

## **Hearing Exhibit 1**

## Amazon's Statement of Issues

In response to the Panel's request of April 27, 2017, Amazon and ICANN met and conferred but were unable to reach agreement on a statement of issues to be considered. Amazon's submission is set forth below.

The action under review in this proceeding is the decision of ICANN's New gTLD Program Committee ("NGPC") to "accept . . . the advice" of ICANN's Governmental Advisory Committee ("GAC") "that the [.AMAZON Applications] should not proceed." C-054, at 7.

The panel's duty is to compare the NGPC's decision to ICANN's governing documents, including its Articles of Incorporation ("Articles"), Bylaws, and gTLD Applicant Guidebook ("Guidebook"), and determine whether the NGPC's decision is consistent with those documents, including the NGPC's duties to exercise due diligence in ascertaining facts and to exercise independent judgment.

The substantive issues presented for this Panel's consideration are:

1. Whether the NGPC violated ICANN's Articles, Bylaws, or Guidebook by accepting the GAC's advice where the GAC did not offer or agree upon reasons for that advice.
2. Whether the NGPC violated ICANN's Articles, Bylaws, or Guidebook by relying on certain reasons provided by the governments of Brazil and Peru, but not adopted by the GAC, in light of the information before or reasonably available to the NGPC concerning whether those reasons were consistent with ICANN's governing documents and core values.
3. Whether the NGPC violated ICANN's Articles, Bylaws, or Guidebook by failing to consider Amazon's legitimate interest in obtaining the .AMAZON Applications.

If the Panel finds that the NGPC violated its duties, it should then consider what remedy to impose, including whether it has authority to grant Amazon's request that ICANN be ordered to grant the .AMAZON Applications.

Respectfully submitted,

/s/ John Thorne

*Counsel for Claimant Amazon*

Exhibit 1  
Amazon v. ICANN  
5/1/17 IRP

## **Hearing Exhibit 2**

## Amazon v. ICANN

### List of Issues that the Panel Will Have to Decide as Part of Its Reasoned Declaration

Members of the Panel:

In response to the Panel's email request dated April 27, 2017, Amazon and ICANN have met and conferred and have agreed on the following list of issues the Panel will have to decide as part of its reasoned declaration. The inclusion of an issue on this list does not mean that both sides necessarily agree that there is evidence to support the other side's view of the issue. And the need to decide some of these issues may be contingent on resolution of other issues.

#### Scope of Review

1. To the extent Amazon is challenging whether the generally applicable procedures of the Applicant Guidebook ("Guidebook") are consistent with ICANN's Articles of Incorporation ("Articles") and Bylaws, were those aspects of Amazon's challenges timely brought?
2. Does the Panel's remit extend to entertaining challenges to actions of the Governmental Advisory Committee ("GAC") or its members as inconsistent with the Articles, Bylaws, or Guidebook?

#### Substantive Issues

3. Did Amazon demonstrate that the Board's (acting through the NGPC) acceptance of the GAC advice not to proceed with the .AMAZON Applications inconsistent with the Articles, Bylaws, or Guidebook because the GAC did not include a statement of its rationale for the advice?
4. Did Amazon demonstrate that the NGPC failed to exercise due diligence and care in having a reasonable amount of facts when it decided to accept the GAC advice?
5. Did Amazon demonstrate that the NGPC acted inconsistently with the Articles, Bylaws, or Guidebook by relying on the rationales of Brazil and Peru in making its decision to accept the GAC advice?
6. Did Amazon demonstrate that the NGPC acted inconsistently with the Articles, Bylaws, or Guidebook by failing to consider Amazon's and Internet users' interests in the .AMAZON Applications?
7. Did Amazon demonstrate that the NGPC members failed to exercise independent judgment in taking the decision to accept the GAC advice, believed to be in the best interests of ICANN?

Exhibit 2  
Amazon v. ICANN  
5/1/17 IRP

**Remedial Issue**

8. Does the IRP Panel have the authority to issue a binding order directing the ICANN Board to take some specific action in relation to the .AMAZON Applications?

Members of the Panel:

In response to the Panel's request dated April 27, 2017, Amazon and ICANN have met and conferred and have agreed on the following statement concerning the issues presented to the Panel.

### Scope of Review

The action under review in this proceeding is the decision of ICANN's New gTLD Program Committee ("NGPC") to "accept . . . the advice" of ICANN's Governmental Advisory Committee ("GAC") "to the ICANN Board contained in the GAC's Durban Communiqué stating that it is the consensus of the GAC that the [.AMAZON Applications] should not proceed." C-054, at 7.

The panel's duty is to compare the NGPC's decision to ICANN's governing documents, including its Articles of Incorporation ("Articles"), Bylaws, and gTLD Applicant Guidebook ("Guidebook"), and determine whether the NGPC's decision is consistent with those documents.

The parties disagree concerning whether all of Amazon's contentions are within the scope of review as thus defined. Amazon contends that all of its contentions constitute timely challenges to the NGPC's decision. [ICANN contends that some of Amazon's contentions constitute untimely challenges to the adoption of the Guidebook itself, and that others of Amazon's contentions constitute challenges that exceed the scope of review because they concern the conduct of the GAC or individual GAC members.]

### Issues Presented

#### 1. Whether the NGPC could accept GAC advice without a rationale

Amazon contends that the NGPC's decision to accept the GAC's advice was contrary to the NGPC's duties under ICANN's governing documents (including the Articles, Bylaws, and Guidebook) because, as the NGPC conceded in its decision, it "d[id] not have the benefit of the rationale relied upon by the GAC" in issuing that advice. *Id.* at 10.

[ICANN's statement of its position.]

#### 2. Whether the NGPC could accept the GAC advice here by relying on the rationales of Brazil and Peru

Amazon contends that the NGPC's reliance on the rationales presented by Brazil and Peru was contrary to the NGPC's duties under ICANN's governing documents because Brazil's and Peru's rationales were not the rationales of the GAC and were themselves inconsistent with those governing documents and were legally and factually unsupported.

[ICANN's statement of its position.]

#### 3. Whether the NGPC failed to consider Amazon's and Internet users' legitimate interests in the .AMAZON Applications

Amazon contends that the NGPC failed to consider Amazon's legitimate interest in obtaining the .AMAZON Applications and to balance that interest against the interests asserted by Brazil and Peru.

[ICANN's statement of its position.]

#### **Remedial Issues**

If the Panel finds that the NGPC violated its duties, it should then consider what remedy to impose. Amazon contends that the Panel can and should issue a binding order directing the NGPC to approve the .AMAZON Applications without delay. **[ICANN contends that the Panel lacks the authority to issue such an order and can issue only a declaration as to whether a violation occurred, potentially coupled with a nonbinding recommendation for future action.]**

**Hearing Exhibit 3**



**C-102**

Exhibit 3  
Amazon v. ICAW  
5-1-17 JRP/leatz

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

AMAZON EU S.À.R.L.,

Claimant,

v.

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent.

