

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AMAZON EU S.À R.L., ) ICDR CASE NO. 01-16-0000-7056  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S PREHEARING BRIEF**

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## Introduction

In this Independent Review Process (“IRP”) proceeding, Amazon EU S.à r.l. (“Amazon”) challenges the decision of the ICANN Board (acting through its New gTLD Program Committee, or “NGPC”) to accept the Governmental Advisory Committee (“GAC”) consensus advice that three Amazon applications – for .AMAZON and its Chinese and Japanese character equivalents (“Amazon Applications”) – should not proceed. Amazon argues that the NGPC improperly accepted the GAC advice because the NGPC did so without investigating the circumstances or exercising its own judgment. The evidence, however, contradicts Amazon’s claims. It shows that in considering the GAC advice the NGPC acted carefully and thoughtfully: Over a ten-month period, the NGPC invited, received, and considered numerous comments from Amazon, from many concerned governments, and from other ICANN stakeholders; it drew on many NGPC members’ experience with the development of the Applicant Guidebook (“Guidebook”); and it sought the advice of an expert on international law on pertinent principles.

Ultimately, following its significant analysis of the facts and circumstances, the NGPC concluded that the strong presumption afforded to the public-policy concerns identified by the GAC and numerous individual governments regarding the Amazon Applications had not been overcome by contrary considerations. Accordingly, the NGPC found that accepting the GAC advice was in the best interests of ICANN. The notion that the NGPC passively accepted the GAC advice is simply wrong.

Amazon’s arguments are unsupported and run contrary to the explicit language of the Guidebook and the years-long process of drafting the Guidebook:

- Amazon argues that its use of .AMAZON would pose no risk of harm to the Amazon region, because that region could use other gTLD strings. However, the Guidebook recognizes the principle that some uses of geographic names in gTLDs may be harmful, stating that appropriate consideration must be given to the interests of governments in geographic

names (see Section 2.2.1.4 of the Guidebook). The Guidebook specifies particular geographic names that are prohibited or restricted, but also provides that the GAC can object to other applications where it perceives a name poses geographic-based public-policy concerns, even if the name is not specifically prohibited or restricted as a geographic name within Section 2.2.1.4.

- Amazon argues that the GAC advice was not truly “consensus advice” because not all GAC members wholeheartedly supported it. However, “consensus” in the GAC means “general agreement without formal objection.”<sup>1</sup> That definition follows a long-established intergovernmental tradition<sup>2</sup> in which countries choose to agree on a result through a consensus process, even though there may be a spectrum of opinions. Here, the GAC followed that process, and not a single GAC member lodged a formal objection to the advice. Moreover, the GAC explicitly indicated that it was providing “consensus” advice in its communiqué to the Board.
- Amazon argues that the NGPC could not act on GAC advice that lacked a stated rationale. Amazon is mistaken. While an early Guidebook proposal suggested that a stated rationale should be included in GAC advice, that provision was not adopted. The operative version of the Guidebook deliberately does *not* require the GAC advice to include a formal rationale. Even so, the GAC’s discussion of the Amazon Applications, as well as other materials, provided the NGPC with all it needed to understand and evaluate the GAC’s concerns. Specifically, the GAC’s discussion reflects many governments contributing their own concerns to the debate, showing a coherent set of reinforcing public-policy concerns motivating the advice.
- Amazon argues that the GAC advice should not have been accepted because dismissal of another party’s Community Objection had already resolved the matter. Amazon, however, is conflating two separate processes. The dismissal of the Community Objection was a separate matter not affecting the GAC advice. Indeed, the finalized version of the Guidebook establishes GAC advice as an alternative for governments that do not wish to employ the generally available “dispute resolution procedures,” such as the Community Objection procedure.

These principles of the ultimate version of the Guidebook used to evaluate all new gTLD applications doom much of Amazon’s argument. And this IRP proceeding is far too late for challenging the generally applicable Guidebook principles, as opposed to the way in which they

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<sup>1</sup> GAC Operating Principles (pub. 27 Oct. 2011) at Principle 47, Ex. R-2.

<sup>2</sup> See *infra* pp. 29-32.

were applied to the Amazon Applications. If Amazon objected to the terms of the Guidebook as adopted in 2011-2012, it should have brought an IRP proceeding at the time, but it did not do so. Instead, Amazon submitted the Amazon Applications along with applications for 73 other gTLDs, all subject to evaluation under the same Guidebook provisions.

To the extent that Amazon is arguing that the GAC advice was not consensus advice, the facts establish otherwise. The Amazon Applications engendered significant objections in South America causing the matter to be brought to the GAC; Amazon was unable to persuade *any* of the GAC's more-than-130 members to formally oppose the proposed GAC advice against the Amazon Applications (which would have prevented "consensus advice"); and the GAC's Durban Communiqué explicitly stated that the "GAC has reached consensus on GAC Objection Advice" as to the Amazon Applications.

Under the Guidebook, once the GAC issued consensus advice against the Amazon Applications, that resulted in a "strong presumption for the ICANN Board that the [Amazon Applications] should not be approved."<sup>3</sup> This meant that the GAC advice would be accepted unless there were reasons sufficiently strong to convince the NGPC that the GAC's public-policy concerns should be rejected, and the NGPC found no such reasons. Rather, the reasons Amazon presented were based essentially on harm to its private interests. The NGPC clearly was not required to reject the GAC advice and approve the Amazon Applications on this basis.

In sum, the NGPC took great care to investigate the facts and circumstances and to reflect on how best to follow the procedures of the Guidebook, thereby exercising due diligence in having a reasonable amount of facts in front of the NGPC and exercising independent judgment in coming to its decision to accept the GAC advice. ICANN should prevail in this IRP.

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<sup>3</sup> Guidebook (4 Jun. 2012 version) § 3.1, Ex. C-020.

## Scope of the Independent Review Process

This IRP proceeding is conducted according to Article IV, Section 3 of ICANN’s Bylaws, as amended through 7 February and 30 July 2014.<sup>4</sup> That section, which is applicable to this IRP proceeding,<sup>5</sup> established the IRP as “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.”<sup>6</sup> Unless otherwise indicated, all references to the Bylaws in this Prehearing Brief are to the version of the Bylaws applicable to the conduct challenged in this IRP proceeding.

The IRP *applies only to Board (including NGPC) actions*. It does not apply to ICANN’s advisory committees or to the actions of participants in those committees. The IRP’s applicability to only Board action is interwoven into Article IV, Section 3’s Bylaws provisions.<sup>7</sup> Thus, although Amazon devotes a substantial part of its brief to complaints that actions of the GAC and the governments of Brazil and Peru were contrary to ICANN’s Bylaws, actions of the GAC and participating governments are not subject to IRP review.

An IRP panel’s role is limited to “comparing contested actions of the Board to the Articles of Incorporation and Bylaws.”<sup>8</sup> This review does not extend to substantive review of

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<sup>4</sup> These Bylaws versions apply because the challenged Board actions occurred on 14 May 2014 (when the NGPC decided to accept the GAC advice), 22 August 2014 (when the Board Governance Committee recommended that the NGPC deny Amazon’s Reconsideration Request 14-27), and 8 September 2014 (when the NGPC denied reconsideration as recommended). Amazon submitted the 30 July 2014 Bylaws with its original IRP Request in this matter as Exhibit C-064. The only difference between the 24 May 2014 and 30 July 2014 Bylaws is that the latter set includes amendments made in Board Resolution 2014.07.30.10 providing for compensation of non-voting liaisons to the Board, other than the GAC liaison. That has no effect on the current dispute, so that the relevant terms of the Bylaws are as set forth in Exhibit C-064.

<sup>5</sup> Extensively revised ICANN Bylaws came into effect on 1 October 2016. They now provide for IRP review of actions by ICANN officers and staff as well as the Board, significantly altering the procedures. The new Bylaws, however, do not apply to the NGPC’s actions challenged here.

<sup>6</sup> Bylaws, Art. IV, § 3.1, Ex. C-064.

<sup>7</sup> *See id.* at Art. IV, § 3 (title is “Independent Review of Board Actions”); *see also id.* at §§ 3.1 (Board actions are subject to independent review), 3.2 (persons affected by Board violations have standing), 3.3 (IRP must be filed 30 days after posting of Board minutes), 3.4 (IRP standard of review depends on character of Board actions), 3.11 (IRP panel authority relates to Board actions), and 3.21 (Board considers IRP Panel declarations).

<sup>8</sup> Ex. C-064 at Art. IV, § 3.4.

the Board’s actions: numerous prior IRP panels have recognized they are “neither asked to, nor allowed to, substitute [their] judgment for that of the Board.”<sup>9</sup> The Bylaws require the standard of review to focus on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>10</sup>

Under the applicable version of the Bylaws, IRP requests must have been filed within thirty days after ICANN posted minutes of the meeting in which the Board took the action being challenged in the IRP. While Amazon’s IRP Request (effective 17 July 2014)<sup>11</sup> is timely to challenge the NGPC’s treatment of the Amazon Applications (minutes posted 23 June 2014), it was made far too late to challenge the Board’s adoption of the Guidebook’s procedures (in 2011 and 2012). Regarding timing, Bylaws Article IV, Section 3.3 states:

A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.<sup>12</sup>

Several IRP proceedings have been brought to challenge NGPC actions concerning new gTLD applications submitted under the Guidebook. These IRP requests were filed in 2013 or

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<sup>9</sup> Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 at ¶ 115 (3 Mar. 2015), Ex. CLA-001; Final Declaration, *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505 at ¶ 124 (9 Oct. 2015), Ex. CLA-004; Partial Final Declaration, *Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065 at ¶ 94 (19 Oct. 2016), CLA-031; Final Declaration, *Merck KGaA v. ICANN*, ICDR No. 01-14-0000-9604 at ¶ 21 (10 Dec. 2015), CLA-008.

<sup>10</sup> Ex. C-064 at Art. IV, § 3.4. *See also* Ex. R-39 (Rule 8 (“Standard of Review”) of Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process. Standard of Review (April 2013), which repeats this formulation); and CLA-008 at ¶ 18 (“The mandatory focus on the three elements (a-c) further informs the exercise of comparison.”)

<sup>11</sup> Prior to filing its Request for Independent Review, Amazon invoked the “cooperative engagement” process, which had the effect of tolling its time to initiate an IRP proceeding until 1 March 2016. *See* Ex. C-064 at Art. IV, § 3.14; *and* Cooperative Engagement Process – Requests for Independent Review (11 April 2013), Ex. R-56.

<sup>12</sup> Ex. C-064 at Art. IV, § 3.3.



after, well after the Board adopted the New gTLD Program on 30 June 2011 and published the last version of the Guidebook on 4 June 2012. One of the earliest IRP declarations concerning a new gTLD application was *Booking.com B.V. v. ICANN*. The Final Declaration in that matter established that an IRP proceeding could appropriately compare the handling of an application to the procedures of the Guidebook as well as to ICANN’s Articles and Bylaws (¶ 106), but that challenges to the appropriateness of the Guidebook’s procedures were untimely:

We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3.3 of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.<sup>13</sup>

Similarly, the panel in *Vistaprint Limited v. ICANN* stated that “the Panel does agree with ICANN that the time for challenging the Guidebook’s standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed.”<sup>14</sup> Thus, to the extent that Amazon challenges Guidebook provisions as inconsistent with the Articles and Bylaws, it is time-barred.

## **Statement of Facts**

### **A. Nature of ICANN**

The Internet Corporation for Assigned Names and Numbers (“ICANN”) is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of

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<sup>13</sup> Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 at ¶¶ 106, 129 (3 Mar. 2015), Ex. CLA-001.

<sup>14</sup> Final Declaration, *Vistaprint :Limited v. ICANN*, ICDR Case No. 01-14-0000-6505 at ¶ 172 (9 Oct. 2015), Ex. CLA-004.

the applicable version of the Bylaws, ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems."<sup>15</sup> ICANN is a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors as well as three Supporting Organizations, which are responsible for developing and recommending to the Board substantive policies concerning specific types of unique identifiers, and several Advisory Committees, which are chartered to advise the ICANN Board as to their views of how to enhance certain ICANN activities.

