

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**  
International Arbitration Tribunal  
ICANN Independent Review Process

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ICDR Case No. 01-21-0004-1048

GCCIX, W.L.L.,

Claimant

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

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**PROCEDURAL ORDER NO. 3**  
**(Review of Emergency Panelist's Order)**

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Tribunal

Gary L. Benton, Chair  
Amb. (r.) David Huebner  
Prof. Catherine Kessedjian

**Date**

28 April 2022

## **A. Introduction**

1. This Order addresses the application of Claimant GCCIX, W.L.L. (“Claimant” or “GCCIX”) for review of the Emergency Panelist’s Order in this Independent Review Process (“IRP”) requiring content to be excised from GCCIX’s Request for Independent Review (“Initial Request”). Respondent Internet Corporation For Assigned Names And Numbers (“Respondent” or “ICANN”) opposes the application.
2. The dispute giving rise to this IRP relates, principally, to ICANN’s 2013 decision to deny GCCIX’s application to operate the .GCC generic top-level domain (“gTLD”). As well, GCCIX seeks review with respect to policy and practices concerning the Government Advisory Committee (GAC), the GNSO Council, the Cooperative Engagement Process (“CEP”) and IRP rules and procedures.
3. This IRP was initiated by GCCIX on 3 June 2021 by submission of its Notice of Arbitration and subsequently submitted Initial Request.
4. On 15 July 2021, ICANN requested the appointment of an Emergency Panelist with respect to its request for interim measures. The Emergency Panelist was duly appointed, conducted proceedings and issued the Emergency Arbitrator Order dated 8 December 2021.<sup>1</sup>
5. The Emergency Arbitrator Order directed GCCIX to file a new Request for Independent Review (“Excised Request”) with the ICDR with specified text and appendices relating to the CEP in the Initial Request excised and directed that the sole documents to be placed in the arbitration file for this Tribunal to be the Excised Request and the Emergency Arbitrator Order.
6. GCCIX’s Excised Request is dated 10 December 2021.
7. On 1 February 2022, immediately following the appointment of this Tribunal, GCCIX asked the Tribunal to review the request for relief made to the Emergency Panelist. The parties were informed that the Tribunal would discuss the GCCIX’s request with the parties at the upcoming Preparatory Conference.
8. The Preparatory Conference was held on 3 February 2022. The Tribunal agreed to consider GCCIX’s request in the form of an application for review to be submitted by GCCIX. The parties agreed to various dates and provisions for a briefing schedule and the Tribunal addressed additional requests as to submissions and page limits and set a tentative hearing date for 20 April 2022, as confirmed in Procedural Order No. 1 (Procedures and Schedule) (“PO1”).
9. GCCIX’s Opening Brief on the review application was timely submitted on 10 February 2022; ICANN’s Opposition Brief was timely submitted on 3 March 2022; GCCIX’s Reply Brief was timely submitted on 10 March 2022; and ICANN’s Sur-Reply Brief was timely submitted on 17 March 2022.

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<sup>1</sup> As detailed herein, this process is governed by the ICDR International Arbitration Rules (“ICDR Rules”) contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 March 2021, as supplemented by the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018. The ICDR Rules, Article 7, uses the phrase “Emergency Arbitrator.” Article 10 of the Interim Supplementary Procedures uses the phrase “Emergency Panelist.”

10. No request for oral argument was made by the parties and, on 21 March 2022, the Tribunal informed the parties that it determined a hearing on the application would not be necessary and the Tribunal proceeded with deliberations on the application.
11. The ruling of the Tribunal on this application follows.