**ICDR Case No. 01-16-0000-7056**

**JOINT STIPULATION OF AMAZON EU S.À.R.L AND ICANN**

Amazon EU S.à.r.l. (“Amazon”) and the Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby enter the following stipulations for purposes of the above-captioned proceeding only:

1. The strings that are the subjects of Amazon’s applications 1-1315-58086, 1-1318-5591, and 1-1318-83995 (collectively, “Amazon Applications”) do not fall within the criteria for geographic names contained in Section 2.2.1.4 of the Applicant Guidebook. In reasonable reliance on ICANN’s representation referenced in this paragraph, Amazon has agreed not to pursue production of documents concerning the Geographic Names Review (Applicant Guidebook Section 2.2.1.4) conducted in the Initial Evaluation of the Amazon Applications.
2. The ICANN Independent Objector commenced community objections before the International Centre for Expertise of the International Chamber of Commerce (“ICC”) concerning the Amazon Applications. Professor Luca G. Radicati di Brozolo (the Independent Expert selected by the ICC) issued an Expert Determination (marked by Amazon as Exhibit C-047) dismissing those community objections. As referenced in the New gTLD Program Committee (“NGPC”) briefing materials for its 14 May 2014 meeting, the Expert Determination was included in the NGPC Reference Materials. In deciding to accept the GAC’s advice that the Amazon Applications should not proceed, the NGPC did not rely on the substantive rulings made in that Expert Determination. In reasonable reliance on ICANN’s representations referenced in this paragraph, Amazon has agreed not to pursue Amended Request for Production No. 5.
3. ICANN’s procedures require that complaints to the ICANN Ombudsman be kept confidential. Accordingly, ICANN does not seek nor maintain access to the documents in the possession of the office of the ICANN Ombudsman. The Ombudsman published a report entitled “New Ombudsman Report on Dot Amazon” on 28 May 2015 (available at <https://omblog.icann.org/index.html%3Fm=201505.html>), which did not provide any recommendation for ICANN Board action regarding the Amazon Applications.

("Ombudsman Report"). ICANN has represented that it will not rely on the Ombudsman Report, or the fact that the Ombudsman Report did not issue a recommendation for Board action regarding the Amazon Applications, for any purpose in these IRP proceedings. In reasonable reliance on ICANN's representations referenced in this paragraph, Amazon has agreed: (i) not to pursue discovery of documents concerning the ICANN Ombudsman; and (ii) that Amazon will not rely on the Ombudsman Report for any purpose in these IRP proceedings.

4. ICANN has represented to Amazon that, to the best of its knowledge, neither the ICANN Board nor any of its members had any communications with the Independent Objector in forming the ICANN Board's decision to accept the GAC's advice that the Amazon Applications should not proceed. In reasonable reliance on ICANN's representations referenced in this paragraph, Amazon has agreed not to pursue discovery of documents concerning communications between the ICANN Board and its members, on the one hand, and the Independent Objector, on the other.

Agreed to by the Parties:

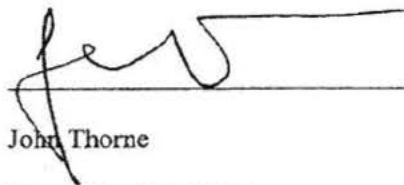


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Name:

Date:

Counsel for Respondent Internet  
Corporation for Assigned Names and  
Numbers



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John Thorne

Date: March 3, 2017

Counsel for Claimant Amazon E.U.  
S.à.r.l.

So entered.

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Panel Chair

## **Hearing Exhibit 3A**

## Amazon v. ICANN

### ICANN's List of Issues that the Panel Will Have to Decide as Part of Its Reasoned Declaration

Following the Panel's email request dated April 27, 2017, Amazon and ICANN conferred on identifying the issues that the Panel will have to decide as part of its reasoned declaration. Despite good-faith discussions, they were unable to agree.

ICANN submits this list of issues that it believes, based on the positions most recently taken by the parties, the Panel may have to decide. The inclusion of an issue on this list does not mean that ICANN necessarily agrees that there is evidence to support Amazon's view of the issue. And the need to decide some of these issues may be contingent on resolution of other issues.

#### Scope of Review

1. To the extent Amazon is challenging whether the generally applicable procedures of the Applicant Guidebook ("Guidebook") are consistent with ICANN's Articles of Incorporation ("Articles") and Bylaws, were those aspects of Amazon's challenges timely brought?

#### Substantive Issues

2. Did Amazon demonstrate that the Board's (acting through the NGPC) acceptance of the GAC advice not to proceed with the .AMAZON Applications is inconsistent with the Articles, Bylaws, or Guidebook because the GAC did not include a statement of its rationale for the advice?

3. Did Amazon demonstrate that the NGPC failed to exercise due diligence and care in having a reasonable amount of facts when it decided to accept the GAC advice?

4. Did Amazon demonstrate that the NGPC's consideration of the reasoning of Brazil and Peru in making its decision to accept the GAC advice was inconsistent with the Articles, Bylaws, or Guidebook?

5. Did Amazon demonstrate that the NGPC failed to consider Amazon's and Internet users' interests in the .AMAZON Applications, and that it therefore acted inconsistently with the Articles, Bylaws, or Guidebook?

6. Did Amazon demonstrate that the NGPC members failed to exercise independent judgment in taking the decision to accept the GAC advice, believed to be in the best interests of ICANN?

#### Remedial Issue

7. Does the IRP Panel have the authority to issue a binding order directing the ICANN Board to take some specific action in relation to the .AMAZON Applications?

**Exhibit 3A**

**Amazon v. ICANN  
5/02/2017 IRP**

**Hearing Exhibit 4**

# Amazon v. ICANN

## Independent Review Process

ICANN's Opening Statement

May 1, 2017

Exhibit 4  
Amazon v ICANN  
5-1-17 IRP

# Summary of ICANN's Arguments

- The NGPC did not violate the Articles, Bylaws or Guidebook in accepting the GAC consensus advice against Amazon. Instead, the evidence has shown and will show:
  - The GAC insisted on, and received, the right to give advice on the geographic nature of a string without a formal rationale, much less a consensus rationale.
  - The ICC's dismissal of the community objection did not nullify the GAC advice, which pre-dated the dismissal in all events.
  - The GAC issued consensus advice that was supported by numerous countries across the world.
  - The NGPC thoroughly investigated over a 10 month period after the GAC issued its consensus advice.
  - The NGPC exercised independent judgment.
  - The NGPC did not discriminate against Amazon.



# Amazon's Applications

- November 2012: GAC Early Warning Notices
- March 2013: ICANN's Independent Objector files Community Objection based on grounds similar to the Early Warnings
- April 2013: GAC takes up Brazil/Peru opposition to the Amazon Applications at April 2013 meeting
- Spring/Summer 2013: Amazon lobbies several countries to block consensus advice, but no country agrees to block consensus advice
- July 2013: U.S. issues its Statement on Geographic Names:  
“the United States is willing 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.”

## Amazon's Applications (cont.)

- July 2013: The GAC debates the Amazon Applications in open session. Nearly 20 countries speak in support of GAC advice against the Amazon Applications, including Russia, China, and South Africa. (Exhibit C-40 – Transcript)
- The GAC chair calls for formal objections to the advice, and no country offered one. Because this is the classic definition of consensus advice, the chair declares that the GAC had reached consensus in opposition to the Amazon Applications.
- January 2014: ICC expert rules against the Independent Objector (after the GAC has issued its consensus advice), based on Amazon's inaccurate statements that governments had dropped their opposition.