As relevant to the present proceeding, during 2005-2007, the Generic Names Supporting Organization ("GNSO") made 19 policy recommendations to the ICANN Board relating to a process for establishing new gTLDs. Following the ICANN Board's adoption of the 19 policy recommendations, the entire ICANN Community then developed procedures to implement the Program, which the ICANN Board ultimately approved.

In its role as an advisory committee to ICANN, the GAC provided advice to the ICANN Board that helped shape the procedures embodied in the Guidebook. Since ICANN's inception, the GAC has been the place within ICANN for governments to advise the Board on matters of governmental concern. The GAC now has more than 170 members,<sup>16</sup> consisting of national governments and, when invited by the GAC, multinational governmental organizations and treaty organizations. Article XI, Section 2.1(a) of the ICANN Bylaws describes the GAC's role:

The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's

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<sup>15</sup> Ex. C-064 at Art. I, § 1.

<sup>16</sup> In July 2013, when the GAC gave its advice concerning the Amazon Applications, the GAC had 131 members.

policies and various laws and international agreements or where they may affect public policy issues.<sup>17</sup>

ICANN’s Core Values found in the applicable version of the Bylaws, while noting that ICANN is rooted in the private sector, provide that ICANN should “recognize[e] that governments and public authorities are responsible for public policy and duly tak[e] into account governments’ or public authorities’ recommendations.”<sup>18</sup>

As provided in the applicable version of the Bylaws, the GAC was the only advisory committee for which, if the Board does not follow its advice, the Board and the GAC are required to engage in a collaborative effort to reach agreement:

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.<sup>19</sup>

Moreover, by its longstanding practice as documented in the GAC’s Operating Principle 47, the GAC seeks to reach consensus before giving advice to ICANN:

The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice<sup>[footnote 1]</sup>, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the [GAC] Chair shall convey the full range of views expressed by members to the ICANN Board.<sup>20</sup>

Footnote 1 reads:

In United Nations practice, the concept of “consensus” is understood to mean the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection

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<sup>17</sup> Ex. C-064 at Art. XI, § 2.1(a).

<sup>18</sup> *Id.* at Art. I, § 2.11.

<sup>19</sup> *Id.* at Art. XI, § 2.1(j).

<sup>20</sup> GAC Operating Principles, Principle 47, as amended – October 2011, Ex. R-2.

that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions “without a vote”, “by consensus” and “by general agreement” are, in the practice of the United Nations, synonymous and therefore interchangeable.<sup>21</sup>

## **B. Development of the Guidebook**

### **1. Initial Policy Development in the GNSO (2005-2007)**

In November 2005, the GNSO began<sup>22</sup> a process to develop policy recommendations on whether new gTLDs should be introduced and, if so, how. The GNSO Committee on New Top-Level Domains issued a final report<sup>23</sup> in August 2007 recommending that ICANN implement a process for receiving and evaluating applications to establish and operate new gTLDs. In September 2007, the GNSO Council approved 19 policy recommendations to the Board.<sup>24</sup>

During the development of these recommendations, various stakeholders issued various position papers. On 28 March 2007, the GAC issued “GAC Public Policy Principles for New Top-Level Domains,”<sup>25</sup> which informed the Board of the GAC’s views regarding appropriate policies for establishing new gTLDs. That document recognized (in Section 3.4) that the entire ICANN community would need to help craft procedures to implement the proposed policies: “The evaluation procedures and criteria for introduction, delegation and operation of new TLDs should be developed and implemented with the participation of all stakeholders.”<sup>26</sup>

### **2. ICANN’s Initial Development of the Implementation Plan (2008-2010)**

On 28 June 2008, the ICANN Board adopted the 19 GNSO policy recommendations

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<sup>21</sup> *Id.* at Principle 47, n.1.

<sup>22</sup> GNSO Council Vancouver Meeting Minutes (28 Nov. 2005), R-57.

<sup>23</sup> ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains (8 Aug 2007), R-58.

<sup>24</sup> GNSO Council Teleconference Minutes (6 Sept. 2007), R-59.

<sup>25</sup> GAC Principles Regarding New gTLDs (28 Mar. 2007), R-34.

<sup>26</sup> *Id.*

concerning the introduction of new gTLDs, and requested an implementation plan for consideration. Development of the implementation plan took the form of a series of draft versions of a lengthy document called the “Applicant Guidebook,” intended to describe the new gTLD application and evaluation process. Several drafts were published for public comment by the ICANN community and by the general public. These are listed in Annex 1 at the end of this Prehearing Brief.

### **3. Refinements to the Evaluation Procedure Prompted by GAC Input (2011-2012)**

The draft Guidebook reached draft Version 5 on 12 November 2010.<sup>27</sup> Draft Version 5 engendered critical comments from the GAC on a variety of aspects, including recommendations regarding the handling of sensitive strings.<sup>28</sup> The result of these comments, as well as comments from other ICANN Community participants, was that several changes were made to the Guidebook between Version 5 (published 12 November 2010) and the operative Version 10 (published 4 June 2012).<sup>29</sup>

As noted in the Introduction above, in key respects Amazon’s arguments appear to be based (incorrectly) on early proposals (i.e. Guidebook Version 5 and before), not on the procedures in the operative version of the Guidebook, pursuant to which all applications were evaluated. Details of the Guidebook revision process are discussed in the course of the Argument below. As explained, the NGPC’s acceptance of the GAC advice concerning the Amazon Applications was fully consistent with the procedures of the operative version of the

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<sup>27</sup> gTLD Applicant Guidebook, Proposed Final Version (12 Nov. 2010), R-60.

<sup>28</sup> New gTLD Program Explanatory Memorandum: GAC and Governmental Objections; Handling of Sensitive Strings; Early Warning (15 Apr. 2011), Ex. R-7.

<sup>29</sup> Version 10’s publication on 4 June 2012 was shortly before 13 June 2012, when all applications were deemed submitted. When Amazon submitted its applications in April 2012, the most recently published draft Guidebook was version 9 (11 January 2012). For purposes of the issues in this proceeding, versions 9 and 10 do not differ in any material way.

Guidebook, as well as the ICANN Articles and Bylaws.

## **C. Amazon Applications and Their Evaluation**

### **1. Amazon Submits Its Applications (April 2012)**

In April 2012, Amazon submitted the three gTLD applications at issue here. Amazon apparently saw a valuable opportunity in ICANN's New gTLD Program,<sup>30</sup> such that it expended the effort and resources needed to prepare and submit applications for 76 gTLDs (29 of which have thus far led to contracts with ICANN<sup>31</sup>).

### **2. Governmental and Public Opposition in the Amazon Region (November 2012-October 2013)**

The Amazon Applications soon engendered significant opposition within South America, all of which the NGPC later considered in evaluating the GAC advice against the Amazon Applications. On 20 November 2012, the Governments of Brazil and Peru, with the endorsement of Bolivia, Ecuador, and Guyana, submitted an Early Warning notice through the GAC as called for in the Guidebook, explaining that:

The Amazon region constitutes an important part of the territory of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, due to its extensive biodiversity and incalculable natural resources. Granting exclusive rights to this specific gTLD to a private company would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome. It would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.

In addition, this gTLD string requested by "Amazon EU S.à.r.l." matches part of the name, in English, of the "Amazon Cooperation Treaty Organization", an international organization which coordinates initiatives in the framework of the Amazon Cooperation Treaty, signed in July 1978 by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, and expedites the execution of its decisions through its Permanent Secretariat.

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<sup>30</sup> As reflected in Guidebook Version 9, which had then been published and is materially the same as the last version.

<sup>31</sup> See generally <https://gtldresult.icann.org/applicationstatus/viewstatus>.

It should also be noted that the application for the “.AMAZON” gTLD has not received support from the governments of the countries in which the Amazon region is located. **Therefore, the Governments of Brazil and Peru (GAC Members), with full endorsement of Bolivia, Ecuador and Guyana (Amazonic non-GAC members) and also of the Government of Argentina,** would like to request that the “.AMAZON” gTLD application be included in the GAC early warning process.<sup>32</sup>

The Early Warning process is described in the Guidebook as follows:

#### 1.1.2.4 GAC Early Warning

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The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (*see* subsection 1.1.2.7) or of a formal objection (*see* subsection 1.1.2.6) at a later stage in the process.

A GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities. A GAC Early Warning may be issued for any reason. . . .<sup>33</sup>

Several South American countries voiced support for the concerns of Brazil and Peru.

On 5 April 2013, the Fourth Ministerial Conference on the Information Society in Latin America and the Caribbean issued the Montevideo Declaration, which declared:

*Recognizing* that, with a view to defending sovereignty and human rights, it is necessary to protect the present and future rights of the countries and peoples of Latin America and the Caribbean in the information society and to prevent circumstances from arising that would limit their opportunities for legitimate advancement and development in the digital environment, . . .

We resolve to . . .

*Reject* any attempt to appropriate . . . “amazon” . . . or any other generic top-level domain (gTLD) names referring to geographical areas or historical,

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<sup>32</sup> GAC Early Warning – Submittal Amazon-BR-PE-58086 at pp. 1-2 (emphasis in original), Ex. C-022.

<sup>33</sup> Guidebook, § 1.1.2.4, Ex. C-20.

cultural or natural features, which should be preserved as part of the heritage and cultural identity of the countries of the region . . . .<sup>34</sup>

Later, in October 2013, the Brazilian Embassy conveyed to ICANN a resolution of the Committee on Foreign Affairs and National Defense of the Brazilian Senate opposing the Amazon Applications, noting that “registration of such an Internet domain that refers to the natural resources and the public heritage of Amazon countries would also impose a permanent restriction on domains that refer to the Amazon and the customs of peoples in that region.”<sup>35</sup>

### **3. Community Objections Filed by the Independent Objector (March 2013-January 2014)**

Separately from GAC advice, concerns about strings can be raised by “Public Objection” procedures, as described in Guidebook Module 3.<sup>36</sup> This two-track approach was a significant change to the Guidebook made in response to the 2011 comments from the GAC. Until Version 5, the Guidebook established four dispute resolution procedures, but had no specific provisions concerning GAC advice. The separate process for GAC advice was incorporated in Section 3.1 of Guidebook Version 6, and Version 5’s pre-existing procedures, which could be invoked by members of the public, were moved to Sections 3.2-3.5.<sup>37</sup>

Sections 3.2 to 3.5 cover four different types of dispute resolution procedures available to specified parties. Relevant here is the Community Objection process.<sup>38</sup> It is designed to allow challenges where “[t]here is substantial opposition to the gTLD application from a significant

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<sup>34</sup>Montevideo Declaration (3-5 April 2013), Ex. R-61. The Declaration was issued by the Economic Commission for Latin America and the Caribbean, which consists of 33 countries in Latin America and the Caribbean, together with several Asian, European and North American nations that have historical, economic and cultural ties with the region.

<sup>35</sup>Federal Senate of Brazil Resolution (Request) No. 73 of 2013 (Unofficial Translation) at p. 8, Ex. R-62.

<sup>36</sup>Ex. C-20 at § 3.2.

<sup>37</sup>The revisions to the Guidebook to address GAC or GAC member concerns also allowed governments to invoke the dispute resolution procedures available more generally, should they choose to do so.

<sup>38</sup>The other three types of Objections are String Confusion Objections, Legal Rights Objections, and Limited Public Interest Objections. *See* Ex. C-020 at § 3.2.1.



portion of the community to which the gTLD string may be explicitly or implicitly targeted.”<sup>39</sup>

The Guidebook also establishes the position of the Independent Objector, appointed to pursue Community Objections when others had concerns but chose not to formally object.<sup>40</sup>

A formal objection to a gTLD application may also be filed by the Independent Objector (IO). The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.<sup>41</sup>

Brazil and Peru chose not to invoke the Community Objection process, instead preferring to follow the GAC advice process of Section 3.1. However, the Independent Objector elected to file Community Objections<sup>42</sup> to the Amazon Applications, relying in part on the governmental concerns stated in the Early Warning.

