRP process if no relief is granted and the registry agreement is signed.
62. Counsel for ICANN also pointed to and relied on the harm caused by the delay in the delegation to the applicant Asia Green which has invested time, effort and money into the pursuit of its application. That harm is said to be real and significant, with added continuing expense and delay in the conduct of business using the domain. It is said that this real harm stands in contrast to the vague allegations of harm to the GCC which may be caused by the

delegation of the disputed domain, particularly when the GCC could itself apply for and obtain .ARABIANGLF. It may be argued that the harm to Asia Green is not relevant to a consideration of relief on this application as Asia Green is not a party to this proceeding. However, in my view it is appropriate to consider such harm as it will also reflect upon and reinforce the potential reputational harm to ICANN with respect to the integrity of the application process.

63. In considering the harm to Asia Green, it must be remembered that Asia Green already has access to another delegated domain .PARS, for which a registry agreement is signed and is intended to target the same market as .PERSIANGULF. Asia Green will not be precluded from actively developing its business. Counsel for ICANN candidly admitted during oral submissions that he was not certain of the need for Asia Green to have two registries for essentially the same market, but noted that Asia Green had in any event spent considerable time and money for the disputed domain. Apart from the general impact of delay, there was no specific evidence of harm to Asia Green, such as a particular lost business opportunity.
64. In my view, the harm to the GCC absent any interim relief clearly outweighs any harm to Asia Green which may be caused by the grant of interim relief requiring ICANN to refrain from signing a registry agreement for .PERSIANGULF pending the IRP process. Any delay can be kept to a minimum by the prompt constitution of the IRP panel through the ICDR and a reasonable and efficient schedule for the conduct of the review. The application process has not in any event been proceeding in an overly expeditious manner, given that the application was made in July 2012. By September 2013, the NGPC Scorecard noted that ICANN will “continue to process the application” and it was only in November 2014 that the signing of a registry agreement appeared imminent. There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green.
65. In balancing the harm which may arise, whether interim relief is granted or not, it is clear on a balance of probabilities and not mere possibilities, that the harm to the GCC absent any relief is irreparable and that the loss of an effective meaningful IRP process outweighs any harm to either Asia Green or ICANN arising from delay in the signing of the registry agreement.

c. Protection of an Existing Right

66. This criterion was accepted and applied by the IRP Panel in the *DotConnectAfrica* Decision on Interim Measures of Protection, relied upon by the Claimant, although it is not entirely

clear where this requirement originates in the authorities and what is intended by it. This requirement is not normally separately identified either in case law or in authoritative texts as a specific criterion for the grant of interim injunctions or interim measures of protection. It is perhaps plain and obvious that the grant of an interim measure to preserve a factual or legal status quo is virtually always dependent on the assertion of an identified legal or equitable right. However, some interim measures not applicable here, such as an order to freeze assets to preserve rights of execution, may relate to only potential rights as opposed to existing rights. In any event, both the Claimant and the Respondent have proceeded on the basis of the existence and application of this third criterion.

67. The ICANN Bylaws, Article IV, Section 3.1 establishes “a separate process for independent third party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” As stated in the Reply, it is this right which the Claimant seeks to protect, failing which the review will become meaningless after the execution of the registry agreement by ICANN. The protection of this right for the independent review of a Board decision to delegate the domain and enter into a registry agreement is an existing right which meets this pre-requisite for the grant of interim emergency relief.

d. A Reasonable Possibility that the Requesting Party will succeed on the Merits

68. The consideration and impact of the merits of the IRP is the main point of contention between the parties. They disagree not only on the basis of the available evidence, but more fundamentally on the definition and scope of this legal requirement. The Claimant maintains that it need show only a *reasonable possibility* of success on the merits of the IRP. The Respondent, while appearing to confirm the applicability of that test in its written submission (ICANN Response, para. 42), also submitted a more stringent standard that the Claimant must show a *reasonable likelihood* of success, which, ICANN submits, cannot be established on the evidence.