# NGPC Begins Its Investigation

- July 2013: GAC issues consensus advice (Durban Communiqué), and Amazon is invited to respond
- August 2013: Amazon submits lengthy response (316 pages). (Ex. C-43) Amazon makes three arguments (each of which it continued to make through its last IRP brief):
  1. GAC advice is contrary to international law
  2. Discrimination between .AMAZON and .IPIRANGA
  3. Amazon followed the rules and thus its applications should be approved
- Fall 2013: NGPC retains Jérôme Passa to analyze certain international law issues

## **NGPC's Investigation (cont.)**

- December 2013/January 2014: NGPC receives additional submissions from Amazon and Brazil/Peru
- March 2014: NGPC receives the Passa analysis that it commissioned and invites Amazon and Brazil/Peru to respond
- April 2014: NGPC receives responses to the Passa report from Amazon, Brazil, and Peru
- 29 April 2014: NGPC meets to analyze the materials received and has an extensive discussion regarding next steps (Ex. R-31 – NGPC Meeting Minutes)
- 14 May 2014: NGPC continues deliberation; decides to follow GAC advice via a detailed Board Resolution (Ex. R-72)

# **GAC Can Advise on Unlisted Geographic Strings**

- During early policy development, a GNSO working group recommended a string-by-string, rather than list-based, approach to restricting geographic strings.
- Nevertheless, Guidebook Versions 1 to 5 included a list-based approach.
- In early 2011, the GAC objected because the lists did not include strings that had troublesome geographic connotations, even if the strings were not on a list.

# GAC Can Advise on Unlisted Geographic Strings (cont.)

- Thus, Guidebook Version 6 (April 2011) introduced GAC advice as a mechanism to identify applications for **unlisted** strings that had troublesome geographic connotations.
- The operative Guidebook thus allowed the GAC to object to any application on any grounds. (Ex. C-15 – Guidebook version 11 Jan. 2012)
- The deadline for Amazon to complain about the provisions of the Guidebook has long passed, as confirmed by several IRP Panels.

# The GAC Truly Gave Consensus Advice

- Amazon argues that the GAC did not give consensus advice. But GAC Operating Principle 47, adopted in 2011 to support the Guidebook provisions on consensus, is clear: “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.”
- This is not a situation where only 1-2 countries advocated for the advice. Nearly 20 countries supported Brazil and Peru. (Ex. C-40)
- The GAC was not required to give a reason for its advice. Such a requirement would be contrary to consensus decision-making principles, which encourage members with different philosophies to come together to achieve a result in the *group’s* best interest. Early drafts of the Guidebook proposed that the GAC give a reason, but that language was removed at the GAC’s request.

# The ICC Determination Did Not Nullify the GAC Advice

- March 2013: the Independent Objector files a Community Objection against the Amazon Applications based on the Early Warning.
- May 2013: Amazon opposes the Community Objection, arguing that the Brazil and Peru governments, which represented the community, were no longer pursuing their objections. By that time, however, the governments had already put the matter before the GAC, which issued consensus advice in July 2013.
- Amazon does not tell the ICC expert about this (and Brazil and Peru were not parties to the proceeding). Months after the GAC issued consensus advice, the expert dismisses the community objection based on his mistaken belief that the governments were not objecting.
- In all events, the Community Objection process and GAC advice are two independent methods for objecting to an application, and neither has precedential effect on the other.



# The NGPC Thoroughly Investigated

- The NGPC's 10-month investigation:
  - Invited and reviewed Amazon response to the GAC advice
  - Received comments at a public forum
  - Commissioned the Passa report as to international law
  - Received extensive additional comments from Amazon, Brazil, and Peru in response to the Passa report
  - Received letters and other communications from various stakeholders
  - Reviewed the history of the Guidebook's development
  - Made a determination following extensive discussion that it believed to be faithful to the Guidebook and in ICANN's best interests

# The NGPC Thoroughly Investigated (cont.)

- The IRP test requires “due diligence and care in having a reasonable amount of facts.” Bylaws Art. IV sec. 3.4(b)
- Following the GAC consensus advice, the “strong presumption” meant that the GAC advice would be followed unless there was evidence sufficiently strong to convince the NGPC that the underlying public policy concerns were unfounded.
- But the concerns had plausible foundations:
  - As the Guidebook recognized, gTLDs with geographic connotations raise concerns, such as the potential for public interests of territories to be privately appropriated, often warranting governmental protection.

# The NGPC Thoroughly Investigated (cont.)

- The GAC's consensus advice reflects general agreement of governments throughout the world, which are broadly responsible for safeguarding the public interest.
- Brazil, Peru, and other governments gave substantial reasons why commercial appropriation threatened harm to the people of the Amazon region.
- Amazon's disagreement with those reasons does not override the fact that numerous countries asserted or supported them. Amazon has private commercial interests, but the Guidebook reflects the policy that, where geographic terms are involved, the public interest is paramount.
- Amazon's arguments that it "followed the rules" is based on its incorrect view that the GAC had no role if the Geographic Names Panel passed an application.

# The NGPC Exercised Independent Judgment

- Amazon argues that the NGPC “defer[red] to the GAC’s veto without evaluating its reasons” “simply because the GAC said so.” Considerable evidence shows these arguments to be completely wrong.
- The NGPC gathered relevant information, reviewed all parties’ submissions, deliberated extensively, and came to a thoughtful disposition of the dispute.
- The NGPC’s responsibility was to act in ICANN’s overall best interest – both as an organization and a community. This meant:
  - Adhere to the procedures of the Guidebook, as finally adopted
  - Respect legitimate expectations of *all* stakeholders and balance their interests
- The minutes of the April and May 2014 NGPC meetings reflect thorough and thoughtful debate. This was not a rubber stamp. (Exs. R-31 and R-72)

# **.AMAZON Was Different from .IPIRANGA**

- Amazon argues that rejecting .AMAZON and allowing .IPIRANGA was discriminatory.
- The two situations were entirely different:
  - Like the vast majority of other gTLD applications – over a thousand applications – no objections were asserted against the .IPIRANGA application. Thus, according to Guidebook procedures, the NGPC never considered the application and, thus, did not “treat it differently“ or in any fashion at all.
  - .AMAZON was the subject of GAC advice. Guidebook §5.1 specifically mentions GAC advice as a reason for individualized NGPC consideration, and Module 6 provides that the Board can consider any application for any reason.

## **.AMAZON Was Different from .IPIRANGA (cont.)**

- Moreover, the scale of geographic consequence was different:
  - The Amazon river is the world's largest, and flows for 4,345 miles through a basin that is home to 10,000,000 people, 1,000,000 of them indigenous peoples from 400 tribes facing many threats, including extinction.
  - Ipiranga brook, in contrast, is 5.6 miles long and flows through the Ipiranga district, a small part of the São Paulo megalopolis with a population of 98,863.
- Although the Board did not address the .Ipiranga application at all, ICANN's Bylaws permit "disparate treatment [when] justified by substantial and reasonable cause." Bylaws Art. II sec. 3.

# Conclusions

- All geographic strings are a proper subject for GAC advice.
- The GAC advice was truly consensus advice under the Guidebook. Consensus reasoning was not required and did not have to be articulated. Thus, there was a “strong presumption.”
- The ICC dismissal of the Community Objection did not nullify, or require the NGPC to reject, the previously issued GAC advice.
- The NGPC took care to gather the pertinent facts.
- The NGPC exercised independent judgment.
- The NGPC did not discriminate against the Amazon Applications.
- Therefore, the Board (NGPC) fulfilled its duties under – and acted consistent with – the Articles, Bylaws, and Guidebook.