On May 24, 2013, Amazon filed oppositions<sup>43</sup> to these Community Objections. Amazon<sup>44</sup> argued that the Independent Objector’s filing was not supported by substantial opposition of the Amazon community:

The fact that neither the [Amazon Cooperation Treaty Organization] (“OTCA”) nor any government, IGO or other representative body filed objections indicates that there is no substantial opposition from within any relevant community.<sup>45</sup>

That OTCA and its governments have preferred to continue negotiations with Amazon rather than file objections demonstrates that they believe this objection does not have to succeed to protect their interests.<sup>46</sup>

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<sup>39</sup> *See id.* at § 3.2.1.

<sup>40</sup> As well as Limited Public Interest Objections, not relevant here.

<sup>41</sup> Ex. C-020 at § 3.2.5.

<sup>42</sup> *See* Community Objection (13 Mar. 2013), Ex. C-023 (objecting to English string). Similar objections were made to the Japanese and Chinese versions.

<sup>43</sup> Amazon Opposition to Community Objection, Ex. R-63 (English), Amazon Opposition to Community Objection, R-64 (Japanese), and Amazon Opposition to Community Objection, R-65 (Chinese).

<sup>44</sup> Amazon’s response also challenged the Independent Objector’s involvement because, as disclosed in the objection he filed, he was counsel to Peru in connection with boundary disputes with Chile and Ecuador. *See* Ex. C-023 at p. 6.

<sup>45</sup> Ex. R-63 at p. 6.

<sup>46</sup> *Id.* at p. 14.

The lack of comment from the vast populations with “common interests” in the Amazonia region, and the decision by every government, OTCA and the [ICANN At-Large Advisory Committee], not to file objections means that there was no substantial opposition within either the asserted community or the public who use the global Internet when the objection was filed.<sup>47</sup>

Amazon made these claims of lack of governmental opposition in late May 2013 despite knowing of (and having already objected to)<sup>48</sup> the GAC’s request for additional time to consider governmental objections to the Amazon Applications.<sup>49</sup> Further, after the GAC issued the Durban Communiqué on 18 July 2013 explicitly stating that the “GAC has reached consensus on GAC Objection Advice”<sup>50</sup> against the Amazon Applications proceeding, Amazon did not correct its statements in its Community Objection Opposition that there was no governmental opposition.

Six months later (on 27 January 2014), apparently unaware that the GAC had issued consensus advice against the Amazon Applications, the Expert handling the Community Objection proceeding dismissed the Community Objections.<sup>51</sup> Among other things, the Expert found that the required “substantial opposition within the community” had not been shown, based on his apparent (incorrect) belief that Brazil and Peru had failed to pursue their objections:

As evidence of substantial opposition to the Applications the IO [Independent Objector] relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

This is not without significance. . . . The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments’ attitude is an indication of

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<sup>47</sup> *Id.* at p. 15.

<sup>48</sup> GAC Advice Response Form for Application submitted by Stacey King (10 May 2013), Ex. C-030.

<sup>49</sup> GAC Beijing Communiqué (11 Apr. 2013) at pp. 3-4, Ex. R-19.

<sup>50</sup> GAC Durban Communiqué (18 July 2013) at pp. 3-4, Ex. R-22.

<sup>51</sup> *See* ICC Expert Determination, Ex. C-047.

their belief that their interests can be protected even if the Objection does not succeed. . . .<sup>52</sup>

The Expert also found that the Community Objections failed because the Independent Objector did not demonstrate “a likelihood of material detriment” based on similar reasoning: “The fact that none of them was prompted to raise any objection, whether formally or at least informally, can be taken as a significant indication of lack of likelihood of detriment.”<sup>53</sup>

In sum, the Community Objections were dismissed based on the Expert’s stated, but mistaken, belief that there was no longer any serious governmental opposition.

#### **4. Amazon Applications Pass Geographic Names Review (March-July 2013)**

One of the steps in ICANN’s initial evaluation of applications is “Geographic Names Review,” as described in Guidebook Section 2.2.1.4. As part of the Initial Evaluation Process, a Geographic Names Panel compares applied-for strings with lists of nations, territories, sub-national place name, and cities.<sup>54</sup> The Amazon Applications passed those reviews in March-July 2013.<sup>55</sup> Passing the Geographic Names review does not, as the Board made clear when approving the New gTLD Program’s launch,<sup>56</sup> prevent the GAC from issuing advice relative to those applications.

#### **D. The GAC Considers and Issues Consensus Advice (April-July 2013)**

At its Beijing meeting on 11 April 2013, the GAC discussed requests by Brazil and Peru to issue consensus advice against the Amazon Applications. Because the discussion about the Amazon Applications was not concluded at the 11 April 2013 meeting, the GAC requested more

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<sup>52</sup> See *id.* at ¶¶ 90-91 (emphasis added).

<sup>53</sup> *Id.* at ¶ 104.

<sup>54</sup> Ex. C-020 at § 2.2.1.4.4. An ICANN contractor: Economist Intelligence Unit and InterConnect Communications, in partnership with the University College London.

<sup>55</sup> Initial Names Report on .アマゾン (Japanese) (22 March 2013), Ex. C-024; Initial Names Report on .亚马逊 (Chinese) (5 April 2013), Ex. C-025; Initial Names Report on .AMAZON (12 July 2013), Ex. C-037.

<sup>56</sup> See *infra* Argument Section A at pp. 25-30.

time to complete its discussions during the GAC's next scheduled meeting, in Durban in July 2013.<sup>57</sup> On 10 May 2013, Amazon's Senior Corporate Counsel wrote ICANN to protest the GAC's request for additional time to complete its consideration of the Amazon Applications.<sup>58</sup>

Between the GAC's Beijing and Durban meetings, Amazon vigorously lobbied several countries, including the United Kingdom,<sup>59</sup> Germany,<sup>60</sup> Luxembourg,<sup>61</sup> and Australia,<sup>62</sup> requesting that they object to GAC advice against the Amazon Applications. These efforts failed and no country formally objected to the proposed GAC advice. Amazon also tried to persuade the United States to object, but the United States determined that, while it had concerns about the underlying rationale, it would not block consensus within the GAC. That position was released on 5 July 2013 as "U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting," and stated:

The United States has listened carefully to the concerns expressed by colleagues on certain geographic strings. It is our sincere hope that individual governments can resolve their concerns on specific geographic strings through agreements on specific safeguards negotiated with the relevant applicants. We encourage all parties to continue to do so leading to Durban. However, in the event the parties cannot reach agreement by the time this matter comes up for decision in the GAC, the United States is willing in Durban to abstain and remain neutral on .shenzhen (IDN in Chinese), .persiangulf, .guangzhou (IDN in Chinese), .amazon (and IDNs in Japanese and Chinese), .patagonia, .yun, and .thai, thereby allowing the

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<sup>57</sup> Ex. R-19 at § IV(c)(i).

<sup>58</sup> GAC Advice Response Form for Application submitted by Stacey King (10 May 2013), Ex. C-030. At the time, Ms. King was Amazon's Senior Corporate Counsel. She was Secretary of ICANN's Intellectual Property Constituency from December 2010 to June 2012 and is now General Manager of Amazon Registry Services, Inc.

<sup>59</sup> Email from Stacey King, Senior Corporate Counsel (IP) at Amazon to Mark Carvell, Head, UK Global Internet Governance Policy (8 April 2013), Ex. R-66.

<sup>60</sup> Email from Brian Huseman, Director, Public Policy, at Amazon to Hubert Schoettner, German Federal Ministry of Economics and Technology (8 April 2013), Ex. R-67.

<sup>61</sup> Email from Stacey King, Senior Corporate Counsel (IP) at Amazon to Claudine Kariger, Senior Policy Adviser, Luxembourg Media and Communications Department (8 April 2013), Ex. R-68.

<sup>62</sup> Email from Stacey King, Senior Corporate Counsel (IP) at Amazon to Peter Nettlefold, Senior Adviser, Australian Digital Government Strategy Department (8 April 2013), Ex. R-69; *see also* e-mail from David Gross, Amazon retained counsel, to Stephen Conroy, Australian Minister for Broadband, Communications and the Digital Economy (19 June 2013), Ex. R-70.

GAC to present consensus objections on these strings to the Board, if no other government objects.

The United States affirms our support for the free flow of information and freedom of expression and does not view sovereignty as a valid basis for objecting to the use of terms, and we have concerns about the effect of such claims on the integrity of the process. We considered that the GAC was of the same mind when it accepted ICANN's definition of geographic names in February 2011 and agreed that any potential confusion with a geographic name could be mitigated through agreement between the applicant and the concerned government. In addition, the United States is not aware of an international consensus that recognizes inherent governmental rights in geographic terms. Therefore, the choice made in this discrete case does not prejudice future United States positions within the ICANN model or beyond.<sup>63</sup>

Thus, although expressing areas of concern, the United States was willing to “abstain and remain neutral . . . , thereby allowing the GAC to present consensus objections on these strings to the Board, if no other government objects.”<sup>64</sup>

Meanwhile, numerous governments expressed their concerns about the Amazon Applications in the lead-up to the Durban GAC meeting. On 13 July 2013, Argentina, Brazil, Chile, Peru and Uruguay, with the full support of Amazon basin countries, submitted their “Statement on ‘.amazon’ and other strings containing geographic names,” which read in part as follows:

From the beginning of the process, our countries have expressed their concerns with the aforementioned applications, presenting various documents to the GAC referring to the context and basis of the national and regional concerns, including Early Warning and GAC Advice requests. Various facts, recorded in several historiographical, literary and official documents throughout history, including recent Official Regional Declarations, haven been submitted and explained by each country directly to the GAC and to the applicants, through the established procedures and through an active engagement process with the interested parties that has allowed us to explain our position for requesting the withdrawal of the applications. This is the position adopted, for example, by the IV Latin

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<sup>63</sup> U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting, Ex. C-034.

<sup>64</sup> *Id.*

American and Caribbean Ministerial Conference on Information Society, the Amazon Cooperation Treaty Organization, the Brazilian Internet Steering Committee, the Brazilian Congress and the Brazilian Civil Society, the Peruvian Congress Commission on Indigenous Peoples, local governments of the Peruvian Amazon region and several representatives of the Peruvian Civil Society.<sup>65</sup>

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Finally, on 13 and 16 July 2013, the GAC held meetings to discuss the Amazon Applications.<sup>67</sup> These were open to public observation and transcribed.<sup>68</sup> Brazil and Peru gave detailed statements. South Africa, Gabon, Sri Lanka, Trinidad and Tobago, Russia, Uruguay, Uganda, Argentina, Portugal, Chile, Iran, China, Nepal, and Thailand each spoke supporting the Brazil/Peru position.<sup>69</sup>

The many participants in the discussion, and those submitting written statements beforehand, expressed concerns about geographic, ethnic, and cultural sensitivities. The various governments discussed a spectrum of concerns with the Amazon Applications.<sup>70</sup> Some countries expressed hope that the evaluation process could be revised in future gTLD rounds to more

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<sup>65</sup> Statement on “.amazon” and other strings containing geographic names, 47<sup>th</sup> ICANN GAC Durban Meeting, Submitted by Argentina, Brazil, Chile, Peru, and Uruguay, with the full support of Amazon basin countries (13 July 2013), Ex. C-039.

<sup>66</sup> Redacted - Information Designated Confidential In This IRP

Durban – GAC Plenary 2 Transcript, Ex. C-038; Durban – GAC Open Plenary 4 Transcript, Ex. C-040.

<sup>68</sup> *See id.* Amazon relies on the IRP Declaration in the *DCA* IRP matter to argue that the GAC improperly acts on secret rationales. Amazon’s Prehearing Brief at pp. 29-31. While unclear how Amazon’s argument about the GAC’s consideration of *DCA*’s application is relevant here, it is undisputed that the GAC followed enhanced transparency when discussing the Amazon Applications, compared to the discussion of *DCA*’s application for .AFRICA.

<sup>69</sup> *See* Ex. C-038; Ex. C-040.