## **B. Background**

12. As noted, the dispute giving rise to this IRP relates, principally, to ICANN's 2013 decision to deny GCCIX's application to operate the .GCC generic top-level domain ("gTLD"). As well GCCIX seeks review with respect to policy and practices concerning the Government Advisory Committee (GAC), the GNSO Council, the Cooperative Engagement Process ("CEP") and IRP rules and procedures.
13. In 2012, GCCIX submitted to ICANN the sole application for operation of the .GCC generic Top Level Domain ("gTLD"). "GCC" is the well-known acronym for the Gulf Cooperation Council, formally known as the Cooperation Council for the Arab States of the Gulf, an intergovernmental organization ("IGO") whose membership is six Gulf states. GCCIX's application encountered opposition purportedly because it was not affiliated with or supported by the GCC or its member states. In 2013, the ICANN Board accepted the consensus advice of the GAC that GCCIX's application should not proceed.
14. GCCIX initiated an ICANN CEP in February 2014. GCCIX contends that ICANN did not proceed with the CEP in good faith.
15. GCCIX initiated this IRP in 3 June 2021 and subsequently submitted its initial Request.
16. On 15 July 2021, an ICDR Emergency Measures request was made by ICANN pursuant to the ICDR Rules, Article 7.<sup>2</sup> The relief requested related principally to the confidentiality of the CEP conducted between the parties and ICANN requested that certain allegations in the initial Request, and annexes thereto, be stricken to preclude their being viewed by this Tribunal.<sup>3</sup> GCCIX opposed the appointment contending there was no emergency and no action to be properly taken.
17. The Emergency Panelist's Emergency Arbitrator Order is dated 8 December 2021. The Emergency Panelist granted the request as a matter of emergency relief while expressly not addressing the likelihood of success on the merits. The Emergency Panelist observed in his Order that ICANN's 7 February 2014 Bylaws provided that, prior to bringing an IRP, complainants are urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing issues.

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<sup>2</sup> As addressed herein, the Tribunal relies on the Order and the parties' current submissions for purposes of this ruling. The Tribunal has not accessed the submissions made to the Emergency Panelist or the excised content and relies on the description provided by the parties.

<sup>3</sup> Specifically, according to the Order, ICANN sought the following relief: "6. ICANN is seeking two forms of interim relief from the Emergency Panelist. One, ICANN is requesting that the Emergency Panelist issue an order striking the portions of pages 3, 15–17, 18, 19, and 26 of Claimants IRP Request that refer to the parties' confidential CEP as well as annexes 11 through 13 to Claimant's IRP Request. In response to the Emergency Panelist's question regarding the mechanics of such relief, the Emergency Panelist can award this relief by ordering Claimant to submit an amended IRP Request that excludes the stricken allegations within thirty days of the Emergency Panelist's order. Second, ICANN is requesting that the Emergency Panelist order the ICDR to remove from the record Claimant's original IRP Request with the inadmissible allegations and annexes, as well as the briefing and order on this Application to Strike, to avoid the IRP Panel inadvertently reviewing the stricken allegations as it reviews the record. If, however, the Emergency Panelist's order does not include references to the substance of the stricken allegations and annexes, ICANN would have no objection to the Emergency Panelist's order remaining part of the record."

The 2014 Bylaws provided that any matters discussed during cooperative engagement (and conciliation) are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP. The October 2016 Bylaws and subsequent revisions make no express reference to confidentiality.

18. The Emergency Panelist noted that confidentiality issue is not easily answered and review of the substantive arguments would not be of assistance given that the issue will ultimately be one for the Tribunal to decide. The Emergency Panelist found there was a sufficiently serious question related to the merits and a harm for which there will be no adequate remedy in the absence of such relief. Further, the Emergency Panelist found the balance of hardships favors ICANN as the material would be exposed if relief was not granted. The Emergency Panelist rejected GCCIX's position that the grant of relief would deny GCCIX from asserting its claims given that the matter would be fully reviewable by the Tribunal. Finally, the Emergency Panelist observed that ICANN was not presently seeking costs and, as GCCIX did not prevail, it is not entitled to recovery of attorneys' fees.
19. The Emergency Arbitrator Order directed GCCIX to file an Excised [IRP] Request with the ICDR with specified text relating to the CEP in the Initial Request excised and directed that the sole documents to be placed in the arbitration file for this Tribunal to be the Excised Request and the Emergency Arbitrator Order. The Order acknowledged the position of parties that the matters addressed in the Order are reviewable by the Tribunal in due course.
20. Claimant's Excised Request is dated 10 December 2021 and Respondent's Response to the Request, denying the claims, is dated 27 December 2021.
21. Thereafter, this Tribunal was duly appointed and a 3 February 2022 Preparatory Conference was scheduled. On 1 February 2022, immediately following the appointment of this Tribunal, GCCIX asked the Tribunal to review the request for relief made to the Emergency Panelist. At the 3 February Preparatory Conference, GCCIX requested that the review be by means of a motion to dismiss submitted by ICANN. The Tribunal agreed to consider GCCIX's request in the form of an application for review to be submitted by GCCIX. As detailed above, the request has been fully briefed by both sides.
22. At the Preparatory Conference, ICANN requested that the submissions not disclose the excised content. GCCIX responded that would be difficult to do but provided an overview. The Tribunal informed the parties that it is principally concerned, as a predicate question, whether a basis for exclusion exists. Accordingly, the Tribunal directed that submissions may address the nature of the excised content but should not disclose the content itself.
23. As addressed at the Preparatory Conference and confirmed in PO1, this IRP is conducted in accordance with the ICANN Articles of Incorporation dated October 2016 and the ICANN Bylaws dated 28 November 2019, in particular, Section 4.3 of the Bylaws. Although these versions of the Articles of Incorporation and the Bylaws are the governing documents with respect to the Independent Review Process, GCCIX asserts violations under one or more prior, then-existing, versions of the Bylaws. As provided in the ICANN Bylaws and as stipulated, the ICDR International Arbitration Rules as supplemented by the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018, apply to this proceeding.