69. **The Applicable Test.** In the *DotConnectAfrica* Decision on Interim Measures, the IRP panel considered the competing tests of proof of a *prima facie* case and proof of a reasonable possibility of success and found that there was no meaningful difference between those two tests. They are essentially one and the same standard. That panel in *DotConnectAfrica* also

went on to state that interim relief should be available “on a standard of proof which is less than required for the merits under applicable law”. This panel agrees with that finding. It should also be noted that in some fora, the requisite standard is couched in terms of whether a preliminary assessment reveals that there is a serious question to be tried or determined which is a standard the same or very similar to the standard of proof of *prima facie* case or proof of a reasonable possibility of success. The threshold is relatively low.

70. The standard of proof of a reasonable likelihood of success on the merits, as submitted by the Respondent, sets the bar too high for interim relief. That is essentially the same standard as balance of probabilities which is the normal civil standard to be applied at the hearing of the substantive merits of the IRP. The lesser standard of a *prima facie* case or a reasonable possibility of success is more appropriate for a number of reasons.
71. On an emergency interim application such as this, the submissions and the evidence are usually incomplete, largely due to the time constraints in developing the evidentiary record. That is the case here. More evidence and detailed submissions can be expected at a substantive hearing. Given the limited evidentiary record, the tribunal must refrain from prejudging the merits of the case on the interim relief application. If the higher standard of reasonable likelihood is applied, it is inevitable that the tribunal will be engaging in an early determination of the merits. A prejudgement of the merits cannot be avoided if the same standard of proof is applied for emergency interim measures as for the substantive hearing. The lesser standard facilitates a provisional assessment without any binding or preclusive impact on the merits hearing. Once the threshold is met, the focus of the analysis will be on the test of irreparable harm and the balance of the respective harm pending the decision on the merits.
72. Where the grant of interim relief may in effect amount to a final determination and put an end to the entire dispute, a more extensive review of the merits may well be appropriate to weigh the likelihood of success along with the irreparability of harm and the balance of the respective harm. However, that is not this case. The grant of interim relief will not foreclose the completion of the IRP process. However, the refusal of interim relief likely will have that effect.
73. The standard of a *prima facie* case or reasonable possibility of success quite properly requires some consideration of the legal sufficiency and relative strength of the respective parties’

cases. Therefore, frivolous and weak cases can be identified and rejected to ensure that the interim measure of protection does not become an unjustified lever or windfall that can damage an innocent party (see Born, *supra*, at page 1992). In that regard, it cannot be said that the merits of the GCC's IRP Request is either frivolous or vexatious. It appears to raise 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.

- 74. The Obligation of ICANN under the Bylaws.** The starting point for the discussion on whether the GCC has shown a reasonable possibility of success on the merits of the IRP is a clarification of the obligations of the ICANN Board under the Articles and Bylaws against which the actions and decision of the Board must be compared and measured. While the Claimant initially relied upon the various instances of GAC advice to the ICANN Board as the basis of its request for review, the Bylaws do not oblige the ICANN Board to accept any or all of the advice of the GAC or to take actions that are consistent only with the GAC advice. The Bylaws require the ICANN to take that advice into account and, where the advice is not followed, to provide reasons for so doing. (Exhibit R-ER-1, Bylaw Article XI, 2.1.j).
- 75.** In its Reply, the GCC also expressly referred to and relied upon the core values set out in Bylaw Article I, Section 2.4, 2.8 and 2.11, quoted earlier at paragraph 47.c.1, and the obligation of the ICANN Board to be guided by those core values in making decisions. The Claimant identified these three of the eleven core values as the yardstick to measure and to assess the ICANN Board action to delegate the domain and to enter into a registry agreement with Asia Green. However, the last paragraph of Article I, Section 2 of the Bylaws makes it clear that the application of the individual or specific core values is necessarily qualified. Due to the breadth of the general language in the stated core values, the closing paragraph of Section 2 expressly provides that "situations will inevitably arise in which perfect fidelity to all eleven core values is not possible". The Board has latitude in its decision making and must of necessity exercise discretion in the balancing of all of the core values to arrive at any decision. Not all core values may be advanced to the same extent.
- 76.** By the same token, the closing sentence of Article 1, Section 2 also sets out certain basic requirements with which the ICANN Board must comply in its decision making. According to the last sentence of Section 2, ICANN *shall*: (1) "*exercise its judgment*"; (2) "*to*