## **Hearing Exhibit 5**





## **Hearing Exhibit 6**

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Details

ICANN (Internet Corporation for Assigned Names and Numbers) Announcements

10 Jul 2015

Independent Review Process

## Independent Review Panel Finds in Favor of DCA Trust: Makes Recommendation to ICANN (Internet Corporation for Assigned Names and Numbers)'s Board to Resume Evaluation of DCA's Application

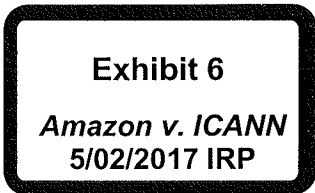
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A three-member panel convened to review DotConnectAfrica Trust's (DCA's) request for Independent Review issued its final declaration, late yesterday. The 63-page IRP declaration, [which is now published on the ICANN \(Internet Corporation for Assigned Names and Numbers\) website \(/en/system/files/files/final-declaration-09jul15-en.pdf\)](#) [PDF, 506 KB], held in favor of DCA and recommended that ICANN (Internet Corporation for Assigned Names and Numbers) send DCA Trust's application for .AFRICA back into evaluation.

The panel cited two main concerns relating to the ICANN (Internet Corporation for Assigned Names and Numbers) Governmental Advisory Committee (Advisory Committee)'s (GAC (Governmental Advisory Committee)'s) advice on DCA's application: (1) the panel was concerned that the GAC (Governmental Advisory Committee) did not include, and that ICANN (Internet Corporation for Assigned Names and Numbers) did not request, a rationale on the GAC (Governmental Advisory Committee)'s advice; and (2) the panel expressed concern that ICANN (Internet Corporation for Assigned Names and Numbers)



took action on the GAC (Governmental Advisory Committee)'s advice without conducting diligence on the level of transparency and the manner in which the advice was developed by the GAC (Governmental Advisory Committee).

The panel found that ICANN (Internet Corporation for Assigned Names and Numbers)'s conduct was inconsistent with the ICANN (Internet Corporation for Assigned Names and Numbers) Articles and Bylaws because of certain actions and inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

"Consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) will carefully review the panel's declaration and the ICANN (Internet Corporation for Assigned Names and Numbers) Board will be asked to consider the matter at its next meeting on 28 July 2015," said John Jeffrey, ICANN (Internet Corporation for Assigned Names and Numbers)'s General Counsel and Secretary.

Although ICANN (Internet Corporation for Assigned Names and Numbers) has already entered into an agreement with ZA Central Registry for the .AFRICA string, the panel has recommended that ICANN (Internet Corporation for Assigned Names and Numbers) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain), at this time. The panel ordered ICANN (Internet Corporation for Assigned Names and Numbers) to pay the administrative and panel fees. The panel also indicated that both parties are responsible for their own attorney's fees and expenses.

The IRP is one of the accountability review processes set out in the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws. For an understanding of how ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability review processes work, including the IRP, please view this [infographic \(/sites/default/files/assets/accountability-mechanisms-5100x3300-19mar14-en.png\)](#).

More Announcements

[Date Change for ICANN62 in June 2018 to be held in Panama \(/news/announcement-2017-05-02-en\)](#)

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Board to Hold Two Open Sessions During Geneva Workshop \(/news/announcement-2017-04-25-en\)](#)

[Reminder: ICANN \(Internet Corporation for Assigned Names and Numbers\) Quarterly Stakeholder Report – Register for the FY17 Q3 Call on 27 April 1500 UTC \(/news/announcement-2017-04-25-en\)](#)

[ICANN \(Internet Corporation for Assigned Names and Numbers\) Publishes ICANN58 By the Numbers Report \(/news/announcement-2017-04-24-en\)](#)



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<a href="#">Learning (/en/about/learning)</a>	<a href="#">Global Support (/resources/pages/customer-support-2015-06-22-en)</a>	<a href="#">Independent Review Process (/resources/pages/irp-2012-02-25-en)</a>	<a href="#">Agreements (/en/about/agreements)</a>	<a href="#">Domain Name Dispute Resolution (/en/help/dndr)</a>
<a href="#">Participate (/en/about/participate)</a>	<a href="#">Security Team (/about/staff/security)</a>	<a href="#">Request for Reconsideration (/groups/board/governance/information)</a>	<a href="#">Specific Reviews (/resources/reviews/aoc)</a>	<a href="#">Name Collision (/en/help/name-collision)</a>
<a href="#">Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)</a>	<a href="#">PGP Keys (/en/contact/pgp-keys)</a>	<a href="#">Ombudsman (/help/ombudsman)</a>	<a href="#">Annual Report (/about/annual-report)</a>	<a href="#">Registrar Problems (/en/news/announcements/announcements-06mar07-en.htm)</a>
<a href="#">Board of Directors-2014-03-19-en (/resources/pages/board-of-directors-2014-03-19-en)</a>	<a href="#">Certificate Authority (/contact/certificate-authority)</a>	<a href="#">Request for Reconsideration (/groups/board/governance/information)</a>	<a href="#">Financials (/en/about/financials)</a>	<a href="#">WHOIS (http://whois.icann.org/)</a>
<a href="#">President's Corner (/presidents-corner)</a>	<a href="#">Registry Liaison (/resources/pages/contact-2-2012-02-25-en)</a>	<a href="#">Document Disclosure (/en/about/transparency)</a>	<a href="#">Planning (/en/about/planning)</a>	<a href="#">KPI Dashboard (/progress)</a>
<a href="#">Staff (/en/about/staff)</a>	<a href="#">Specific Reviews (https://forms.icann.org/en/about/aoc-review/contact)</a>	<a href="#">RFPs (/en/news/rfps)</a>	<a href="#">Litigation (/en/news/litigation)</a>	<a href="#">Correspondence (/en/news/correspondence)</a>
<a href="#">Careers (https://chi.tbe.taleo.net/chi06/rats/careers/v2/searchResults?org=ICANN&amp;cws=37)</a>	<a href="#">Organizational Reviews (http://forms.icann.org/en/groups/reviews/contact)</a>	<a href="#">Complaints Office (https://www.icann.org/complaints-office)</a>	<a href="#">Request a Speaker (http://forms.icann.org/en/contact/speakers)</a>	
<a href="#">Newsletter (/en/news/newsletter)</a>	<a href="#">Request a Speaker (http://forms.icann.org/en/contact/speakers)</a>	<a href="#">For Journalists (/en/news/press)</a>		
<a href="#">Development and Public Responsibility (https://www.icann.org/development-and-public-responsibility)</a>				

## **Hearing Exhibit 7**

# Amazon v. ICANN

## Independent Review Process

### ICANN's Closing Presentation

May 2, 2017

Exhibit 7

Amazon v. ICANN  
5/02/2017 IRP



# Summary of Argument - I

- The GAC insisted on, and received, the right to give advice on any application for any reason, including the geographic nature of the application.
- The ICC's dismissal of the community objection did not nullify the GAC advice, which pre-dated the dismissal in all events.
- The GAC issued consensus advice on the Amazon Applications that was supported by numerous countries across the world, and to which no country objected.
- There is no evidence that the GAC's advice was motivated by anything other than legitimate public policy interests.

# Summary of Argument - II

- The NGPC thoroughly investigated over a 10 month period and exercised independent judgment.
- There is no evidence that the NGPC was concerned about so-called “threats” from Brazil or Peru.
- The NGPC did not discriminate against Amazon or otherwise violate the Articles, Bylaws, or Guidebook.
- Mr. Atallah’s testimony supported ICANN’s position on all of these issues.

# New gTLD Program

- In 2000, the ICANN Board approved a small number of new gTLDs for the purpose of determining whether adding gTLDs would harm Internet security or stability.
- In 2005-07, the GNSO developed policy principles that there be a large-scale new gTLD expansion. The GNSO also provided implementation suggestions to the Board.
- The ICANN Board accepted the GNSO policy recommendations in 2008, subject to development of appropriate implementation provisions.