## **C. Party Contentions**

### **(1) GCCIX's Opening Brief**

24. In its Application to Review Emergency Panelist's Interim Order ("Opening Brief"), GCCIX contends that the excised text states GCCIX's allegations that ICANN engaged in the CEP in bad faith by refusing to substantively respond to GCCIX's communications or otherwise take any steps to narrow the IRP issues despite detailed requests provided over a period of some eight years.<sup>4</sup> It states that the excised text further describes the three excised Annexes as letters from GCCIX supporting the allegations.<sup>5</sup>
25. GCCIX contends that ICANN repeatedly protests that it does not seek dismissal of GCCIX's claim of bad faith but it has succeeded in doing so.
26. GCCIX contends the 2013 CEP rules remain in force today and govern the CEP between ICANN and GCCIX and those rules provide that "ICANN is expected to participate in the [CEP] in good faith." GCCIX contends those rules do not contain a confidentiality provision.
27. GCCIX contends that the ICDR Rules, the ICANN Interim Supplementary Procedures, and current ICANN Bylaws, adopted 19 November 2019 govern this IRP. It observes that the Subsection 13 of the 2014 Bylaws contained CEP confidentiality language but the Bylaws, as modified 1 October 2016, deleted the language and the CEP language remains the same in the current 28 November 2019 Bylaws. It contends the 2016 Bylaws and later versions are applicable as the IRP proceeding was initiated after 2016.
28. GCCIX contends ICANN has no authority nor justification for claiming confidentiality as to any CEP discussions as a result of the 2016 Bylaws. It speculates that the confidentiality language was likely excluded from the 2016 Bylaws because the CEP rules require consideration of good faith. Regardless, GCCIX contends that the issue is not confidential as it is only seeking to prove that ICANN never responded in any substantive way to the CEP Request.
29. GCCIX contends that, in ICANN failing to respond, it has violated its current Bylaws, Article 3, Section 1, mandate to always act with maximum transparency. It observes that the Bylaws also require all IRP proceedings and evidence be "on the record" which it contends means the "public record." It contends that ICANN has already published a significant portion of Annex 12 on its website even though it wants the Annex stricken.
30. GCCIX contends that the Emergency Panelist's Order must be reversed because it does not address the merits. It observes that the ICDR Rules, Article 7(5), expressly allow the tribunal to affirm, reconsider, modify or vacate the interim order of the emergency relief and that it is the sole responsibility of this Tribunal to rule on admissibility of evidence. It further contends the Order is overbroad as the excision includes all allegations and evidence that merely refer to the CEP.
31. GCCIX contends that the current Bylaws control this IRP and the 2014 Bylaws are not applicable to this IRP. It contends the CEP rules and current Bylaws permit consideration of evidence that the parties didn't to engage in the CEP in good faith, as the Bylaws, Section 4.3(e)(2) allow an award of fees and expenses to ICANN if a Claimant does not participate in good faith in the CEP and

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<sup>4</sup> GCCIX also contends the excised material is relevant to ICANN's stay application. That application has since been denied without regard to the excised material.

<sup>5</sup> GCCIX describes excised Annex 11 as its formal Request for CEP, excised Annex 12 as a responsive letter from GCCIX counsel to ICANN summarizing its position on the issues and excised Annex 13 as a letter from GCCIX counsel to ICANN noting that it had not received any substantive response and again asserting GCCIX's position.

ICANN is the prevailing party in the IRP. GCCIX contends that it is impossible to prove bad faith without referring to the parties' communications.