determine which core values are most relevant and how they apply to the specific circumstances of the case at hand"; and, (3) *"to determine, if necessary, an appropriate and defensible balance among competing values"*. It is against these requirements that the relevant decision in issue of the ICANN Board must be assessed on the evidence. The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

77. This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement.
78. **The Decision in Issue.** The Respondent submitted, in part, that the Claimant had failed to identify any "action or decision" of the Board capable of review. The Respondent then also argued in the alternative that the only Board decision that could have injured the GCC is the September 2013 decision to "continue to process the application" in accordance with the Guidebook, following the GAC Durban Communique that the GAC did not object to the application (ICANN Response at para. 48). The Claimant submitted in Reply that the Board action in issue is well known and is simply the decision to proceed to delegate the domain .PERSIANGULF and to enter into a registry agreement. It is not disputed that ICANN is in fact about to enter a registry agreement with Asia Green for that domain.
79. The Emergency Panel accepts the Claimant's position that the Board decision and action in issue is the decision to proceed to delegate the domain .PERSIANGULF to Asia Green and to enter into a registry agreement, all pursuant to the Guidebook. If not for that decision, this Emergency Request would not have been brought. That decision is capable of review.

80. The only available documentary evidence of that Board decision adduced by the parties is the posting of the NGPC Resolution and Scorecard on September 12, 2013 to “continue to process the application”, followed by the posting on September 30, 2013 of the Minutes and Briefing Materials related to that decision. There are no other Board resolutions or memoranda after September 2013 which otherwise address or confirm the Board deliberation or decision to make the delegation. It is in relation to the posting of the Resolution, Scorecard and Minutes that the Respondent has based its main arguments against any emergency interim relief, namely that the request for the IRP was time-barred or was in any event unreasonably and fatally delayed. It is appropriate to now address these two main related arguments asserted by ICANN regarding the September decision.
81. **The Issues of Time-Bar and of Delay.** ICANN has relied on the requirement under Article IV, Section 3.3 of the Bylaws that the request for an IRP “must be filed within 30 days of the posting of the Board meeting (and the accompanying Board Briefing Materials, if available).” It is said that the 30 day time limit is mandatory and, in this case, commenced on September 30, 2013. Therefore the filing period expired on October 30, 2013. As a result, the December 5, 2014 filing of the IRP Request is, according to the ICANN, patently out of time. In addition, ICANN asserts that this lengthy delay from October 2013 to December 2014 was unreasonable and was left unexplained in the Claimant’s initial submission. Accordingly it is submitted that such delay, in and of itself, further justifies the denial of extraordinary discretionary relief.
82. The GCC responded to the time-bar and delay arguments in its Reply. The GCC relied on the Witness Statement of Mr. Al Marzouqui which outlined the ongoing contact between him, as the GCC representative, and ICANN over the disputed domain, including the high level meeting in June 2014 to attempt to resolve the issue. Therefore, the GCC asserted that any time limit for filing the IRP Request was extended by ICANN’s conduct.
83. In the view of the Emergency Panel, the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable. The evidence of Mr. Al Marzouqi, while vague in some of the detail, provides a number of reasonable examples of such conduct. First, as of September 30, 2013, the Expert