<sup>70</sup> At one point in the discussion, the Peru representative asserted that “Amazon” was a geographic name requiring governmental support under the Guidebook because it appeared on the ISO 3166-2 list, but the exact match to “Amazon” does not appear on the ISO 3166-2 list. Peru clarified its point by a 24 December 2013 letter, asserting that the Guidebook “should be understood as covering the expression subject of application, in every language.” *See* Letter from Fernando Rojas Semanez, Vice Minister of Foreign Affairs of Peru, to Steve Crocker (24 Dec. 2013), Ex. C-045. In the GAC discussion, larger issues of sensitivity to cultural, ethnic, and geographic concerns predominated, so that the distinction between the English and Spanish does not appear material to the participants or their reasons.

directly classify geographically sensitive strings. But in the end, there was general agreement about the Amazon Applications. As stated by the GAC Chair:

Chair Dryden: Perhaps I can continue. I think we can settle this. So what I propose to do is put the question regarding dot Amazon, and then we will conclude this session. So are there any objections to a GAC consensus objection to the application for dot Amazon? Recognizing that there are IDN [Japanese/Chinese] equivalents, this would apply to those equivalents. So I am now asking you in the committee whether there are any objections to a GAC consensus objection on the applications for dot Amazon, which would include their IDN equivalents. I see none. Would anyone like to make any comments on the string dot Amazon. I see none. Okay. So it is decided, and now we will break for lunch. Please be back here at 2:00.<sup>71</sup>

Following its normal practice, the GAC issued a communiqué after its meetings had concluded. Its 18 July 2013 Durban Communiqué included the following item:

- a. The GAC Advises the ICANN Board that:
  - i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:<sup>[footnote 3]</sup>
    1. The application for .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591) . . . .<sup>72</sup>

The Durban Communiqué's footnote 3 reads:

<sup>3</sup> Module 3.1: "The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved."<sup>73</sup>

#### **E. The NGPC Considers and Ultimately Accepts the GAC Advice (August 2013-May 2014)**

As the Guidebook contemplated, Amazon was invited to submit a response to the GAC

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<sup>71</sup> Durban – GAC Open Plenary 4 Transcript at p. 30, Ex. C-040.

<sup>72</sup> GAC Durban Communiqué (18 July 2013) at pp. 3-4, Ex. R-22.

<sup>73</sup> *Id.* at p. 3

advice. On 23 August 2013, it submitted a twenty-page response,<sup>74</sup> with 296 pages of attachments, urging the NGPC to reject the GAC advice. Amazon made three arguments: (1) that “The GAC Advice Is [Contrary] to International Law,” asking the NGPC to obtain “independent expert advice on the protection of geographic names in international law generally and the violations of relevant principles of international law and applicable conventions and local law represented by the GAC Advice”<sup>75</sup>; (2) that .AMAZON was being treated differently than .IPIRANGA;<sup>76</sup> and (3) that it had followed the rules of the New gTLD Program,<sup>77</sup> citing to statements made during the Guidebook development process from 2007 through March 2011, but not mentioning the significant refinements that were made in response to GAC concerns after Version 5 of the Guidebook.

Following careful consideration of Amazon’s response, with respect to Amazon’s first argument (international law), the NGPC retained Jérôme Passa, a professor at the Université Panthéon-Assas in Paris “to provide an opinion on the well foundedness of various objections raised against the reservation of the new gTLD ‘.amazon’.”<sup>78</sup> He submitted a 14-page report on 31 March 2014 that concluded:

As regards the application for assignment of the new gTLD ‘.amazon’ filed by the Amazon company:

- i) there is no rule of international, or even regional or national, law applicable in the field of geographical indications which obliges ICANN to reject the application;
- ii) there is no rule of international, or even regional or national, law applicable in the field of intellectual property and in particular of trade

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<sup>74</sup> Amazon’s Response to GAC Advice, Ex. C-043.

<sup>75</sup> *Id.* at pp. 12-13.

<sup>76</sup> *Id.* at pp. 13-17.

<sup>77</sup> *Id.* at pp. 17-19.

<sup>78</sup> Jérôme Passa Report, Ex. C-048. Article XI-A, Section 1, empowers ICANN to obtain external expert advice on public-policy issues. In addition, Section 3.1 of the Guidebook authorizes the Board to consult independent experts in resolving issues raised in GAC advice.



marks or in the field of fundamental rights, which obliges ICANN to accept this application.<sup>79</sup>

This conclusion supported the view that ICANN, within its processes, could either accept or reject the Amazon Applications and neither would be inconsistent with international law.

Scott Hayden, Amazon's Vice President, Intellectual Property, provided a four-page response on 14 April 2014.<sup>80</sup> Mr. Hayden, after agreeing with Passa's conclusion that international law allowed ICANN to accept the Amazon Applications, also agreed that it allowed ICANN to reject the Amazon Applications:

We have never argued, despite the question posed to the Expert, that Amazon is entitled to .AMAZON or that ICANN is obliged to award us .AMAZON based on intellectual property rights alone.<sup>81</sup>

In short, Amazon agreed that the decision of whether to accept its applications was not governed by international law, but was to be dealt with based on ICANN's procedures. Mr. Hayden's letter then repeated Amazon's arguments that acceptance of the GAC advice would "override years of multistakeholder-created consensus policy, which the [Guidebook] represents,"<sup>82</sup> while ignoring the explicit changes made to the Guidebook as it went through its many revisions.<sup>83</sup>

The NGPC met on 29 April 2014 to discuss the GAC consensus advice concerning the Amazon Applications, and consider all of the facts, positions, and analyses that the NGPC had received. The NGPC reviewed and considered three possible actions: (a) accepting the GAC advice and rejecting the Amazon Applications; (b) suspending the Amazon Applications to allow

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<sup>79</sup> Ex. C-048 at p. 14.

<sup>80</sup> Letter from Scott Hayden to Steve Crocker (14 April 2014), Ex. C-051.

<sup>81</sup> *Id.* at p. 2.

<sup>82</sup> *Id.* at p. 3.

<sup>83</sup> Brazil and Peru also submitted comments on the Passa report. *See* Letter from Benedicto Fonseca Filho, Brazilian Department of Scientific and Technological Themes and Virgilio Fernandes Almeida, Brazilian National Secretary for Information Technology Policies, to Stephen D. Crocker, ICANN Chair (14 April 2014), Ex. R-71; Letter from Fernando Rojas Samanez, Peruvian Vice Minister of Foreign Affairs to Steven D. Crocker, ICANN Chair (11 April 2014), Ex. C-050.

additional time for a consensual resolution; or (c) rejecting the GAC advice and allowing the Amazon Applications to proceed. The minutes of the 29 April 2014 meeting<sup>84</sup> show that the NGPC discussed that the GAC advice was indeed consensus advice, reiterated the need to treat applications coming before the NGPC consistently, and expressed some skepticism that additional time might result in a consensual resolution. At the conclusion of the discussion, the NGPC “Chair directed staff to schedule a meeting in May so that the Committee could continue its discussion on .AMAZON (and related IDNs), in addition to other open items of GAC advice.”<sup>85</sup>

The NGPC met again on 14 May 2014, and while Amazon argues that the NGPC did little to evaluate the competing positions, the NGPC actually had the benefit of extensive reference materials<sup>86</sup> and committee papers.<sup>87</sup> After additional discussion of alternatives, the NGPC adopted Resolution 2014.05.14.NG03, which after recitals stated:

Resolved (2014.05.14.NG03), the NGPC accepts the GAC (Governmental Advisory Committee) advice identified in the GAC Register of Advice as 2013-07-18-Obj-Amazon, and directs the President and CEO, or his designee, that the applications for AMAZON (application number 1-1315-58086) and related IDNs (Internationalized Domain Names) in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5581) filed by Amazon EU S.a r.l. should not proceed. By adopting the GAC advice, the NGPC notes that the decision is without prejudice to the continuing efforts by Amazon EU S.à r.l. and members of the GAC to pursue dialogue on the relevant issues.<sup>88</sup>

The resolution was accompanied by a lengthy and comprehensive rationale, which described the extensive record before the NGPC as well as the NGPC’s consideration of that record.

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<sup>84</sup> NGPC Meeting Minutes (29 April 2014), Ex. R-31.

<sup>85</sup> *Id.*

<sup>86</sup> NGPC Meeting – Reference Materials (14 May 2014), Ex. C-056.

<sup>87</sup> NGPC Meeting – Committee Papers (14 May 2014), Ex. C-057.

<sup>88</sup> NGPC Adopted Resolution 2014.05.14.NG03, Ex. R-72.

## **F. Amazon Seeks Reconsideration (May-September 2014)**

On 29 May 2014, Amazon submitted Reconsideration Request 14-27.<sup>89</sup> Under ICANN procedures, requests for reconsideration of Board (including Board committee) action are referred to the Board Governance Committee (BGC) for review and recommendation. On 22 August 2014, the BGC recommended that the request be denied with a 20-page rationale.<sup>90</sup> On 8 September 2014 the NGPC denied reconsideration with a similar rationale.<sup>91</sup>

### **Argument**

Before accepting the GAC advice, the NGPC carefully investigated the underlying facts, faithfully applied the procedures as adopted in the Guidebook, and exercised thoughtful, independent judgment about how best to promote ICANN's policies and mission. Contrary to Amazon's arguments: (1) the Guidebook permits the GAC to object to geographic strings; (2) the GAC's advice was "consensus advice" because there was general agreement and no formal objection; (3) the GAC was not required to include a statement of consensus reasons with its advice, particularly because the public policy concerns were readily apparent from available materials; (4) the NGPC conducted a reasonable investigation and exercised its own judgment; (5) the ICC's dismissal of the Independent Objector's Community Objections did not preclude acceptance of (and was unrelated to) the GAC advice; and (6) under the Guidebook, the allowance of .IPIRANGA (an unchallenged application) did not make the NGPC denial of the Amazon Applications (GAC-challenged applications) discriminatory. For all of these reasons, Amazon's IRP Request should be denied.

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<sup>89</sup> See Amazon's Reconsideration Request (29 May 2014), Ex. C-059.

<sup>90</sup> Recommendation of the Board Governance Committee (BGC), Reconsideration Request 14-27 (22 Aug. 2014), Ex. C-065.

<sup>91</sup> Approved Resolutions – Meeting of the New gTLD Program Committee (8 Sept. 2014), Ex. R-73.

### **A. Unlisted Geographic Strings Are Proper Subjects of GAC Advice**

Amazon’s Prehearing Brief argues that, because “Amazon” does not fall within the criteria for a geographic name contained in Section 2.2.1.4 of the Guidebook, the GAC could not properly object to the string based on its geographic character.<sup>92</sup> This argument is wrong.

Although proposed early versions of the Guidebook (Version 5 and earlier) did not discuss the GAC objecting to specific strings, language was later added to the Guidebook providing for the GAC to give advice on strings not within Section 2.2.1.4 that have a geographic character.

From the very beginning of the GNSO’s policy development work, it was recognized that geographic strings may raise governmental concerns.<sup>93</sup> The Guidebook addresses these concerns by establishing a two-track approach. Section 2.2.1.4 provides for “Geographic Names Review” under which strings found on various lists of country, regions, and city names are *per se* deemed geographic and, as a result, are either prohibited,<sup>94</sup> or allowed only with governmental support or non-objection.<sup>95</sup> In addition, the Guidebook leverages the role of the GAC as ICANN’s public-policy adviser by providing that the GAC could advise the Board to reject strings considered to be geographic even where they do not meet the criteria within the scope of the Geographic Names Review.

The history of the Guidebook’s evolution is illuminating. As noted below, the original (before 2008) notion was to evaluate whether a string had troublesome geographic connotations on a string-by-string basis, since it would be difficult to identify ahead of time a definitive set of strings raising geographic sensitivities. The GNSO Council chartered a Reserved Names

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<sup>92</sup> See Amazon’s Prehearing Brief at pp. 34-41.

<sup>93</sup> The principle that geographic strings may raise sensitivities is reflected at the beginning of Section 2.2.1.4 of the final Guidebook: “Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names.” Ex. C-020 at § 2.2.1.4.

<sup>94</sup> *Id.* at § 2.2.1.4.1.

<sup>95</sup> *Id.* at § 2.2.1.4.2.