32. GCCIX cites to the 2019 IRP Decision in Afilias v. ICANN as an example where substantial CEP discussions were admitted to prove ICANN's bad faith in the CEP process resulting in an award of all of Claimants' fees to be paid by ICANN.
33. GCCIX contends that ICANN relies on Cal. Evidence Code § 1152 to justify excluding the allegations. It contends California litigation rules are not applicable and, even if they were, the focus is not on a statement made "in compromise" in a "settlement discussion." GCCIX contends that references to California law or US federal litigation law have no applicability here under ICANN's own rules as a global gatekeeper of the DNS.
34. Likewise, GCCIX contends that ICDR's mediation rules are not applicable because the CEP is not a mediation and there was no mediation under the ICDR Rules.
35. Accordingly, GCCIX requests that the Initial Request and the supporting evidentiary Annexes be entered into the record and that ICANN be ordered to post the Initial Request on the IRP page of its website unredacted. Further ICANN requests that ICANN be ordered to post the briefing, evidence and Interim Order from the Emergency proceeding online.

## **(2) ICANN's Opposition Brief**

36. In its Opposition Brief, ICANN refers to Accountability Mechanisms, including the IRP, created by its Bylaws. It observes that the Bylaws in place at the time the parties entered into the CEP describe the CEP as "a period of cooperative engagement with the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP." It contends that the CEP is essentially a mediation or settlement discussion and to foster open and candid settlement communications it has always been considered confidential.
37. ICANN observes that the Bylaws in place at the time GCCIX initiated the CEP explicitly state that all matters discussed during the CEP are to remain confidential and not subject to discovery or as evidence for any purpose during the IRP.
38. ICANN contends that this confidentiality standard is consistent with applicable state and federal law as well as the ICDR's Mediation Procedures. It observes that both California Evidence Code § 1152 and Federal Rules of Evidence § 408 statements made by the parties during settlement negotiations are not admissible to provide liability. It observes these authorities recognize the strong public policy favoring settlement negotiations and the necessity of candor in conducting them. It observes that California courts have struck confidential settlement discussions from complaints.
39. Further ICANN refers to the Afilias IRP Decision for the proposition that California law, as supplemented by US federal law, may apply in circumstances to ICANN communications and documents.
40. ICANN acknowledges that the CEP with GCCIX lasted several years and contends that the parties were unable to reach a resolution. It contends that GCCIX included CEP communications in its IRP request and is relying on the material for improper purposes. GCCIX refused to remove the references and ICANN contends that it was left with no option but to request interim relief that excised the references.
41. ICANN contends that this application to overturn the Emergency Panelist's Order should be denied

as the allegations and annexes ordered excised constitute confidential settlement communications under the applicable Bylaws and state and federal law. It contends that affirming the Order is necessary to maintain the integrity of the CEP process and the ICANN community's confidence in the confidential nature of these types of settlement discussions, which is a key public policy that encourages the resolution of disputes. It contends that affirmance will also avoid unfair prejudice to ICANN as otherwise ICANN will need to disprove the allegations by disclosure of additional confidential information.

42. ICANN rejects GCCIX's assertion that ICANN has disclosed confidential CEP discussions. It contends a portion of Annex 12 was disclosed as a matter of standard practice as a Documentary Information Disclosure Policy (DIDP) request not as a CEP discussion, and the remainder of the Annex should be kept confidential.
43. ICANN contends that all versions of the Bylaws support that CEP discussions are confidential. It contends that just as the 2013 CEP rules in place at the time of the CEP govern the CEP so do the 2014 Bylaws. Moreover, ICANN observes that the current Bylaws do not state that CEP discussions are *not* confidential.
44. Further, ICANN observes that the current Bylaws only address bad faith by a claimant, not ICANN, and the reference to bad faith has nothing to do with confidential CEP discussions. Rather, ICANN contends that the operative Bylaws, current Bylaws and the CEP rules all describe a process where the expectation is confidential settlement discussions. ICANN adds that the current community working group is considering CEP rule revisions to memorialize that CEP discussions are confidential.
45. ICANN rejects GCCIX's contention that the Afilias IRP Decision was addressed to CEP discussions and that the fee award in that IRP related to bad faith litigation tactics during the CEP.
46. Accordingly, ICANN contends that the excised material is confidential and asks that the Tribunal uphold the Emergency Panelist's Order and keep the allegations and annexes excised out of the record.