# Guidebook Development 2008-2010

- Implementation was developed during 2008-2012 through successive drafts of the New gTLD Applicant Guidebook (“Guidebook”).
- The Guidebook was developed via extensive consultation with the ICANN community, through a process that included numerous versions and public comment on those versions.
- From the beginning, concerns were recognized over names having geographic meaning.
- The Guidebook also included objection procedures (e.g., Community Objections) by which members of the public (and an Independent Objector) could object to applications.

## **GAC Concerns with Early Guidebook**

- Beginning in late 2010, concerns were raised by the GAC. These concerns and the resulting revisions were reflected in the 15 April 2011 *New gTLD Program Explanatory Memorandum on GAC and Government Objections* (Ex. R-7):
  - The GAC advocated that governments should be allowed to raise concerns via the GAC as an addition to (and separate from) the other objection procedures. Ex. R-7, p. 2 (“Amend the evaluation process to include review by governments, via the GAC.”).
  - Objections should be possible via the GAC as to any application on any ground. Ex. R-7, p. 2 (“GAC Early Warning and GAC Advice on New gTLDs can be applied to any application, e.g., sensitive, community, sector, or geographic strings of any type.”)

## GAC Concerns with Early Guidebook (cont.)

- If the GAC provided consensus advice, there should be a strong presumption for ICANN that the application should not proceed. Ex. R-7, p. 3 (“GAC advice that is stated to be a ‘GAC consensus’ position and that states, this application should not proceed, will create a strong presumption for the Board that the application should not be approved.”); p. 4 (“proposed GAC Early Warning and GAC Advice on New gTLDs procedures are **designed so the GAC can provide input on any application for any reason**”).
- These refinements of the Guidebook were confirmed by Mr. Atallah in his witness statement (Atallah Ex. 1, Paras 11-23 and Exs. C-13, R-7-16), and reconfirmed during his re-direct. Notably, Amazon did not ask questions of Mr. Atallah on these topics.

# GAC Can Advise on Unlisted Geographic Strings

- The Board explained that the Guidebook had been revised in this way when authorizing the New gTLD Program's launch in June 2011:

“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**.” Launch Rationale § 4(III)(G), p. 45 (Ex. R-76), posted July 2011
- The operative Guidebook thus allowed the GAC to object to any application on any grounds. (Ex. C-15 – Guidebook version 11 Jan. 2012)
- The deadline for Amazon to complain about the provisions of the Guidebook has long passed, as confirmed by several IRP Panels.

# The ICC Determination Did Not Undercut the GAC Advice

- March 2013: the Independent Objector filed a Community Objection against the Amazon Applications based on the Early Warning. Ex. C-23.
- May 2013: Amazon opposed the Community Objection, arguing that the Brazil and Peru governments, which represented the community, were no longer pursuing their objections. Ex. R-63.
- By that time, however, the governments had already put the matter before the GAC, which issued consensus advice in July 2013.
- Amazon did not tell the ICC expert about this (and Brazil and Peru were not parties to the proceeding). Months after the GAC issued consensus advice, the expert dismissed the community objection based on his mistaken belief that the governments were not objecting. Ex. C-47.



# The ICC Determination Did Not Nullify the GAC Advice (cont.)

- Amazon argues that the “procedures for determining a geographic name set forth in the Guidebook are the exclusive procedures for protective geographic names.” (Prehearing brief at 36). This is wrong because:
  - The Guidebook expressly created GAC advice as an alternative, available to governments, to Community Objections
  - The Community Objection was pursued by the Independent Objector, who does not act on behalf of any particular entity (C-020 § 3.2.5)
  - Due to Amazon’s misleading opposition to the Community Objection, the ICC expert mistakenly thought the governments no longer opposed, leading him to find a lack of community objections or harm.
  - The Community Objection process and GAC advice are two *independent methods* for objecting to an application, and neither has precedential effect on the other.

# Objections to Amazon Applications

- Amazon submitted 76 applications under the New gTLD Program in Spring 2012, including .AMAZON and its Japanese and Chinese versions (.アマゾン and .亚马逊).
- The three “Amazon Applications” passed the Initial Evaluation’s Geographic Names Review because the strings did not appear on the specific lists.
- Nevertheless, strong opposition was raised in South America:
  - Early Warning by Brazil, Peru, Bolivia, Ecuador, Guyana, and Argentina.
  - Montevideo Declaration (4<sup>th</sup> Ministerial Conference of Economic Commission for Latin America/Caribbean).
  - Resolution of opposition in Brazilian Senate.
  - Statements by other intergovernmental organizations.

# Objections to Amazon Applications (cont.)

- November 2012: GAC Early Warning Notices
- March 2013: Community Objection filed by ICANN's Independent Objector, based on grounds similar to the Early Warnings
- April 2013: GAC takes up Brazil/Peru opposition at April 2013 meeting
- Spring/Summer 2013: Amazon lobbies several countries to block consensus advice, but no country agrees to support Amazon

# Amazon Pursues “Political” Options

Exhibit R-67

**From:** Huseman, Brian  
**To:** Hubert.Schoettner@bmwi.bund.de  
**Sent:** 4/8/2013 6:37:57 AM  
**Subject:** GAC Advice

Hubert--

I write to follow up with you on our discussions, specifically in connection with GAC advice on the question of geographic concerns over strings in the new gTLDs.

We respectfully ask you to oppose any proposals that would give individual GAC member countries the ability to veto applications on the basis of a sensitivity, without considerations of the laws of other sovereign nations. Accordingly, we write to formally request that you object to any objection to the .amazon application (and its IDN variants). Alternatively, if you cannot object, we ask that you remain neutral.

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We respectfully ask you to oppose any proposals that would give individual GAC member countries the ability to veto applications on the basis of a sensitivity, without considerations of the laws of other sovereign nations. Accordingly, we write to formally request that you object to any objection to the .amazon application (and its IDN variants). Alternatively, if you cannot object, we ask that you remain neutral.

**From:** Huseman, Brian  
**To:** Hubert.Schoettner@bmwi.bund.de  
**Sent:** 4/8/2013 6:37:57 AM  
**Subject:** GAC Advice

- This one was sent to Germany. Amazon sent similar letters to United Kingdom (Ex. R-66), Australia (Ex. R-69) and Luxembourg (Ex. R-68)

# Objections to Amazon Applications (cont.)

- July 2013: U.S. issues its Statement on Geographic Names: “the United States is willing 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.” Ex. C-034.
- July 2013: The GAC debated the Amazon Applications in open session. Nearly 20 countries spoke in support of GAC advice against the Amazon Applications, including Russia, China, and South Africa. (Ex. C-038, C-040 – Transcripts)

# Objections to Amazon Applications (cont.)

- Peru summarized its basis for objecting:
  - “The 2007 [GAC] principle states that ICANN's core values indicate that the organization, while remaining rooted in the private sector, recognizes that governments and public authorities are responsible for public policy and should take into account governments and public authorities' recommendations.”
  - “They [the GAC principles] also make reference to the provision of the Universal Declaration of Human Rights and the obligation that the new gTLDs should respect the sensitivities regarding terms with national, cultural, geographic, and religious significance.”
  - “They [the GAC principles] clearly add that ICANN should abide country, territory or place names and country, territory or regional language or people descriptions unless in agreement with the relevant governments or public authorities. Therefore, within the context of the approved principles, there is clear basis that supports our position as governments.”  
(Ex. C-038, p. 6)

# Objections to Amazon Applications (cont.)

- Peru elaborated three reasons (Ex. C-040, p. 14):
  - “And first, in terms of legal grounds for our request, we believe there is enough legal grounds in ICANN bylaws, in prior GAC advice, and also in the applicant's guide.”
  - “The second remark is that there is no doubt that this is a geographic name. Amazon is -- pertains to four departments of the Amazon countries.” In arguing this, Peru made multiple arguments, including an incorrect statement that ISO 3166-2 gave “Amazon” a three-digit number.
  - “And the third remark is that, indeed, this is a public interest issue, and that is why we are discussing this in the GAC. There are several populations that have been involved in this, and I want to stress the fact that, unanimously, all Amazon countries and all Amazon provinces, departments, and local governments have expressed, in writing, their rejection to dot amazon.”