Working Group, which recommended that “[t]here should be no geographical reserved names” but that “proposed challenge mechanisms currently being proposed in the draft new gTLD process would allow national or local governments to initiate a challenge [i.e. on a string-by-string basis].”<sup>96</sup>

When the Board authorized development of an implementation plan for the new gTLDs in June 2008, geographic names were recognized as posing issues that would require further consultation with the community.<sup>97</sup> Evaluating strings with geographic sensitivities on an entirely ad-hoc basis would leave prospective applicants uncertain. Draft Version 1 of the Guidebook sought to address this by including a definition of “geographical names” relying on lists of countries, territories, sub-national places, cities and continents,<sup>98</sup> and this approach continued through Version 5.

As noted above,<sup>99</sup> the GAC objected to Guidebook Version 5 on several grounds, including its omission of a specified GAC review of sensitive strings. The GAC recommended that the evaluation process include review by governments, via the GAC. As a result of this recommendation, over the next several months, the Board adopted several changes to the Guidebook specifically setting out a GAC role in evaluating and potentially advising on applied-for strings raising public policy concerns.

On 15 April 2011, ICANN published Version 6 of the Guidebook, which now included “a GAC Early Warning procedure and a GAC Advice on New gTLDs (i.e., objection)

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<sup>96</sup> See ICANN Generic Names Supporting Organisation Final Report: Introduction of New Generic Top-Level Domains (8 August 2007), section entitled “Term of Reference – Selection Criteria,” Recommendation 20, Ex. R-58.

<sup>97</sup> Transcript of 26 June 2008 ICANN Board Meeting, remarks of Paul Twomey (then ICANN CEO), Ex. R-74 (“Specifically, issues around geographical terms is clearly something that we will have to consider and write up an implementation terms and bring back for consideration with the board and the community.”).

<sup>98</sup> Applicant Guidebook version 1 (24 October 2008) at §§ 2-8 to 2-11, Ex. R-4. Concurrently with the release of Version 1, ICANN published New gTLD Program Explanatory Memorandum: Proposed Process for Geographic Name Applications, (22 October 2008), Ex. R-75 (discussing implementations alternatives).

<sup>99</sup> See *supra*, pp. 10-11.

procedure.”<sup>100</sup> The GAC advice mechanism allowed the GAC to “provide advice on *any* application”<sup>101</sup>; if the advice was by consensus it would “create a strong presumption for ICANN that the application should not be approved.”<sup>102</sup>

The GAC continued to have concerns about details of Version 6, leading to in-person and telephone meetings between the Board and the GAC to find a mutually acceptable solution.<sup>103</sup> Version 7 of the Guidebook was released on May 30, 2011, but the GAC still expressed some concerns, leading to additional face-to-face meetings on 19 June 2011.<sup>104</sup> These meetings resulted in almost complete agreement on a mechanism for the GAC to express concerns of governments with respect to applied-for strings.

On 20 June 2011, based on its near-complete agreement with the GAC,<sup>105</sup> the Board adopted Resolution 2011.06.20.01 authorizing the ICANN President and CEO to implement the New gTLD Program based on Version 7 of the Guidebook subject to additional revisions that had been agreed with the GAC, which the Board directed be made.<sup>106</sup> The resolution was published with a 121-page document entitled “ICANN Board Rationales for the Approval of the Launch of the New gTLD Program”<sup>107</sup> (“Launch Rationales”) adopted by the Board to reflect its reasoning in detail. Section 4 of the Launch Rationales, covering “Geographic Names,” included the following summary of the resolution of the geographic names issues that the Board and GAC had achieved in their months-long period of consultations:

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<sup>100</sup> See New gTLD Program Explanatory Memorandum: GAC and Government Objections; Handling of Sensitive Strings; Early Warning at p. 2 (15 April 2011), Ex. R-7.

<sup>101</sup> Applicant Guidebook (April 2011 Discussion Draft) at § 3-2, Ex. R-9 (emphasis added).

<sup>102</sup> *Id.*

<sup>103</sup> Such consultation is contemplated by ICANN’s Bylaws. Ex. C-064 at Art. XI, § 2.1(j).

<sup>104</sup> Transcript of ICANN New gTLDs and Applicant Guidebook Meeting with Board/GAC (19 June 2011), Ex. R-13.

<sup>105</sup> Resolution 2011.06.20.01, 8<sup>th</sup> recital, Ex. R-14.

<sup>106</sup> *Id.*

<sup>107</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, Ex. R-76.

- The Board has accepted GAC advice to require government approval in the case of applications for certain geographic names.
- The Board intended to create a predictable, repeatable process for the evaluation of gTLD applications. Thus, to the extent possible, geographic names are defined with respect to pre-existing lists.
- The Board recognized that the Community Objection process recommended by the GNSO to address misappropriation of a community label would be an additional avenue available to governments to pursue a case where a name was not protected by reference to a list. The Board discussed this topic extensively with the GAC. As a result of the consultation on this and other topics, the Applicant Guidebook was revised to incorporate an Early Warning process which governments could use to flag concerns about a gTLD application at an early stage of the process. These procedures could also help address any concerns from governments about geographic names not already protected in the process.
- The Board also confirmed that the GAC has the ability to provide GAC Advice on New gTLDs concerning any application. Thus, governments would not be required to file objections and participate in the dispute resolution process, but rather, may raise their concerns via the GAC. This process could be used, for example, for governments to object to an application for a string considered by a government to be a geographic name.<sup>108</sup>

In sum, the implementation approach in the operative version of the Guidebook employs a two-track approach to identify and handle strings raising geographic sensitivities. The first

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<sup>108</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, § 4(III)(G) (entitled “The Board’s Reasons for the Proposed Approach to Geographic Names”) at p. 45, Ex. R-76 (emphasis added).

The Expert Report of Heather Ann Forrest, submitted by Amazon, takes the position in paragraph 7.6.3 that “concerns relating to geographic names are conclusively addressed in the procedures of Module 2 of the Guidebook.” Expert Report of Heather Ann Forrest.

In reaching this conclusion, she entirely ignores or is unaware of the Board’s discussion of its *agreements with the GAC* set forth in its Launch Rationales for Resolution 2011.06.20.01, which as described above clearly contemplates GAC advice on unlisted strings.

Instead, paragraph 8.3 of her Report refers to a different rationale that the Board cited in companion Resolution 2011.06.20.02. That second rationale, “Rationale: Remaining areas of difference between ICANN’s Board and Governmental Advisory Committee regarding implementation of the New gTLD Program (20 June 2011), Ex. R-77, listed the “remaining issues” on which the Board and GAC *could not agree* and giving reasons for the Board adhering to its earlier position.

Inexplicably, she concludes that the absence of geographic names from the list of issues not agreed somehow means that the Board failed to agree (as the Launch Rationales said happened) with GAC’s previously stated objections concerning treatment of geographic names.

track states criteria for *per se* designation of strings as geographic.<sup>109</sup> The second track created a second level of scrutiny: The GAC could consider any string “considered by a government to be a geographic name” and, if it felt appropriate, advise the Board that the string should be prohibited or made subject to protective measures.

### **B. The GAC’s Advice Was Consensus Advice**

Amazon argues that the GAC advice was not, in fact, consensus advice.<sup>110</sup> However, the GAC was unequivocal in its Durban Communiqué that it *had* “reached consensus on GAC Objection Advice”<sup>111</sup> on the Amazon Applications. By express definition, consensus in the GAC means “general agreement in the absence of any formal objections.”<sup>112</sup> And while Amazon seeks to highlight (often subtle) differences among various GAC members’ reasoning, those differences do not undercut the presence of a consensus on the advice that, in the Guidebook’s words, “a particular application should not proceed.”<sup>113</sup>

Within the GAC, the meaning of “consensus” has long been well-understood and has been documented since 2011. Consensus decision making is a hallmark of cooperation among governments: “The abiding principle in United Nations decision making is, whenever possible, to reach consensus amongst all participating governments.”<sup>114</sup> In other words, consensus does not require that all members agree on the specific rationale for advice, or that they would decide it the same way if it were their individual decision. A consensus decision is a decision of the group, not any single member.

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<sup>109</sup> Ex. C-020 at § 2.2.1.4.

<sup>110</sup> Amazon’s Prehearing Brief at pp. 28-34.

<sup>111</sup> Ex. C-041 at § IV(1)(1)(a)(i).

<sup>112</sup> Ex. R-15.

<sup>113</sup> Ex. C-020 at §§ 1.1.2.7 (advice type I).

<sup>114</sup> United Nations, Intergovernmental Negotiations and Decision Making at the United Nations: A Guide (2d updated ed. 2007) at p. 4, Ex. R-78 (describing the General Assembly, Security Council, and ECOSOC).



From its inception, the GAC has operated by consensus. By early 2011, however, clarity about what constituted consensus rose in importance. As previously noted,<sup>115</sup> at that time, the GAC objected to the absence of GAC review of individual gTLD applications. After meetings with the GAC, the Board agreed that “[a] procedure for GAC review will be incorporated into the new gTLD process,” but asked that any such advice define “whether the advice from the GAC is supported by a consensus of GAC members (which should include identification of the governments raising/supporting the objection).”<sup>116</sup>

That went partway to address the GAC’s concerns, but raised another concern – that the GAC, not the Board, is best suited to determine whether consensus has been achieved. To address this, ICANN issued Version 6 of the Guidebook (15 April 2011), which gave the GAC the responsibility to determine when consensus is achieved and made the GAC’s advice more forceful when it is: “If the GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, that will create a strong presumption for ICANN that the application should not be approved.”<sup>117</sup>

In view of the increased focus on whether GAC advice had “consensus,” the GAC amended its operating principles on 27 October 2011 to include the following definition of “consensus”:

**Principle 47**

The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the [GAC] Chair

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<sup>115</sup> See *supra*, pp. 10-11.

<sup>116</sup> ICANN Board Notes on the GAC New gTLDs Scorecard (4 March 2011) at pp. 1-2, Ex. R-79.

<sup>117</sup> Ex. R-9 at § 3-2 (emphasis added).

shall convey the full range of views expressed by members to the ICANN Board.<sup>118</sup>

The key to this definition is that consensus within the GAC means “general agreement in the absence of any formal objection.” It allows consensus to be achieved even though there may be a spectrum of opinions. It also allows consensus when, if the matter were an individual rather than group decision, one or more members might decide differently. Where, however, the GAC *as a group* decides on advice, without any member lodging a formal objection, it is “consensus advice.”

This meaning of consensus is illustrated by the position of the United States, stated in its July 2013 “U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting.” Although expressing concerns over the appropriateness of an objection to the Amazon strings: “the United States is willing in Durban to abstain and remain neutral on . . . amazon (and IDNs in Japanese and Chinese) . . . thereby **allowing the GAC to present consensus objections on these strings to the Board, if no other government objects.**”<sup>119</sup>

At the conclusion of the GAC’s discussion regarding the Amazon Applications, the GAC Chair formally inquired whether there were any objections to a GAC consensus objection to the Amazon Applications, and none was made:

So I am now asking you in the committee whether there are any objections to a GAC consensus objection on the applications for dot Amazon, which would include their IDN equivalents. I see none. Would anyone like to

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<sup>118</sup> Ex. R-15 at p. 7 (footnote omitted).

<sup>119</sup> Ex. C-034 (emphasis added). Page 31 of Amazon’s Prehearing Brief argues that the NGPC did not consider this “separate statement of the United States.” This argument, previously made unsuccessfully by reconsideration, is startling. Needless to say, even at the time the U.S. letter was quite notorious within the ICANN community. It was discussed at the ICANN Public Forum (where members of the community have the opportunity to address the Board, including NGPC, members) in Durban on 18 July 2013. Durban – ICANN Public Forum (18 July 2013) at p. 17, Ex. C-042 (statement of Claudio DiGangi on behalf of INTA).

make any comments on the string dot Amazon. I see none. Okay. So it is decided, and now we will break for lunch.<sup>120</sup>

The GAC's Durban Communiqué explicitly affirmed that consensus had been achieved.