### **(3) GCCIX's Reply Brief**

47. In its Reply Brief, GCCIX contends that it is entitled to prove its claim of ICANN's bad faith and there is no way it can do so without providing evidence of unanswered communications to ICANN and to show ICANN never discussed those communications or offered any concessions for seven years.
48. GCCIX contends the CEP was not a settlement discussion, negotiation or mediation because there were never any communications, discussions or negotiations. It rejects the CEP was a mediation as no mediator was involved and it rejects it was a settlement discussion as ICANN executives never participated in the CEP. It contends that ICANN's call for public confidence in the confidential nature of settlement discussions is misplaced as there was no settlement discussion.
49. GCCIX contends that it only seeks to introduce its own unanswered letters. It contends that the excised communications set forth many other issues involving Bylaws breaches and is highly relevant as to all of Claimant's IRP claims, all of which justify an award of reasonable attorneys' fees.
50. In addressing various responsive points made by ICANN, GCCIX contends Annex 12 was provided as part of the CEP. It also contends the Afilias IRP decision did relate to relief requested during the CEP. It contends that interim relief was requested because the relief requested was not provided during the CEP.

#### **(4) ICANN's Surreply Brief**

51. In ICANN's Surreply Brief, denominated a Rejoinder, ICANN reiterates that it has acted in good faith and that the Bylaws and the law provide an evidentiary bar to the use of settlement communications. ICANN observes that neither California law nor federal law limit protection to specific offers or compromises; rather they also provide protection to conduct and statements made during the negotiations.
52. It rejects GCCIX's position that the CEP was not a settlement discussion and contends the Bylaws are not so narrow and protect all matters discussed during the CEP. As noted by ICANN, GCCIX always had the option of unilaterally terminating the CEP but chose not to do so.
53. It rejects GCCIX's contention that GCCIX is only intending to offer its own correspondence as it intends to use that correspondence to argue ICANN somehow conceded the accuracy of the statements made and would force ICANN to respond to the biased allegations and disclose confidential information.

#### **D. Analysis**

54. As recognized by the Emergency Panelist, the issue before the Tribunal comes with some procedural oddities. GCCIX asks this Tribunal to review the Emergency Panelist's Order excising material from the IRP Request to the Tribunal. ICANN made the request to the Emergency Panelist on the basis the material is confidential to the CEP and should not be viewed by the Tribunal. The Emergency Panelist granted the relief recognizing the potential harm to ICANN and purposefully without addressing the merits of the underlying claims, expecting that the Tribunal would be asked to review whatever decision was made.
55. In this context, and in giving consideration to the parties' arguments now, it appears to the Tribunal there has been a long delay of matters that need not have been raised and relate little to the core issues in this IRP.
56. ICANN is correct that the operative Bylaws with respect to the CEP were the 2014 Bylaws in place at the time the CEP was initiated. Those Bylaws expressly provide that any matters discussed during the CEP are to remain confidential and not subject to discovery or admitted as evidence for any purpose within the IRP. There is limited basis to argue that because this IRP is governed by the current Bylaws we must analyze the CEP initiated in 2014 under the current Bylaws rather than the Bylaws in place at the time. We decline to subject the CEP to Bylaws that were adopted after the initiation of the CEP. It would be unjust to the parties to a CEP to void any confidentiality expectations retroactively.
57. As noted, there is no explicit language in the 2016 Bylaws or subsequent revisions that expressly provide there is no confidentiality. Even if there were, excluding the confidentiality language from the 2016 Bylaws does not necessarily mean that prior CEPs are no longer confidential. The parties do not offer any contemporaneous reasoning provided by the drafters as to why the language was removed and we are left only to speculate.<sup>6</sup> That is not a sufficient basis to conclude the 2016 Bylaws should be applied retroactively to disregard confidentiality protections.
58. Although there are differences, it appears that a CEP is somewhat the equivalent of a settlement

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<sup>6</sup> Accordingly, we give no weight to GCCIX's speculation that the provision was removed to accommodate the "good faith" provision in the CEP rules. Likewise, we put no weight on ICANN's suggestion that community plans to explicitly add a reference to confidentiality in the CEP rules should guide analysis of the Bylaws.



negotiation. It is well established under California law, US federal law and principles of international law that settlement discussions are to be afforded certain confidentiality protection.<sup>7</sup> The CEP rules' reference to a period of cooperative engagement prior initiating the IRP and reference to resolving or narrowing issues fit fully within the common understanding of a settlement negotiation. Absent a provision otherwise, it would be the reasonable expectation of parties to the CEP that they are engaged in settlement discussions in which some degree of confidentiality would be expected. It would defeat the purpose of a CEP to have every matter discussed, including offers, admissions and communications relating thereto, admissible to establish liability in a subsequent IRP.