# Objections to Amazon Applications (cont.)

- Amazon attacks Peru's use of ISO 3166-2 in supporting the unremarkable statement that "there is no doubt that this is a geographic name." But this is only one of the bases given by Peru to argue the geographic character of "Amazon," and its incorrect reference to .Amazon being on a "list" was likely ignored, consistent with Australia's comments.
- After completion of debate, the GAC chair called for formal objections to the advice, and no country offered one. Because this is the classic definition of consensus advice, the chair declared that the GAC had reached consensus in opposition to the Amazon Applications.



# NGPC Begins Its Investigation

- July 2013: GAC issues consensus advice (Durban Communiqué)
- July 2013: Amazon is invited to respond
- August 2013: Amazon submits lengthy response (316 pages). (Ex. C-043) Amazon makes three arguments (each of which it continued to make in its briefing to the Panel):
  1. GAC advice is contrary to international law
  2. Discrimination between .AMAZON and .IPIRANGA
  3. Amazon followed the rules and should be approved
- Fall 2013: NGPC commissions Jérôme Passa to analyze certain international law issues

# NGPC Continues Investigating

- December 2013/January 2014: NGPC receives additional submissions from Amazon and Brazil/Peru
- March 2014: NGPC receives Passa analysis and invites Amazon and Brazil/Peru to respond
- April 2014: NGPC receives responses from Amazon, Brazil, and Peru
- 29 April 2014: NGPC meets to analyze the materials received and has an extensive discussion regarding next steps (Ex. R-31 – NGPC Meeting Minutes – Mr. Atallah’s testimony)
- 14 May 2014: NGPC continues deliberation; decides to accept GAC advice (Ex. R-83 – Board Resolution – Mr. Atallah’s testimony)

## NGPC's Investigation (cont.)

- Amazon's suggestions that the NGPC was motivated by so-called "threats" or extraneous concerns is unsupported by any evidence.
- As Mr. Atallah testified, numerous countries raised issues regarding ICANN's role.
- ICANN's interaction with Brazil was to explain Brazil's legitimate options under the Guidebook, not to tell Brazil how to "win." Indeed, there were no assurances the GAC would issue consensus advice regarding the Amazon Applications.
- There is zero evidence that the NGPC took any of these issues into account. To the contrary, Mr. Atallah repeatedly denied that the NGPC ever discussed these issues or any other extraneous matters when evaluating the Amazon Applications.
- The NGPC evaluated its options and ultimately agreed to accept the "strong presumption" created by the GAC's consensus advice.

# Nature of Independent Review Process

- Independent Review Process applies only to Board (including NGPC) actions:  
“Any person materially affected by a decision or action **by the Board** that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.” (Bylaws Article IV, Section 3.2)
- Actions by GAC and participating governments **are not covered** by the Independent Review Process.

# Nature of Independent Review Process (cont.)

- Role of an IRP Panel is to compare contested Board actions with requirements of ICANN's Articles and Bylaws:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”  
(Bylaws Article IV, Section 3.4)

# Nature of Independent Review Process (cont.)

- IRP Panels are not to substitute their independent judgment for that of the Board:

“The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook . . . . [I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with the applicable rules found in the Articles, Bylaws, and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves), but merely to apply them to the facts.”

*Booking.com* Final Decl. ¶¶ 108, 115.

## Nature of Independent Review Process (cont.)

- *Merck*: “the Panel may not substitute its own view of the merits of the underlying dispute.” (Final Decl. ¶¶ 18, 21-22)
- *Vistaprint*: “[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” (Final Decl. ¶ 124)

## Nature of Independent Review Process (cont.)

- Bylaws specify a 3-part test:
  - 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? (Article IV, Section 3.4)
- *Merck*: “The mandatory focus on the three elements (a-c) further informs the exercise of comparison.”



## Nature of Independent Review Process (cont.)

- IRP proceedings must be filed within 30 days of posting of challenged Board actions. Bylaws Article IV, Section 3.3 Thus, challenges to Guidebook procedures must be filed within **30 days of publication of the procedures' adoption.** *Booking.com* Final Declaration ¶ 129.
- Orderly operation of the New gTLD Program requires that procedures (such as applicability of GAC advice to geographic names) be challenged promptly after adoption. A prospective applicant must challenge Guidebook procedures when they are adopted, rather than after the Guidebook procedures are applied, resulting in a challenge years later.

# Nature of Independent Review Process (cont.)

- Per prior IRP statements, an IRP Panel can issue a binding declaration that the Board did or did not act consistent with the Articles, Bylaws, and Guidebook. **But** the ICANN Board, not an IRP Panel, is responsible for deciding how to remedy nonconforming action:

“[T]he findings of the Panel on whether the Board has acted in a manner that is consistent (or not) with the Articles or Bylaws is “binding” in the sense that ICANN’s Board cannot overrule the Panel’s declaration on this point . . . . 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.”

*Vistaprint* Final Declaration ¶ 130.

# The GAC Truly Gave Consensus Advice

- Contrary to Amazon’s position, the GAC’s advice *was* consensus advice.
- GAC Operating Principle 47, adopted in 2011 to support the Guidebook provisions on consensus, is quite clear:

“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.”
- Consensus advice is a group, not individual, approach to decision making. Although participants may have a range of views, so long as no participant blocks consensus, it is a consensus decision by definition, as Mr. Atallah testified.

# The GAC Truly Gave Consensus Advice (cont.)

- Even the United States, which expressed an individual concern about sovereignty-based objections, stated it would not object so as to “allow[] the GAC to present consensus objections on these strings to the Board.”
- There clearly was consensus within the meaning of the Guidebook. All governments were given the opportunity to object, and none did, despite Amazon’s strenuous efforts to persuade several governments to object.
- This is not a situation where 1-2 countries alone advocated the advice. Nearly 20 countries spoke or wrote in support of Brazil and Peru. (Ex. C-040)

# The GAC Was Not Required to State Consensus Reasoning

- Amazon argues (Prehearing Brief at 19), that the GAC was required to give a consensus reason for its advice. This is wrong.
- Guidebook Version 6 had language encouraging the GAC to state the basis for advice. (GAC "should identify objecting countries, the public policy basis for the objection, and the process by which consensus was reached.") (Ex. R-9 p. 3-2) But the GAC objected that this was contrary to the Bylaws provisions concerning GAC advice (e.g., Art. XI, §2.1(b) (GAC "adopt[s] its own charter and internal operating principles"). The Board agreed:

“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.”). (Ex. R-13 p. 11)