Determination was still pending and was not released until October 30, 2013. The alleged discussion with an unidentified ICANN representative to await the delivery of the Expert Determination before attempting any resolution is reasonable under the circumstances. Otherwise, the 30 day time limit would have expired by the time the Expert Determination was delivered. Second, and most importantly, it is beyond dispute that the President of ICANN met with the representatives of the GCC in early June 2014 with a follow up letter being delivered by the GCC representative to the ICANN President confirming a request not to proceed with the delegation of the disputed domain. The circumstances of the meeting and the unanswered follow up letter, while not expressly referring to the deadline for filing an IRP, are also suggestive of an extension of that filing period. Indeed, the tenor of the evidence with such a high level meeting in June 2014 reasonably suggests that the issue of the delegation was still under active consideration with no final decision having in fact been made. Third, Mr. Al Marzouqi also states that another ICANN representative, again unnamed, suggested in September 2014 that the GCC may have to file a request for IRP. The available evidence and reasonable inferences from that evidence support the defence that the time limit was extended for commencing the IRP, and there is a reasonable possibility that the GCC will succeed on this issue. It is recognized that the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself. After a full review of the evidence on the IRP and the application of the appropriate standard of proof, the IRP panel may well find that the time limit for filing was mandatory and that it expired on October 30, 2013 without any extension. However, at this stage, it is sufficient to find that there is a reasonable possibility that the time has been extended under the circumstances.

84. Counsel for ICANN also argued that the time limit for the IRP filing could be tolled or delayed, but only through the formal invocation of the Cooperative Engagement Process prior to the commencement of the IRP as provided for in the Bylaws Article IV, Section 3, para. 14. This is a voluntary process encouraged by ICANN to try to resolve issues or at least narrow the issues for a reference to the Board. A conciliation process following the commencement of an IRP is also encouraged. According to the copy provided by ICANN, the Cooperative Engagement procedure has an even shorter time limit for commencement, being only 15 days of the posting of the Minutes of the Board. While it is undisputed that the formal Cooperative Engagement Process was never started, it is also undisputed that an

analogous informal engagement process was in fact undertaken involving the most senior officers of both ICANN and the GCC with the apparent purpose of resolving the issues. 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 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.

85. Based on the limited evidence available at this stage, there is a reasonable possibility that, by reason of ICANN's conduct, any time limitation for filing an IRP was extended or otherwise would not be enforced. The Reply evidence of the GCC also provides a reasonable basis for a possible explanation of the delay of over one year, an explanation which may neutralize the defence of delay or laches to the grant of discretionary interim emergency relief.
86. During the IRP process, these issues can be more fully ventilated with additional evidence from both parties about the meeting and contacts. As ICANN did not file any evidence on this Emergency Request of the involvement and conduct of its representatives throughout 2014, it will have the opportunity to do so for the IRP hearing. This evidence will also further assist the determination of whether the 30 day time limit for filing the IRP under the Bylaws is mandatory or directory only or was extended or waived. The IRP Panel will therefore have a fresh opportunity on a complete evidentiary record to further consider the defences of the time bar and the delay.
87. **Comparison of the Bylaws with the Board's Decision and Decision Making Process.** The merits of the IRP will involve a determination of whether the action and decision of the Board with respect to the delegation and registry agreement for .PERSIANGULF was made in a manner consistent with the requirements under the Articles and Bylaws. The IRP Panel will make this comparative determination on the basis of a standard of balance of probabilities. At this stage, only a preliminary assessment can and should be made on these issues. It is sufficient to identify the presence of serious issues or serious questions and determine if there is a reasonable possibility of success on the available evidence. It is also essential to avoid any prejudgement or findings on the merits of these issues and to avoid influencing the IRP Panel in its eventual task.