59. We reject GCCIX's contention that the CEP is not entitled to confidentiality protections because there was no substantive discussion, negotiation or constructive discussion. That point is better directed to the question of what communications made within the course of a CEP are to be afforded confidentiality protection.<sup>8</sup>
60. The 2014 Bylaws appear to answer this question by the language in the 2014 Bylaws that "any matters discussed during the cooperative engagement...are to remain confidential..." However, that language must be read in context with the full sentence and in the context of the Bylaws as a whole. In that context, the sentence cannot be read to mean that communications made may never be uttered again. Rather, it is clear, particularly from the additional language pertaining to "discovery or as evidence for any purpose within the IRP" that the confidentiality restriction is limited to the IRP.
61. As written, the 2014 Bylaws provide a broader sweep for confidentiality protection than provided in US and California evidentiary code provisions.<sup>9</sup> GCCIX is correct that those statutory provisions technically limit confidentiality to communications relating to offers and admissions, and not everything discussed in the course of a settlement discussion. In practice, courts and arbitration tribunals are reluctant to consider anything else addressed in course of settlement discussions, and that appears to be the express intent in the Bylaw language here by excluding "any matters discussed."
62. GCCIX fairly makes the point that some evidence as to settlement discussions must be admissible because the CEP rules expressly provide that "ICANN is expected to participate in the [CEP] in good faith." GCCIX concludes that this language necessarily provides the basis for an IRP claim against ICANN if it does not act in good faith and contends that ICANN counsel have admitted as much. GCCIX is entitled to allege a claim and, following submissions by the parties, the Tribunal will assess its legal and factual merit.<sup>10</sup> The issues must be fully briefed for the Tribunal to conclude

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<sup>7</sup> We agree with GCCIX that the CEP here was not a mediation as there was no neutral person agreed to by the parties to assist in facilitating a settlement. For that reason, and because no mediation was initiated under the ICDR Mediation Rules, the ICDR Mediation Rules do not apply.

<sup>8</sup> GCCIX raises the related question of whether there can be a settlement negotiation if no ICANN executives participated in discussions. The answer is there can be as corporate counsel in the US and elsewhere routinely serve as party representatives in settlement discussions and mediations.

<sup>9</sup> In making our ruling, we reject GCCIX's contention that the issues here are to be decided solely under the applicable Bylaws and rules without regard to any governing law. Courts and arbitration tribunals are bound by and routinely refer to governing law and choice of law considerations when addressing evidentiary issues, particularly those concerning settlement confidentiality and privilege. ICANN refers us to the Afilias IRP Decision for the proposition that California and US federal law should apply to this question. We are cognizant of the joint insistence of the parties at Preparatory Hearing that international principles apply to all ICANN determinations. Accordingly, although we are not necessarily determining that California and US federal law apply, we are guided by their broad principles, consistent in international practice, that the content of settlement communications are generally not admissible as evidence.

<sup>10</sup> Even if the CEP rules do allow for a claim as to the CEP, the question arises whether such a claim is precluded by the language of the Bylaws.

that GCCIX is entitled to assert a claim and has been damaged by bad faith CEP conduct. It appears GCCIX seeks recovery of attorney's fees for the CEP. If, as GCCIX contends, nothing happened in the CEP, its fees would be expected to be quite limited. More to the point, GCCIX has yet to point to language in the CEP rules allowing for recovery of its fees.<sup>11</sup> Until we see pre-hearing briefing on point, the Tribunal is hesitant to open the door to broad claims against ICANN on the ground it acted in bad faith during a CEP. Doing so could over-formalize the CEP process and discourage candid settlement communication.