### **C. The GAC Was Not Required to State a Consensus Rationale**

Amazon's Prehearing Brief also argues that the GAC advice is invalid because it did not include a statement of a "consensus rationale."<sup>121</sup> That argument is contrary to the provisions of the operative version of the Guidebook, which requires only that there be a "consensus of the GAC that a particular application not proceed,"<sup>122</sup> rather than requiring a consensus as to reasoning.

The earliest Guidebook version incorporating the concept of GAC advice contained a suggestion that the GAC should state its basis, but that provision was intentionally removed later in 2011. Guidebook Version 6, issued 15 April 2011, proposed this formulation:

ICANN's transparency requirements indicate that GAC Advice on New gTLDs should identify objecting countries, the public policy basis for the objection, and the process by which consensus was reached. To be helpful to the Board, the explanation might include, for example, sources of data and the information on which the GAC relied in formulating its advice.<sup>123</sup>

The GAC, however, objected to this language in written comments on 26 May 2011, as follows:

The GAC advises the Board that the current text in Module 3 that seemingly dictates to the GAC how to develop consensus advice is problematic and should be deleted, as it is inconsistent with the ICANN Bylaws and the GAC's Operating Principles.<sup>124</sup>

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<sup>120</sup> Ex. C-040 at p. 30.

<sup>121</sup> Amazon's Prehearing Brief at pp. 20 and 28-31.

<sup>122</sup> Ex. C-020 at § 3.1.

<sup>123</sup> Ex. R-9 at § 3-2.

<sup>124</sup> GAC comments on the Applicant Guidebook (15 April 2011 version) at p. 2, Ex. R-10. As the GAC then argued, the Bylaws then in effect authorized the GAC to "adopt its own charter and internal operating principles or procedures to guide its operations," (18 March 2011 ICANN Bylaws, Art. XI, Sec. 2(1)(c)) and required the Board to duly take into account GAC advice without any requirement for a statement of reasons (Art. XI, Sec. 2(1)(j)). Ex. R-80. Effective 1 October 2016, ICANN's Bylaws were amended to require all advisory committees to give a rationale for their advice. Bylaws, as amended, at § 12.3 (1 Oct. 2016), R-81. That provision, however, does not apply to advice given before its effective date.

The Board and the GAC discussed their differences at a joint meeting on 19 June 2011. During that meeting, the Board agreed to the GAC’s position.<sup>125</sup> In the 20 June 2011 Board Resolution 2011.06.20.01, which authorized implementation of the New gTLD Program, the Board ordered “deletion of text in Module 3 concerning GAC advice to remove references indicating that future Early Warnings or Advice must contain particular information or take specified form.”<sup>126</sup> This deletion was implemented in Version 8 of the Guidebook.<sup>127</sup>

As noted in the *Booking.com* and *Vistaprint* IRP decisions,<sup>128</sup> delayed challenges to decisions made in designing the New gTLD Program are limited by the 30-day time limitation embodied in the applicable Bylaws as well as concerns over the chaos that would ensue were such delayed challenges allowed. Amazon did not challenge the Guidebook provisions regarding GAC advice, and it proceeded to file its applications in April 2012. Only in March 2016 did Amazon initiate IRP proceedings. While it is timely for Amazon to challenge the way the operative Guidebook’s principles were applied in accepting the GAC advice in 2014, it is far too late for Amazon to challenge the Board’s decision in 2011 to remove a requirement for stated GAC reasons in the operative Guidebook.

Despite the lack of a formal GAC statement of its reasons in the Durban Communiqué, the NGPC was not left in the dark as to the GAC’s reasons for the advice. After acknowledging that it did “not have the benefit of the rationale relied upon by the GAC in issuing its consensus

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<sup>125</sup> Transcript of New gTLDs and Applicant Guidebook Meeting with Board/GAC (19 June 2011), Ex. R-13 (Peter Dengate Thrush [then ICANN Chair]: “Let me move on, then, to another topic which is removal of references in the guidebook that attempt to specify that future GAC early warnings and advice must contain particular information or take a specified form. And I am delighted to say the board agrees completely with the GAC in relation to this topic.”).

<sup>126</sup> Board Resolution 2011.06.20.01, Ex. R-14.

<sup>127</sup> Summary of Changes to Applicant Guidebook Showing changes from 30 May 2011 version to version 2011-09-19 at pp. 12-15, Ex. R-82.

<sup>128</sup> *See supra*, pp. 5-6.

advice in the Durban Communiqué,<sup>129</sup> the NGPC’s rationale for accepting the GAC advice referred to the many documents explaining the motivations of the GAC’s advice. From those documents and other information before the NGPC, the nature of the governmental concerns was readily apparent.

Brazil and Peru, the countries that requested the GAC advice, described early and often their public policy concerns,<sup>130</sup> and the potential they saw for harm to the Amazon region’s people, culture, and economy. These were extensively discussed in the documents the NGPC reviewed. Many other countries (including Argentina, Chile, China, Gabon, Greece, Iran, Nepal, Portugal, Russia, Sri Lanka, South Africa, Thailand, Trinidad and Tobago, Uganda, Ukraine, and Uruguay) submitted written statements, or made oral interventions, at the GAC meetings supporting the objection, all of which the NGPC considered. The GAC consensus advice was reached at a public meeting, for which transcripts were made available. ICANN also had received many public comments on the issue. And the NGPC members had made themselves fully aware of the range of views of governments and the ICANN community. In short, for Amazon to assert that the GAC’s reasons were not known ignores reality.

#### **D. The NGPC Properly Evaluated the GAC Advice**

The applicable version of the Bylaws provided that IRP proceedings should be decided by asking three questions:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

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<sup>129</sup> Minutes of the Regular Meeting of the New gTLD Program Committee (14 May 2014): Rationale for Resolution 2014.05.14.NG03, Ex. R-83 at p. 9.

<sup>130</sup> Given the role of the GAC, there is no doubt its reasons sounded in public policy. Ex. C-064 at Art. XI, § 2(1)(a) (advice on matters that “may affect public policy issues”).

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>131</sup>

Amazon's Prehearing Brief does not allege that the NGPC members acted with a conflict of interest; only the last two factors are disputed. As demonstrated below: (1) the NGPC exercised due diligence and care in investigating the matter and having a reasonable amount of facts to consider and support its action; and (2) the NGPC members exercised independent judgment in accepting the GAC advice, believed to be in ICANN's best interests.

### **1. The NGPC Conducted a Thorough Investigation and Had a Reasonable Amount of Facts to Accept the GAC Advice**

Amazon's Prehearing Brief suggests that the NGPC accepted the GAC advice "simply because the GAC said so"<sup>132</sup> in a total "abdication of responsibility."<sup>133</sup> The record, however, shows exactly the opposite: The NGPC conducted its own investigation, gathering an extensive record of opinions and evidence, even commissioning expert legal analysis. The NGPC also applied its experience with the principles of the New gTLD Program and the provisions of the Guidebook. And the NGPC's efforts were, from start to finish, careful and intensive.

#### **The NGPC's Investigation**

On 18 July 2013, just hours after the GAC consensus advice was given, ICANN held a public forum during which attendees can address the Board. Stacey King, then Amazon's Senior Corporate Council and now General Manager of its gTLD Division, expressed Amazon's objections to the GAC advice. Two NGPC members responded, with Chris Disspain stating "we understand this is a very, very complicated issue and we will be very careful in decisions we make."<sup>134</sup> Additional comments were made by other attendees about the Amazon Applications,

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<sup>131</sup> Bylaws, Art. IV, § 3.4, Ex. C-064.

<sup>132</sup> Amazon's Prehearing Brief at p. 1.

<sup>133</sup> *Id.* at p. 34.

<sup>134</sup> Durban – ICANN Public Forum (18 July 2013) at p. 22, Ex. C-042.

both pro<sup>135</sup> and con.<sup>136</sup>

Following up on Mr. Disspain's promise to exercise great care concerning the Amazon matter, the NGPC took many steps to investigate, directly disproving Amazon's argument that the Board "blindly" accepted the GAC advice:<sup>137</sup>

- ICANN posted the GAC advice and officially notified Amazon of it, thereby inviting Amazon to give reasons for rejecting the advice.
- The NGPC received and considered Amazon's 23 August 2013 response, 20 pages long with 296 pages of attachments. Amazon argued that the GAC advice should be rejected because: (1) it is inconsistent with international law; (2) the acceptance of GAC advice would be nontransparent and discriminatory; and (3) the GAC advice contravenes policy recommendations implemented within the Guidebook.
- In view of Amazon's allegations about inconsistency with international law, the NGPC commissioned Professor Passa to provide expert analysis on the specific issues of application of law at issue. The NGPC focused this analysis on Amazon's first argument because the NGPC members had a detailed understanding of the background of Amazon's second and third arguments.
- The NGPC received and considered supplemental letters from Amazon dated 3 December 2013<sup>138</sup> and 10 January 2014.<sup>139</sup>
- The NGPC also received and considered letters from the Peruvian Vice Minister of Foreign Affairs concerning the listing of "Amazonas" in a geographic-name list cited in the Guidebook (Peru's 24 December 2013 letter)<sup>140</sup> and responding to Amazon's 10 January 2014 letter (Peru's 3 March 2014 letter).<sup>141</sup>

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<sup>135</sup> *Id.* at pp. 18-19 (intervention of J. Scott Evans); *id.* at pp. 45-47 (intervention of Kiran Malancharuvil); and *id.* at p. 120 (intervention of Zahid Jamil).

<sup>136</sup> *Id.* at p. 29 (remote intervention).

<sup>137</sup> *See generally*, NGPC Adopted Resolution 2014.05.14.NG03, Ex. R-72.

<sup>138</sup> Letters from Stacey King to Steve Crocker at p. 1 (3 December 2013 and 4 July 2013), Ex. C-044.

<sup>139</sup> Ex. C-046 at p.1.

<sup>140</sup> *Id.* at p. 2.

<sup>141</sup> Letter from Fernando Rojas Samanez, Vice Minister of Foreign Affairs of Peru, to Steve Crocker (3 Mar. 2014), Ex. C-91.

- The NGPC received and considered Professor Passa’s analysis dated 31 March 2014, which concluded that international law neither required nor prohibited accepting the Amazon Applications.<sup>142</sup>
- The NGPC invited comment from Amazon, Brazil and Peru on the Passa analysis.
- The NGPC received and considered a 14 April 2014 response from Scott Hayden, Amazon’s Vice President, Intellectual Property, which among other things discussed the ICC’s 27 January 2014 Determination dismissing the Independent Objector’s Community Objections to the Amazon Applications. (Discussed more *infra*, pp. 42-44.)
- The NGPC received and considered responses dated 11 and 14 April 2014 from officials of Brazil and Peru.<sup>143</sup>
- The NGPC referenced and reviewed numerous documents concerning the development of the New gTLD Program, the course of the evaluation of the Amazon Applications, the Board’s interactions with Amazon and the GAC, and discussions in the community in the time leading up to the GAC advice. A non-exhaustive list of 19 of these references is included in the NGPC’s rationale published with its decision to accept the GAC advice.<sup>144</sup>
- The NGPC members also drew upon their familiarity with the underlying circumstances. Many of the NGPC members had significant involvement with the ICANN process generally and the development of the New gTLD Program, and NGPC members regularly interact with all the constituencies in group meetings and individual discussions on the issues.

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<sup>142</sup> Ex. C-048.

<sup>143</sup> Ex. R-71; Ex. C-050.

<sup>144</sup> See NGPC Adopted Resolution 2014.05.14.NG03, Ex. R-72.



## **Making the Decision**

Armed with many extensive factual inputs, on 29 April 2014, the NGPC met to discuss the issues. The minutes of that meeting reflect an extensive discussion.<sup>145</sup> The NGPC discussed the circumstances of the Amazon Applications and the GAC advice and reviewed the various correspondence and comments it had received. It also reviewed the Passa opinion and comments received on it. It considered “whether any additional information would be helpful to the Committee as it continued its deliberations,” then turned to analyzing the consequences of the facts that had been gathered. It reviewed the applicable Guidebook provisions, including those concerning GAC consensus advice. It discussed the differences between consensus advice and non-consensus advice. It considered the need to treat the Amazon Applications consistently with other applications subject to GAC advice. It also considered whether additional time for compromise would be helpful, in view of already-lengthy investigation that the NGPC had undertaken.