88. The Respondent asserts that it has acted consistently with the Bylaws throughout. Based on a careful review of the Bylaws and the evidence, there are in my view a number of serious questions about the process of the Board's decision making and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process. A series of more focussed questions about the decision making process emerge from the analysis of the evidence, including the following:

- a. Did the ICANN Board or the NGPC acting for the Board exercise its own independent judgment in deciding to proceed to delegate .PERISANGULF and to enter into a registry agreement or did it simply adopt the GAC advice in the GAC Durban Communique that the GAC did not object, without doing its own independent assessment?
- b. Did the NGPC identify, consider and take guidance from the core values as set out in Article I, Section 2 of the Bylaws, including values 4, 8, and 11 relied upon by the Claimant? Did the NGPC determine which of the core values were most relevant to the issue of the delegation of .PERSIANGULF in light of the history of the opposition and if so what is the evidence of that?
- c. Did the NGPC determine a balance of the competing values identified in Article I, Section 2 of the Bylaws with respect to the applied for gTLD and the objections to it? If so, what was it and on what was it based? Is that balance defensible, how, and where is that determination recorded? What is the evidence to confirm that a defensible balance of the competing values has been made?
- d. Did the NGPC exercise due diligence to consider a reasonable amount of facts in making its decision to proceed with the delegation under the circumstances? Apart from taking a position consistent with the GAC advice set out in the Durban Communique, what other facts were relied upon by the NGPC? Did the NGPC consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or alternatively was the NGPC entitled or obliged to disregard that opposition due to the wording of the Durban Communique? Given the delay from the September 2013 resolution to November 2014 when the registry agreement was about to be signed, was the NGPC obliged to consider and did it consider, in exercising due diligence, the facts of the

continued opposition of the GCC and the events occurring during that period, such as the June 2014 meeting between ICANN representatives, including President Chehade, and representatives of the GCC, as well as the July follow-up letter? Where is the evidence of that consideration in its decision making? Should the Board consider and weigh the August 29, 2014 policy statement setting out the concerns of the Sub-working group that geographic names generally should be avoided in absence of agreement of relevant affected governments?

- e. When did the ICANN Board in fact decide to delegate the domain? Is it in fact on September 10, 2013 with the adoption of the Scorecard in response to the GAC Durban Communique or was the decision made at a later date, such as after the June 2014 meeting of the ICANN President and the GCC representatives in Kuwait City, in which case how was that decision made?

89. The September 2013 Board decision, as taken, was simply to “continue to process the application in accordance with the established procedures in the AGB”. That decision does not reflect any assessment or application of the competing core values or a consideration of the three stated values relied upon by the GCC. Nor does it provide a statement of a defensible balance of the competing values. It is clear that the ICANN Board was aware of the objections of the GCC and its constituent governments to the application, both before and after the September resolution to continue to proceed. The evidence does not establish that this governmental opposition was taken into account at all in the Board decision to proceed with the delegation of the .PERSIANGULF domain to Asia Green, given the apparent reliance on the wording of the Durban communique. It is certainly not clear under the Bylaws that the evidence of the objections by the GCC and its member states, raised after the September 10 resolution and before the signing of the registry agreement, should **not** be taken into account. To the contrary, core value in Article I, Section 2.11 suggests that recommendations of governments are to be duly taken into account. That is a significant and serious issue for consideration on the IRP in respect of which the parties will be entitled to adduce additional evidence. On the basis of the available evidence, the Claimant has a reasonable possibility of success on the merits of the IRP.

90. ICANN has also asserted that “ICANN did precisely what it was supposed to do pursuant to the Guidebook” and that there “is no Article [of Incorporation], Bylaws provision or

‘guideline’ that requires the ICANN Board to do anything more than follow the processes that it has followed” (ICANN Response, para. 54). That argument itself raises a serious and fundamental question to be considered and determined by the IRP Panel about the inter-relationship of the obligations on ICANN under the Guidebook and the Bylaws. Does compliance with the Guidebook procedures for the processing of a domain application satisfy the obligations on the ICANN Board under Bylaws Article 1, Section 2 in terms of the consideration of competing relevant values and the determination of an appropriate and defensible balance of those competing values? That is not at all obvious and the circumstances suggest an answer in the negative. Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values.