63. The Afilias IRP Decision cited by GCCIX does not support its position that CEP communications may give rise to claims. The award of attorneys' fees there does not appear to be based on any finding as to bad faith conduct in the CEP.
64. Fundamentally, ICANN's request for interim measures was founded on questions as to admissibility of evidence and it is premature to fully consider these questions. An IRP Request is the equivalent of a Demand in arbitration or a Complaint in court. It is not an admission of any evidence. In the context of evaluating the evidence and deciding the merits of this IRP, statements in GCCIX's IRP Request are mere allegations not proof. They do ICANN no harm in this proceeding.
65. Moreover, this is not a situation where claims or evidence are being presented to a jury that requires protection from being unduly influenced by the material or are otherwise being made part of a court record for appeal. The Tribunal is readily able to consider claims asserted and make rulings as to whether they are proper as well as readily able to consider evidence presented and give the evidence the weight, if any, that it deserves.
66. Although the Tribunal questions why a request for emergency measures was needed for purposes of this IRP, the Tribunal recognizes that ICANN would prefer that the issues raised, which it considers to be meritless, not be made part of the public record. Given that ICANN makes IRP records public, this concern is not any different than with respect to a party filing a Complaint in a US court. This is not a consideration before this Tribunal. Our focus is necessarily limited to whether the parties are properly on notice of the claims, the claims are viable, and the parties are given a fair opportunity to present their evidence.
67. The Tribunal does appreciate that if ICANN made substantive communications during the course of the CEP, consistent with the 2014 Bylaws, it does not want those communications utilized for purposes of this IRP.
68. Given these considerations, the Tribunal is not prepared at this stage to preclude GCCIX from asserting its claims. It is entitled to put its claims in front of the Tribunal. That said, it is clear that the 2014 Bylaws impose limitations as to CEP confidentiality. At this stage, the Tribunal will allow assertion of claims that go to the question of ICANN proceeding in the CEP in good faith. That is, the Tribunal will allow pleading that goes to whether ICANN engaged in the CEP not the substance of discussions.<sup>12</sup> More precisely, at present, the Tribunal limits GCCIX's assertion of allegations regarding the CEP to those that address the *fact of CEP communications*. The Tribunal precludes allegations as to the *content of CEP communications*.
69. GCCIX is allowed to submit an Amended Request for IRP consistent with this ruling. The Tribunal has considered and has decided against requiring GCCIX to confer with ICANN on the pleading

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<sup>11</sup> ICANN points to language providing recovery of fees if a Claimant engages in the CEP in bad faith. That unilateral provision may be questionable under California law and merits further consideration if either party intends to rely on it.

<sup>12</sup> In that regard, the Tribunal does not see the utility of GCCIX attaching its communications to ICANN to the Request. For present purposes, it would be sufficient for GCCIX to allege that it submitted a letter on a cited date and no response was received. Admissibility of such letters can be resolved after briefing on the merits.

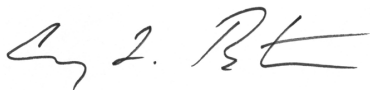
prior to submission (although GCCIX is free to do so). That is likely to add more time and cost than is appropriate. Nonetheless, the Tribunal cautions GCCIX that it will not hesitate to dismiss GCCIX's claims regarding the CEP if it does not comply with the restrictions set forth in this Order.

70. The Tribunal neither affirms nor reverses the Emergency Panelist's Order. That Order contemplated temporary relief until these issues would be addressed by this Tribunal. Given the nature of the relief requested, the issue considered by the Emergency Panelist is now moot. As the Emergency Panelist concluded, it is for this Tribunal to determine whether the material should remain excised.
71. Further, we do not reach the request by GCCIX that ICANN be ordered to publish content on the ICANN site. (Nor do we reach the question of whether GCCIX is free to publish material on its own.) The issues before this Tribunal are limited to whether GCCIX is entitled to relief for ICANN's alleged wrongful acts.
72. For the sake of efficiency, the Tribunal encourages GCCIX to narrow its claims when submitting its Amended Request for IRP and for both sides to focus on core issues.

### **E. Conclusions**

73. For the reasons provided above, the Tribunal deems the issue raised with the Emergency Panelist moot and neither affirms nor reverses the Emergency Panelist's Order.
74. GCCIX is permitted to submit an Amended Request for IRP providing limited detail on the CEP consistent with the terms of this Order within 21 days of issuance of this Order.
75. Allocation of costs with respect to this application are reserved for the final Decision.
76. As addressed herein, for the sake of time and cost-efficiency, the parties are encouraged to focus on the core issues raised in this dispute.

**Date:** 28 April 2022



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Gary L. Benton, Chair  
By and for the Tribunal