# The GAC Was Not Required to State Consensus Reasoning (cont.)

- Even without a formal statement of reasons, the NGPC could determine the basis for the advice. The rationale of the countries that opposed the Amazon Applications was set forth in transcripts, letters, and other statements, all reviewed by the NGPC prior to making its decision:
  - Statement on “.amazon” and other strings containing geographic names” (Argentina, Brazil, Chile, Peru and Uruguay; 13 July 2013) (Ex. C-039)
  - Montevideo Declaration (33 Latin America/Caribbean countries) (3-5 April 2013) (Ex. R-61)
  - Brazilian Internet Steering Committee (Eng. Trans.: “declare the support of all sectors of Brazilian society ... to challenge the delegation of generic domain .amazon ... to entities of private character separated from the public interest”) (26 April 2013) (<http://www.cgi.br/resolucoes/documento/2013/011>)
  - Federal Senate of Brazil Resolution (Request) No. 73 of 2013 p. 8 (Ex. R-62)

# The GAC Was Not Required to State Consensus Reasoning (cont.)

- Letter from Amb. Robby Ramlakhan, Amazon Cooperation Treaty Organization, to Steve Crocker, ICANN Chair (25 March 2014) (<https://www.icann.org/en/system/files/correspondence/ramlakhan-to-crocker-25mar14-en.pdf>)
- Letter from Volodymyr Semynozhenko (Ukraine 8 April 2013) (Ex. C-077)
- Letter from Wanawit Ahkuputra (Thailand; 5 April 2013) (Ex. C-078)
- Letter from Panagiotis Papaspiliopoulos (Greece; 9 April 2013) (Ex. C-079)
- 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)

# The GAC Was Not Required to State Consensus Reasoning (cont.)

- Statement of Peru at 13 July 2013 GAC Open Plenary (Ex. C-038 pp. 4-7)
- Statements of numerous countries at 16 July 2013 GAC Open Plenary (Ex. C-040):

Brazil	Uruguay	Nepal
Peru	Chile	Trinidad and Tobago
China	Iran	Sri Lanka
Russia	Thailand	Gabon
Portugal	South Africa	Uganda
Argentina		

- GAC Early Warning (including Brazil and Peru notes) (Ex. C-022)
- GAC Beijing Communiqué (noting need for further consideration) (Ex. C-027)
- GAC Durban Communiqué (noting consensus GAC objection) (Ex. C-041)



# The NGPC Thoroughly Investigated

- Mr. Atallah confirmed the extensive nature of the NGPC's 10-month investigation:
  - Invited and reviewed Amazon response so as to take Amazon's interests into account
  - Received comments at public forum
  - Received comments from Brazil, Peru, and other governments participating in GAC deliberations
  - Commissioned the Passa report as to international law and received extensive additional comments from Amazon, Brazil, and Peru regarding the Passa report
  - Reviewed the history of the Guidebook's development
  - Reviewed the extensive amount of information that was provided to the NGPC before issuing a unanimous decision

# The NGPC Thoroughly Investigated (cont.)

- The IRP test requires “due diligence and care in having a reasonable amount of facts.” Bylaws Art. IV sec. 3.4(b)
- Following the GAC consensus advice, the “strong presumption” meant that the GAC advice would be followed unless there was evidence sufficiently strong to convince the NGPC that the underlying public policy concerns were unfounded.
- But the concerns had more than plausible foundations:
  - By requiring automatic screening for listed names, the Guidebook already recognized that geographic names were likely to raise legitimate public-policy concerns, such as the potential for public interests of territories to be privately appropriated, often warranting governmental protection.
  - This is NOT a situation where the GAC’s advice was manifestly unrelated to public-policy concerns.

## **The GAC Was Not Required to State Consensus Reasoning (cont.)**

- This is also NOT a situation where the GAC's advice was manifestly wrong.
- The NGPC was entitled to rely on GAC advice concerning matters of public policy involving governments, whose job is to address such matters. The responsible governments, and not the Board, have the expertise and the authority to assess how approving a particular geographic name is likely to affect the associated region and its people.
- Brazil, Peru, and other governments gave substantial reasons why commercial appropriation threatened harm to the people of the Amazon region. There was no basis for the Board to second-guess.

# The NGPC Thoroughly Investigated (cont.)

- Amazon's disagreement with those reasons does not negate the fact that numerous countries asserted or supported them.
- Amazon has private commercial interests, but the Guidebook reflects the policy that, where geographic terms are involved, the public interest is paramount.
- Other than noting that it already used "Amazon" within designated *commercial* domains (i.e., .com and .co.br; see Ex. R-84, p. 2), Amazon presented no showing that the sensitivities on which the Guidebook was based did not apply to its use of the "Amazon" *as a gTLD*.

# The NGPC Thoroughly Investigated (cont.)

- Because the NGPC had more than ample information before it to make a decision, and it had no reason to conduct any additional investigation of the GAC advice.
- There is no “duty to inquire” further in the face of so much strenuous objection and available information.
- Amazon argues that the NGPC “defer[red] to the GAC’s veto without evaluating its reasons” “simply because the GAC said so.” The evidence shows these assertions to be wrong.

# The NGPC Exercised Independent Judgment

- The NGPC gathered relevant information, reviewed all parties' submissions, deliberated extensively, and came to a thoughtful disposition of the dispute.
- The NGPC's responsibility was to act in ICANN's overall best interest – both as an organization and a community. This meant:
  - Adhere to the procedures of the Guidebook, as finally adopted
  - Respect legitimate expectations of all stakeholders
  - Advance policies of the Guidebook
- The minutes of the April and May 2014 NGPC meetings reflect thorough and thoughtful debate. This was not a rubber stamp, as Mr. Atallah confirmed. (Exs. R-31 and R-83)

## The Amazon Applications vs. the DCA Application

- DCA: the GAC issued consensus advice following a single, closed meeting with only one country speaking in favor of the advice.
  - Amazon: the GAC issued consensus advice following two open meetings, considerable expression of public concern, and advice supported by nearly 20 countries.
- DCA: the NGPC adopted the GAC advice in a single meeting based on a more abbreviated investigation.
  - Amazon: the NGPC adopted the GAC advice following a 10 month investigation, at least seven NGPC meetings, the receipt of an expert report, the review of extensive materials from Amazon, Peru and Brazil, and others, and extensive debate. The NGPC's work was heavily documented.

## The Amazon Applications vs. the DCA Application

- DCA: Ms. Dryden’s testimony was focused on what happened at the GAC meeting at which the GAC issued consensus advice on DCA’s application.
  - Her testimony did *not* address the GAC’s advice on the Amazon Applications, which occurred at a different (and open) meeting.
- The DCA IRP Panel did not state that the NGPC must always “investigate” the GAC advice. Instead, because the GAC’s meeting was closed and the GAC gave no reasons for its advice, there was no basis to know what was discussed. On that basis, the DCA IRP Panel stated: “the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application.” (Para. 113)
- By contrast, the NGPC had a wealth of information regarding the GAC advice, including the transcript of the GAC meeting and extensive correspondence.



## The GCC Decision

- The GAC failed to reach a consensus as to .persiangulf. The GAC stated only that it “did not object” to .persiangulf proceeding.
- The IRP Panel concluded that this statement was not a proper form of GAC advice under the Guidebook and “reads like consensus GAC advice that the application should proceed.”
- Under the Guidebook, the GAC was supposed to “convey the full range of views expressed by members to the ICANN Board,” but the GAC did not do so. Had the GAC done so, under Module 3.1 of the Guidebook and Bylaws Art. XI, §2.1(j), there would have been a dialogue between the GAC and the Board.
- The IRP Panel faulted the Board for not investigating the GAC advice further because the form of advice was contrary to the Guidebook’s range of options.
- Here, the form of advice – consensus advice – is specifically set forth in the Guidebook.