91. In its Response, ICANN also relied on the position expressed in the Comments of the Independent Objector (Exhibit R-ER-5) and on the findings of the Expert Determination (Claimant ER Request, Annex 2) to justify the propriety of the delegation. These specific recommendations are certainly material to the Board consideration, but they are not a substitute for the exercise by the Board of its own judgement in balancing the competing values as expressly required under Article 1, Section 2 of the Bylaws. Therefore, at this stage and based on the available evidence, the Claimant appears to have a reasonable possibility of success on the merits of the IRP.
92. Both the Independent Objector and the Expert also noted that the GCC could itself apply for .ARABIANGULF and thereby neutralize any objection with the delegation of .PERSIANGULF. ICANN in its Response has also relied on this argument. The Independent Objector stated that it is not the mission of the gTLD strings to solve or exacerbate such naming disputes, but they should adapt to the *status quo*. This directly raises the type of policy issue which should be addressed by the Board in a discussion and balancing of the core values of ICANN in Article 1, Section 2 and which calls out for a reasoned

discussion and defensible balance to be reached by the Board. There is no question about ICANN solving the naming dispute – it cannot. There is a serious question as to whether, in the context of a geographic naming dispute, the registration of one domain name and the encouragement to register the other will elevate the deeper dispute between the parties to a new level and introduce that dispute to the Internet and to the internet domain name system. As noted in the Expert Determination, denomination disputes can be of high importance, roiling international relations, particularly when it is a flashpoint for deeper disputes as appears to be the case here. While the suggestion of the Independent Objector is for the gTLD strings to adapt to the *status quo*, one of the objectives on an application for interim measures is to preserve the *status quo*. The context assists in determining what may be regarded as the *status quo*. According to the Independent Objector, since both disputed names are in fact used in practice in the different states, it is suggested that both be used. Absent agreement on a common name, that would be consistent with general rules for international cartography. However, in terms of the domain naming system and top level domains for the Internet, neither term is currently used – that is the *status quo* for top level domain names. It is that *status quo* which should be preserved pending the completion of the IRP. The GCC is not asking to use the domain .ARABIANGULF and at this point does not want to use that domain. It is simply seeking to maintain the status quo that neither name be used as a gTLD.

93. This Emergency Panel therefore finds that the GCC has a reasonable possibility of success on the IRP for the purposes of granting interim measures in the nature of injunctive relief. However, nothing in this Interim Declaration should be taken as a finding on the merits binding on the IRP panel or as a suggestion of any decision which the ICANN Board should or should not make in respect of the merits of the domain application in dispute. The IRP Panel will have an opportunity on a full evidentiary record to make the determination required of it pursuant to the ICANN Bylaws, Article IV, Section 3 whether the Board in making its decision has acted consistently with the provision of the Articles and Bylaws. That is not a review *de novo* of the merits of the decision of the ICANN Board, but a review of the decision-making process of the Board in light of requirements under the Bylaws.

e. Other Considerations for Interim Measures

94. Based on the foregoing analysis, the Claimant has established an entitlement to an order that ICANN refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF until the IRP is completed, or until such other order of the IRP panel. Of course in the event that the parties are able to amicably resolve the issues to their mutual satisfaction, the interim order and the proceedings can be brought to an end upon their consent. It is a common term or condition for the grant of such interim measures in the nature of injunctive relief to require the applicant to post security for any potential monetary damages or costs which may be caused by the grant of such measures in the event that the order is subsequently set aside or terminated. No request has been made at this time for security and the parties were not asked to brief the point. Therefore no order for such security shall be made at this time. However, the order made herein is without prejudice to any request which may be made in due to the IRP Panel which shall be free to consider that issue afresh.
95. Neither the Claimant nor the Respondent has sought costs of this Request for Interim Measures. The issue of costs was simply not addressed in the written or oral submissions. No order as to costs will be made at this time, but the issue of costs of this Request for Interim Measures shall be reserved to IPR panel.