The NGPC did not complete its consideration on 29 April, and met again on 14 May 2014. After reviewing and analyzing its options, the NGPC adopted Resolution 2014.05.14.NG03 accepting the GAC consensus advice and directing that the Amazon Applications not proceed. The NGPC supplied a detailed rationale for its decision.<sup>146</sup> All NGPC members present voted in favor of the resolution.

### **The NGPC Had More Than a “Reasonable Amount of Facts” in Front of It When Deciding to Accept GAC Advice Against the Amazon Applications**

As noted above, a key question in this IRP is whether the NGPC “exercised due diligence and care in having a reasonable amount of facts” to make its decision. The NGPC’s detailed

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<sup>145</sup> Minutes – Regular Meeting of the New gTLD Program Committee (29 Apr. 2014), Ex. R-31.

<sup>146</sup> See NGPC Adopted Resolution 2014.05.NG03, Rationale, Ex. R-72.

investigation and its pre-existing familiarity with the circumstances, as described above, show that test was clearly met. As reflected in the minutes of its 29 April 2014 meeting, during its wide-ranging discussion the NGPC reviewed all the materials and considered whether any other information should be gathered, as it had done with the Passa report. At every turn, the NGPC demonstrated a devotion to carrying through with Mr. Disspain’s promise to be “very careful in decisions we make.”

Although IRP panels are not authorized to substitute their evaluation of the evidence for the Board’s,<sup>147</sup> it is worth noting the reasonableness of the NGPC’s resolution. Given the GAC’s consensus advice, a strong presumption arose that the Amazon Applications should not be approved. That presumption meant that the GAC advice would be accepted unless sufficient reasons were advanced to indicate that the GAC advice was wrong; the “strong” character of the presumption requires a compelling persuasiveness taking into consideration the GAC’s role as public-policy adviser to the Board.<sup>148</sup>

The Guidebook specifically recognizes that the interests of governments and public authorities should be considered with respect to gTLDs with geographic connotations.<sup>149</sup> A Geographic Names Review mechanism (Guidebook § 2.2.1.4) had been established to identify many of the names of countries, territories, cities, UNESCO regions, etc., and to prohibit them or allow them only where governments did not object. And in designing the Program, it was

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<sup>147</sup> Ex. CLA-001 at ¶ 115; Ex. CLA-004 at ¶ 124; Ex. CLA-031 at ¶ 94; and Ex. CLA-008 at ¶ 21.

<sup>148</sup> The modifier “strong” makes it clear that the presumption creates not only a burden of production, but also a burden of persuasion. See *Edwards v. CIR.*, 680 F.2d 1268, 1271 (9th Cir. 1982) (“strong presumption[] rebuttable only by clear and convincing evidence”); *United States v. Berger*, 990 F. Supp. 1054, 1057 (C.D. Ill. 1998) (“any doubts must be resolved” in favor of strong presumption); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (only “compelling reasons” can overcome strong presumption); *Mann v. Nat.Res. Def. Council, Inc. v. Securities and Exchange Commission*, 606 F.2d 1031, 1043 (D.C. Cir. 1979) (strong presumption rebutted only by “clear showing”).

<sup>149</sup> Ex. C-020 at § 2.2.1.4. Amazon argues that given its existing use of domain names such as “amazon.com” and “amazon.com.br,” governmental interests in the gTLD “.amazon” would not imply an affiliation with the Amazon region. The comparison is flawed – for over 20 years the “com” domain names have been “intended for commercial entities,” see RFC 1591 at p. 2 (March 1994), Ex. R-84; that commercial presumption is absent from the new gTLDs.

evident to the entire Community that no set of mechanical criteria would capture all geographically sensitive terms; as a result, the Guidebook also specified that GAC advice could be provided regarding strings with geographic connotations not already handled by Section 2.2.1.4. By giving greater effect to *consensus* advice, the Guidebook focused the GAC's input on the most compelling circumstances.

In arguing against the GAC advice, Amazon asserted that the GAC's advice was "inconsistent" with international law. However, the Passa analysis showed that international law was consistent with either blocking or allowing the Amazon Applications (and, thus, that the Board was not legally required to accept or reject the applications).<sup>150</sup> Amazon also argued that rejecting its applications would be non-transparent and discriminatory,<sup>151</sup> but the NGPC gave many opportunities to Amazon for comment and expressly noted the importance of treating the Amazon Applications consistently with similarly situated applications.<sup>152</sup> Finally, Amazon argued that accepting the GAC advice would "contravene[] policy recommendations as implemented in the AGB."<sup>153</sup> The NGPC, however, was undeniably deeply familiar with the procedures set forth in the Guidebook, both in substance and purpose. As discussed above, the NGPC knew that it is appropriate for the GAC to provide advice on strings raising geographic and related concerns and the significance of whether the advice enjoyed consensus.

## **2. The NGPC Members Exercised Independent Judgment Believed to Be in ICANN's Best Interests**

Amazon's Prehearing Brief asserts that the NGPC failed to exercise independent

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<sup>150</sup> See Ex. R-23 at pp. 5-13. With regard to this contention, Amazon's Scott Hayden of Amazon clarified in his 14 April 2014 letter that Amazon's position that the GAC advice was "inconsistent" with international law was based on the fact that international law does not mandate blocking Amazon's applications. See Ex. C-051 at p. 2.

<sup>151</sup> See Ex. C-030 at pp. 13-17. The lack of discrimination by ICANN against Amazon is discussed in Section F, *infra* pp. 45-46.

<sup>152</sup> See NGPC Minutes (29 April 2014), Ex. R-31.

<sup>153</sup> Ex. C-030 at p. 17.

judgment in accepting the GAC advice, but instead mindlessly accepted the GAC's advice.<sup>154</sup>

As set forth above, the record demonstrates that this accusation is unwarranted. The NGPC scrutinized the GAC advice closely, and took initiative to commission Professor Passa to provide expert advice on the relevant legal principles. The NGPC thoughtfully considered the many submissions of Amazon, the governments, and numerous others in the community. The NGPC met repeatedly to ensure a robust investigation and a carefully deliberated result. It closely reviewed the extensive record and applied the Guidebook's procedures and principles.

Although Amazon's Prehearing Brief accuses the NGPC of favoring governments over other constituencies, the NGPC's responsibility was to seek to act in *ICANN's* overall best interests. Those interests are distinct from those of any particular constituency (whether it be governments or business or intellectual property interests). Prominent among *ICANN's interests* – both as an organization and as a community – is the need to adhere faithfully to the procedures of the Guidebook, as finally adopted, thereby respecting the legitimate expectations of all stakeholders and advancing the policies that the New gTLD Program was adopted to implement.

The NGPC's extensive deliberations on the issues demonstrate that its members reflected deeply on the issues presented, and they reached their decision with care. Amazon obviously preferred a different outcome. But the NGPC acted for the overall ICANN Community, and it decided it was better to follow the GAC consensus advice, especially since there simply was not a sufficient reason to disregard that advice.

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<sup>154</sup> See, e.g., Amazon's Prehearing Brief at pp. 2 (The NGPC acted "without exercising its own independent judgment about what is best for all its constituencies (not just governments); or without investigating to ensure that the GAC's position is consistent with and supported by the facts."); see also *id.* at p. 19 ("Merely that the GAC said so is not enough.")

### **E. Acceptance of the GAC Advice Was Not Precluded by the ICC’s Rejection of the Community Objections**

Amazon also argues<sup>155</sup> that the dismissal by the ICC of the Independent Objector’s Community Objections (“ICC Determination”) should have resulted in the NGPC refusing to accept the GAC advice. While the NGPC did consider the ICC Determination,<sup>156</sup> it ultimately determined that the conclusions reached in the ICC Determination did not preclude acceptance of the GAC consensus advice. This was appropriate under the Guidebook because the two procedures – Community Objections and GAC advice – are separate mechanisms not intended to have preclusive effect on one another.

There are four reasons for why the ICC Determination did not preclude the NGPC’s acceptance of GAC advice:

1. The Guidebook explicitly provides governments the *option* to raise geographic concerns by filing Community Objections as “an additional avenue available to governments,”<sup>157</sup> but makes clear that GAC advice is *another option* for expressing objections. As the Board stated in its “ICANN Board Rationales for the Approval of the Launch of the New gTLD Program” when authorizing the New gTLD Program to proceed:

The Board also confirmed that the GAC has the ability to provide GAC Advice on New gTLDs concerning any application. Thus, governments would not be required to file objections and participate in the dispute resolution process,<sup>158</sup> but rather, may raise their concerns via the GAC.<sup>159</sup>

The Launch Rationales gave governments the option of also pursuing “[t]he formal objection and

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<sup>155</sup> See Amazon’s Prehearing Brief at pp. 41-43. See also Expert Report of Heather Ann Forest, ¶ 7.5.9.

<sup>156</sup> Shortly before the NGPC accepted the GAC advice it had received and reviewed a letter from Amazon’s Vice President, Intellectual Property Scott Hayden that discussed the ICC Determination. See Ex. C-051, nn.1, 8. In Part V(G) of the NGPC’s denial of Amazon’s request for reconsideration, it confirmed that it had considered the ICC Determination in making its original decision. Ex. C-068.

<sup>157</sup> Ex. R-71 at p. 45

<sup>158</sup> For example, by filing a Community Objection.

<sup>159</sup> Ex. R-71 at p. 45.

dispute resolution process [including Community Objections] . . . as an additional form of protection.”<sup>160</sup>

The fact that GAC advice and Community Objections were alternatives was emphasized in the NGPC’s 8 September 2014 decision denying Amazon’s reconsideration request:

GAC members are not limited to raising objections that could have been raised in, or that meet the standards required to prevail upon, one of the four enumerated grounds for formal objections. (Guidebook Module 3, § 3.2.) Rather, GAC Advice on new gTLD applications is generally “intended to address applications that are identified by national governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” (Guidebook Module 3, § 3.1.)<sup>161</sup>

GAC advice and Community Objections are separate processes that may be separately pursued.

2. The Community Objection mechanism, which could be invoked by any established community institution as well as the Independent Objector, by design was “drawn narrowly in the Guidebook to prevent abuses.”<sup>162</sup> Thus, a denial of a Community Objection can result from a failure to make the factual showings that the objection process requires, which are not necessary in the case of GAC advice. Accordingly, determinations rejecting Community Objections are not preclusive against governmental advice, particularly given the strong presumption in favor of such advice.<sup>163</sup>

3. Neither the GAC generally, nor Brazil and Peru individually, were parties to the Community Objection proceeding. Rather, the only parties involved were Amazon and the

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<sup>160</sup> *Id.*

<sup>161</sup> Ex. C-068, Part V(G).

<sup>162</sup> Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response at § 2.2.1 (15 April 2011), Ex. R-85. *See also id.* at § 2.2.2.

<sup>163</sup> In this regard, page 42 of Amazon’s Prehearing Brief wrongly suggests that expert determinations are binding for all purposes. In fact, Guidebook § 3.4.6, states that ICANN “will accept [expert determinations] within the dispute resolution process” – i.e. for the community and other objections described in Guidebook §§ 3.2 to 3.5, not for purposes of GAC advice or Board consideration of that advice. Ex. C-020 at § 3.4.6 (emphasis added).

*See* CLA-031 at ¶¶ 39, 145 (stating that the NGPC should have more fully considered non-consensus government opposition to an application, based on its geographic name, even though a Community Objection had been rejected by the ICC).

Independent Objector, who “does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.”<sup>164</sup> Thus, it would be unfair to bind the GAC, or individual governments, to the conclusions of an ICC proceeding.