# **.AMAZON Was Different from .IPIRANGA**

- Amazon argues that rejecting .AMAZON and allowing .IPIRANGA was discriminatory.
- The two situations were entirely different:
  - Like the vast majority of other gTLD applications – several hundred applications – no community objections or any other objections (such as GAC advice) were asserted against the .IPIRANGA application. Thus, according to Guidebook procedures, the NGPC never considered the application and, thus, did not “treat it differently“ or in any fashion at all.
  - .AMAZON was the subject of GAC advice. Guidebook §5.1 specifically mentions GAC advice as a reason for individualized NGPC consideration.

## **.AMAZON Was Different from .IPIRANGA (cont.)**

- Moreover, the scale of geographic consequence was different:
  - The Amazon river is the world’s largest, and flows for 4,345 miles through a basin that is home to 10,000,000 people, 1,000,000 of them indigenous peoples from 400 tribes facing many threats, including extinction.
  - Ipiranga brook, in contrast, is 5.6 miles long and flows through the Ipiranga district, a small part of the São Paulo megalopolis with a population of 98,863.
- Although the Board did not address the .Ipiranga application at all, ICANN’s Bylaws permit “disparate treatment [when] justified by substantial and reasonable cause.” Bylaws Art. II sec. 3.

# The NGPC's Actions Also Satisfied the Articles, Bylaws, and Guidebook

## Articles of Incorporation

- The NGPC “operate[d] for the benefit of the Internet community *as a whole*.” Articles ¶4.
- It conformed to applicable requirements of international law. *Id.* ¶4.
- It followed “open and transparent processes.” *Id.* ¶4.

## Bylaws - Core Values

- The NGPC introduced competition to the extent “practicable and beneficial in the public interest.” Bylaws Art. I, § 2.6. Introducing competition does not mean sacrificing the other competing interests set forth in the Guidebook.
- It “employ[ed] open and transparent policy development mechanisms that (i) promote well-formed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.” Bylaws Art. I, § 2.7.

# The NGPC's Actions Also Satisfied the Articles, Bylaws, and Guidebook (cont.)

- The NGPC “ma[de] decisions by applying documented policies neutrally and objectively, with integrity and fairness.” Bylaws Art. I, § 2.7.
- While “rooted in the private sector, [it] recogniz[ed] that governments and public authorities are responsible for public policy and duly t[ook into account their] recommendations.” Bylaws Art. I, § 2.11.
- It exercised its judgment to balance the core values.

## Bylaws - Non-Discrimination and Transparency

- The NGPC did not “apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment ... .” Bylaws Art. II, § 3.
- The NGPC “operate[d] to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” Bylaws Art. III, § 1.

# The NGPC's Actions Also Satisfied the Articles, Bylaws, and Guidebook (cont.)

## Guidebook

- The NGPC recognized that the Guidebook treated strings with geographic connotations as sensitive.
- The NGPC respected the Guidebook's two-track approach to geographic strings: list-based Geographic Names Review, and GAC advice for other sensitive strings.
- The NGPC conformed to the Guidebook's principle that governments had the option to use the GAC to raise concerns as an alternative to Community Objections.
- The NGPC adhered to the Guidebook procedure that allowed the GAC to express its advice in the manner it chooses, with no requirement of explicit statement of a consensus rationale.

# The NGPC's Actions Also Satisfied the Articles, Bylaws, and Guidebook (cont.)

## Bylaws - Standards for Independent Review

- The NGPC “act[ed] without conflict of interest in taking its decision.” Bylaws Art. IV, §3.4(a).
- The NGPC “exercised due diligence and care in having a reasonable amount of facts.” Bylaws Art. IV, §3.4(b).
- The NGPC “exercise[d] independent judgment, believed to be in the best interests of [ICANN].” Bylaws Art. IV, §3.4(c).

# The NGPC's Actions Also Satisfied the Articles, Bylaws, and Guidebook (cont.)

## Role of the GAC

- The GAC's actions are not reviewable in this IRP. However, the GAC's conduct clearly conformed to the Articles, Bylaws and Guidebook as well. (And those requirements do not apply to the Brazilian government.)
- The GAC's actions were open and transparent, starting from Amazon being alerted of the South American concerns by the Early Warning, and culminating in the two-session public meeting in Durban. Amazon had significant opportunities to present its position to governments, as it did with its lobbying leading up to Durban.
- The GAC's actions were taken in good faith, and there is no indication that they were discriminatory. (Other applicants' strings with significant geographic impact were also the subject of the Durban Communiqué.)
- The GAC acted with judgment and moderation. The GAC's deliberations show its advice was based on genuine concerns. Amazon has not proven otherwise.



# Conclusions

- All geographic strings are a proper subject for GAC advice.
- The ICC dismissal of the Community Objection to the Amazon Applications did not nullify, or require the NGPC to reject, the previously issued GAC advice.
- The GAC advice was truly consensus advice under the Guidebook. Consensus reasoning was not required. Thus, there was a “strong presumption.”
- The NGPC took care to gather the pertinent facts and to obtain additional information, including the Passa report and responses from Amazon.
- The NGPC exercised independent judgment.
- There is no evidence that the NGPC was fearful of (or influenced by) “threats” from Brazil or Peru.
- The NGPC did not discriminate against the Amazon Applications.
- Therefore, Amazon has not demonstrated that the Board (NGPC) acted inconsistent with its duties under the Articles, Bylaws, and Guidebook.

**Hearing Exhibit 8**

## KEY PROVISIONS OF THE ARTICLES, BYLAWS, AND GUIDEBOOK

ICANN's decision not to proceed with the .AMAZON Applications violated numerous provisions of the Articles, Bylaws, and Guidebook. The most relevant provisions (or excerpts) are set forth here for the Panel's reference:

Articles ¶ 4 [ICANN] shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

Bylaws art. I, § 2 In performing its mission, the following core values should guide the decisions and actions of ICANN: . . . .

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. . . .

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations. . . .

Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

Bylaws art. II, § 3 ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause . . . .

Bylaws art. III, § 1 ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Bylaws art. IV, § 1 ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.

**Exhibit 8**

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Bylaws art. XI, § 1	Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.
Bylaws art. XI, § 2, ¶ 1(a)	The [GAC] 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 policies and various laws and international agreements or where they may affect public policy issues.
Bylaws, art. XI, § 2, ¶ 1(j)	The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.
Guidebook § 2.2.1.4	Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments or public authorities in geographic names. The requirements and procedure ICANN will follow in the evaluation process are described in the following paragraphs.
Guidebook § 2.2.1.4.2	The following types of applied-for strings are considered geographic names. [Followed by a list of four specific categories.]
Guidebook § 2.2.1.4.4	A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name . . . . For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.
Guidebook Attachment to Module 2, at A-1.	[O]ne of [ICANN's] key mandates has been to promote competition in the domain name market. ICANN's mission specifically calls for the corporation to maintain and build on processes that will ensure competition and consumer interests – without compromising Internet security and stability. This includes the consideration and implementation of new gTLDs. It is ICANN's goal to make the criteria and evaluation as objective as possible.
Guidebook § 3.1	The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, <i>e.g.</i> , that potentially violate national law or raise sensitivities. . . .  The GAC [may] advise[] 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.
Guidebook § 5.1	The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. 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 . . . .

**Hearing Exhibit 9**

Excerpt from ICANN Bylaws - 20 July 2014  
(Exhibit C-064)

**Art. I Sec. 2 CORE VALUES**

\* \* \*

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

## **Hearing Exhibit 10**

Excerpt from ICANN Bylaws - 20 July 2014  
(Exhibit C-064)

**Art. II Sec. 3 NON-DISCRIMINATORY TREATMENT**

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

**Exhibit 10**

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