VI. Conclusion and Interim Declaration`

96. Based on the forgoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:
- a. ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;
 - b. This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;
 - c. This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and,
 - d. The costs of this Request for Interim Measures shall be reserved to the IRP panel.
97. After the completion of the foregoing reasons for this emergency interim declaration and immediately before its release, the Tribunal received an email from the Claimant dated 11

February 2015, attaching a letter from ICANN dated 2 February 2015 which was apparently in response to the letter dated 9 July 2014 from Mr. Al Ghanim referred to in these reasons. In the February 2 letter, ICANN advised that the processing of the .PERSIANGULF application had been placed “On Hold”. Apparently, Asia Green invoked the Cooperative Engagement Process in respect of some decision of the ICANN Board. As noted earlier, that process must be commenced within 15 days of the posting of the minutes of the Board which are said to violate the Articles or Bylaws. As a result of the application being placed “On Hold”, the GCC took the position that their Emergency Request for Interim Measures had been rendered moot and asked for a declaration to be issued to that effect, but with an express reservation that the matter proceed in the event that ICANN does take further steps to sign an agreement with Asia Green.

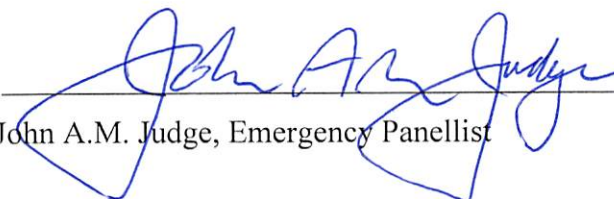
98. As for ICANN’s position, the letter of February 11 also set out ICANN’s position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also delivered a response opposing the GCC request. ICANN asserted that the GCC should either withdraw the Request for Emergency Relief or allow the decision with respect to that Request to be released if the “GCC wishes to ensure that the .PERSIANGULF application remains on hold”. Clearly, ICANN did not agree that the Request was moot. ICANN asserted those accountability mechanisms under the Bylaws should proceed to completion, including this Request for Emergency Relief or, alternatively, that the GCC withdraw the Request for Emergency Relief.
99. On 12 February 2015 at 9:29 pm EST, the GCC replied to the ICANN position. The GCC did not withdraw its Request. The GCC maintained its position that the letter of February 2 from ICANN rendered the Request moot.
100. The parties are not in agreement on a consent disposition to this application. GCC has not withdrawn the Request for Emergency Relief. The Request remains extant. As a result, it is appropriate that this Declaration be released forthwith.
101. Having reviewed the letter of 2 February 2015 and the further submissions of the parties in the email of counsel of February 11 and 12, 2015, this Tribunal finds and confirms that the reasoning and result remains as set out above. The result is not altered or changed by these late submissions. Indeed, these materials reinforce the finding that the Declaration as set out

above should now be issued and released. Most importantly, the position taken by ICANN clearly indicates that, but for an order on this Request for Emergency Relief, the application will not remain on hold, suggesting that the registry agreement will be signed. The fact of the commencement of the Cooperative Engagement Process by Asia Green raises further questions as to what is the decision of ICANN Board in respect of the disputed application. For the purposes of the recently commenced Cooperative Engagement Process it may simply be the decision to put the application on hold pending the completion of the emergency request. The ICANN letter of 2 February 2015 is not an admission or commitment by ICANN that it will place the application on hold pending the completion of the GCC's IRP request. The request by Asia Green for the Cooperative Engagement Process raises many other questions as to the role if any of the GCC in that process and also the impact, if any at all, on the GCC request for the IRP. ICANN is rightly concerned that the accountability processes including the IRP should proceed as intended under the Bylaws. Therefore, for these reasons, the request of the GCC for a declaration that this Request is now moot is denied.

- 102.** To be clear, and having taken into account the submissions of parties received on 11 and 12 February 2015, the interim declaratory relief as set out in paragraph 96 is hereby granted.

Signed in Toronto, Ontario, Canada for delivery to the Parties in Los Angeles, California, USA and Riyadh, Saudi Arabia.

Dated 12 February 2015.


John A.M. Judge, Emergency Panellist