4. Moreover, the Expert issuing the ICC Determination was misled by Amazon’s inaccurate suggestions that the relevant governments, after submitting the GAC Early Warning, had essentially dropped their objections.<sup>165</sup> According to ¶ 90 of the ICC Determination:

as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.<sup>166</sup>

But the facts established the opposite: as Amazon knew, Brazil and Peru had already asked the GAC to advise the Board to reject the Amazon Applications (a month before Amazon’s submissions to the Expert); and when the GAC issued consensus objection advice against the Amazon Applications (six months before the Expert rendered the ICC Determination), Amazon stood silent<sup>167</sup> while the Expert wrote the ICC Determination in ignorance of the facts.<sup>168</sup> In these circumstances, there is no flaw in the NGPC’s determination that the ICC’s Expert Determination did not in any way prohibit the NGPC decision to accept the GAC consensus advice.

#### **F. The NGPC Did Not Discriminate Against the Amazon Applications**

Amazon renews its argument<sup>169</sup> that the Amazon Applications were improperly denied

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<sup>164</sup> C-020 at § 3.2.5.

<sup>165</sup> Amazon Opposition to Community Objection (English) at p. 14, Ex. R-63. *See also id.* at p. 15 and discussion *supra* Statement of Facts Part C.

<sup>166</sup> Ex. C-047 at ¶ 90.

<sup>167</sup> Remarkably, Amazon’s Prehearing Brief finds fault with the GAC because the ICC Determination “was not mentioned in the public portion of the GAC’s Durban meeting,” even though the ICC Determination was issued *six months after* the Durban meeting. Amazon’s Prehearing Brief at p. 42.

<sup>168</sup> *See* the Chronology in Annex 2 to this Prehearing Brief.

<sup>169</sup> Amazon’s Prehearing Brief at pp. 22-25.

while other applications were approved, all without (Amazon alleges) substantial and reasonable cause. Amazon points to the approval of the application for the .IPIRANGA gTLD.<sup>170</sup>

Amazon's argument fails because the NGPC never made any decision about .IPIRANGA. Under the New gTLD Program, applications are normally evaluated and acted upon using the Guidebook's procedures and without Board involvement. As Section 5.1 of the Guidebook makes clear, however, exceptional circumstances – specifically including receipt of GAC advice – can lead to Board scrutiny of an individual application:

Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.<sup>171</sup>

In short, the NGPC never considered any objections to .IPIRANGA because no objections were ever raised.<sup>172</sup> In the case of .AMAZON, by contrast, the Board was presented with, among other things, GAC consensus advice that, under the Bylaws, the Board (NGPC) was required to address. This different procedural posture, between applications with objections and those without, was built into the operative version of the Guidebook, so that the NGPC could focus its attention on controversial applications in administering the Program.<sup>173</sup> Thus, the Guidebook provided the NGPC ample reason to individually consider .AMAZON, but not .IPIRANGA. Like in *Booking.com*, “the time has long since passed . . . to ask an IRP panel to review the actions of the ICANN Board in relation to [a feature of the Guidebook as adopted],”<sup>174</sup> rather

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<sup>170</sup> As Amazon notes, that gTLD is named after the Ipiranga Brook, a small, historically significant river in São Paulo, and is operated by a Brazilian oil company of the same name.

<sup>171</sup> Ex. C-020 at § 5.1.

<sup>172</sup> The same lack of GAC advice occurred with .YAMAXUN, which Amazon's Prehearing Brief n. 12 cites in support of its claim of disparate treatment, even though .YAMAXUN is an Amazon application that was granted.

<sup>173</sup> The non-discrimination provision of ICANN's Bylaws, Art. II, § 3, explicitly allows disparate treatment where “justified by substantial and reasonable cause.” Ex. C-064. Implementing the Program in a way that does not bog the NGPC down in considering uncontested applications is such a justification.

<sup>174</sup> Ex. CLA-001 at ¶ 129; Ex. CLA-004 at ¶ 172.



than the application of those procedures during evaluation.<sup>175</sup>

At most, Amazon is complaining of different treatment *by the Brazilian government* of the .AMAZON application (objection) and the .IPIRANGA application (no objection). But any such differential treatment is well outside the scope of issues that can be addressed by the IRP. The applicable Bylaws established the IRP as “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.”<sup>176</sup> It is not a means to challenge actions by members of the ICANN community such as the Brazilian government.<sup>177</sup>

In sum, there was no discrimination by the NGPC against the Amazon Applications.

**G. The Panel’s Authority Is Limited to Declaring Whether the Board’s Actions Conform to ICANN’s Articles, Bylaws, and Guidebook**

The final argument in Amazon’s Prehearing Brief<sup>178</sup> is that the panel has authority not only to declare whether the ICANN Board acted in conformity with ICANN’s Articles, Bylaws, and Guidebook, but also to “direct ICANN to allow the Amazon Applications to proceed.” That position is contrary to the ICANN Bylaws as well as the uniform view in the numerous IRP declarations that have been rendered.

Article IV, Section. 3.11 of the Bylaws governs the authority of panels in IRP proceedings. It states:

The IRP Panel shall have the authority to:

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<sup>175</sup> Indeed, Amazon is essentially arguing that routine approval of any geographic string that was never brought before the Board (such as .IPIRANGA) means that the Board could never reject a string where an objection was made (such as .AMAZON). This is plainly not the intent of the Guidebook.

<sup>176</sup> Ex. C-064 at Art. IV, Sec. 3.1 (emphasis added).

<sup>177</sup> The applicable IRP Bylaws do not directly allow review of actions of ICANN employees or ICANN advisory bodies, such as the GAC. However, if an action is the subject of Board reconsideration (*see* Ex. C-64, Art. IV, § 2(2)), the Board’s procedural handling of a reconsideration request can be within the IRP’s ambit. *See* Ex. CLA-004 at ¶ 127; *see also* Ex. CLA-008 at ¶¶ 47-50. The ICANN Board, of course, is not and was not a forum for reconsideration of Brazilian government actions.

<sup>178</sup> *See* Amazon’s Prehearing Brief at pp. 46-50.

1. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
2. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
3. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
4. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
5. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
6. determine the timing for each proceeding.<sup>179</sup>

Notably, IRP panels have no authority *to direct* the ICANN Board to take any particular action.

Panels are limited to declaring conformity (or not) with the Bylaws and *recommending* Board action.

Under the applicable version of the Bylaws, it is ultimately for the Board to decide how best to proceed in view of the panel’s final declaration. This is made clear by Article IV, Section 3.21:

Where feasible, the Board shall consider the IRP Panel declaration at the Board's next meeting. The declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.<sup>180</sup>

Note that what is final and binding is the panel’s “declaration” and the Board’s “subsequent action on those declarations.”<sup>181</sup>

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<sup>179</sup> Ex. C-064 at Art, IV, § 3.11.

<sup>180</sup> *Id.* at Art. IV, § 3.21.

<sup>181</sup> *Cf.* Supplementary Procedure 7 (“Interim Measures of Protection”) empowering a panel to “recommend” a stay “until such time as the Board reviews and acts upon the IRP declaration.” Ex. R-39.

Although IRP requesters have frequently requested panels to direct Board actions, panels have repeatedly refused to do so. For example:

*ICM Registry, LLC v. ICANN*: the panel “concluded that the Panel’s Declaration is not binding, but rather advisory in effect.”<sup>182</sup>

*DCA Trust v. ICANN*: the panel limited its ruling to declaring that the Board acted inconsistently with the Articles and Bylaws of ICANN and “recommend[ing]” how ICANN should proceed.<sup>183</sup>

*Vistaprint Limited v. ICANN*: the panel held it could not grant mandatory affirmative relief based on an extensive analysis:

130. . . . The Panel views that it is important to distinguish between (i) the findings of the Panel on the question of whether the ICANN Board’s conduct is consistent (or not) with the Articles and Bylaws, and (ii) any consequent remedial measures to be considered as a result of those findings, at least insofar as those measures would direct the Board to take or not take any action or decision. The Panel considers that, as to the first point, the findings of the Panel on whether the Board has acted in a manner that is consistent (or not) with the Articles or Bylaws is akin to a finding of breach/liability by a court in a contested legal case. This determination by the Panel is “binding” in the sense that ICANN’s Board cannot overrule the Panel’s declaration on this point or later decide for itself that it disagrees with the Panel and that there was no inconsistency with (or violation of) the Articles and Bylaws. However, when it comes to the question of whether or not the IRP Panel can require that ICANN’s Board implement any form of redress based on a finding of violation, here, the Panel believes that it can only raise remedial measures to be considered by the Board in an advisory, non-binding manner. The Panel concludes that this distinction – between a “binding” declaration on the violation question and a “non-binding” declaration when it comes to recommending that the Board stay or take any action – is most consistent with the terms and spirit of the charter instruments upon which the Panel’s jurisdiction is based, and avoids conflating these two aspects of the Panel’s role.

[Paragraphs 131-148 have an informative analysis but are omitted here because of length.]

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<sup>182</sup> Final Declaration, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08 at ¶ 134 (19 Feb. 2010), Ex. CLA-003; *see also id.* at ¶ 152.

<sup>183</sup> Final Declaration, *DCA Trust v. ICANN*, ICDR Case No. 50 2013 001083 at ¶¶ 148-150 (9 July 2015), Ex. CLA-002.

149. . . . Consequently, the IRP Panel finds that it does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.<sup>184</sup>

*Gulf Cooperation Council (GCC) v. ICANN*: the panel declared NGPC had insufficiently considered objections to .PERSIANGULF, p. 44, § X ¶ (1), and “recommend[ed] that the ICANN Board take no further action . . . .”<sup>185</sup> Contrary to the implication in Amazon’s Prehearing Brief, no mandatory relief was sought or ordered.<sup>186</sup>

*Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938 (17 October 2016): the panel issued only recommendations despite request for “a direction from the Panel to ICANN’s Board of Directors” ¶¶ 10.1(a) and 11.1(c), (d).<sup>187</sup>

In sum, all IRP panels to date have respected the command of ICANN’s Bylaws that IRP panels do not have authority to mandate that the ICANN Board take particular action as a result of its consideration of a panel’s declaration. Only the ICANN Board has – and should have – the power to make final determinations on behalf of ICANN.

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<sup>184</sup> Ex. CLA-004 at ¶¶ 130, 149.

<sup>185</sup> Final Declaration, *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065 (24 October 2016), Ex. CLA-031 at p. 44, § X ¶ (1).

<sup>186</sup> At page 49, Amazon’s Prehearing Brief quotes a statement in paragraph 146 of the *GCC* Final Declaration rejecting the position that “affirmative declaratory relief” was not available. The very next sentence makes clear that the panel considered such permitted “affirmative” relief to be different from mandatory ordered relief: it quoted the Bylaws provision giving the panel “the power to recommend a course of action .for the Board to follow.”

<sup>187</sup> Final Declaration, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938 (17 October 2016), Ex. CLA-030.

### Conclusion

The NGPC followed the ICANN Articles, Bylaws, and Guidebook in accepting the GAC consensus advice. The NGPC diligently investigated the circumstances, analyzed the relevant principles of the Guidebook, and applied its independent judgment. ICANN urges the panel to deny Amazon's challenges and to declare ICANN to be the prevailing party in this IRP.

Respectfully submitted,

JONES DAY

By   
Jeffrey A. LeVee

Counsel for Respondent ICANN

Dated: April 5, 2017

## **Annex 1 – Timetable of Drafts of Applicant Guidebook**

24 October 2008	Version 1
18 February 2009	Version 2
30 May 2009	Partial Updates to Version 2
2 October 2009	Version 3
31 May 2010	Version 4
12 November 2010	Version 5
15 April 2011	Version 6
30 May 2011	Version 7
19 September 2011	Version 8
11 January 2012	Version 9
4 June 2012	Version 10 (final version)

Note: Applications were accepted from 12 January to 30 May 2012.

## **Annex 2 -- Chronology of Community Objections and GAC Advice**

20 November 2012	Brazil and Peru submit Early Warning notices
12 March 2013	Independent Objector files Community Objections
11 April 2013	At Beijing meeting, GAC discusses Brazil and Peru request for GAC advice objecting to Amazon Applications
24 May 2013	Amazon opposes Community Objections, noting Brazil and Peru chose simply to negotiate after the Early Warning notices
18 July 2013	At Durban meeting, the GAC issues consensus advice against the Amazon Applications
27 January 2014	ICC Determination is issued rejecting Community Objections, noting that “beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms”