

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. )  
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**ICANN'S RESPONSE TO AMAZON'S REQUEST THAT  
THE PANEL HEAR LIVE WITNESS TESTIMONY**

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Pursuant to the Panel’s Scheduling Order No. 1 (4 October 2016), the Internet Corporation for Assigned Names and Numbers (“ICANN”) responds to Amazon EU S.à r.l.’s (“Amazon’s”) Request that the Panel Hear Live Witness Testimony (“Request”).

## INTRODUCTION

The live testimony Amazon seeks is prohibited, in plain and unambiguous terms, by the procedural rules and ICANN Bylaws governing this proceeding. As Amazon’s Request acknowledges, the 2013<sup>1</sup> Supplementary Procedures that apply to this proceeding expressly limit the hearing to argument only and provide that “all evidence, including witness statements must be submitted in writing in advance.”<sup>2</sup> Further, there is no question that these Supplementary Procedures govern this proceeding: they explicitly state that the Supplementary Procedures “shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR,” and that “[i]n the event of any inconsistency [with the ICDR International Arbitration Rules] these Supplementary Procedures will govern.”<sup>3</sup>

Nevertheless, Amazon argues that live testimony should be permitted despite this undeniable prohibition because Amazon submitted its applications in April 2012 (“Applications”), a year before the 2013 Supplementary Procedures became effective. This argument ignores the plain language of the 2013 Supplementary Procedures about their applicability. Moreover, the restriction of evidence to pre-submitted writings was not an unexpected change; it was the result of a public review, begun in 2010, of the IRP and other

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<sup>1</sup> Paragraph 5 of the Panel’s October 4, 2016, Report of Preliminary Conference and Scheduling Order No. 1 states that the applicable supplementary rules of procedure are the “ICANN Supplementary Procedures, as amended and in effect as of 2011.” It should be noted that the applicable Supplementary Procedures, a copy of which Amazon has submitted as Exhibit 4 to its Request, were actually adopted in April 2013, even though they include a copyright notice erroneously listing 2011 as the publication date. To assist in distinguishing, the 2013 Supplementary Procedures have twelve numbered sections, distinguishing them from the 2011 procedures, which have only ten. For clarity, the 2013 Supplementary Procedures are submitted as Ex. R-39.

<sup>2</sup> Request, p. 4. *See also* 2013 Supplementary Procedures (Request Ex. 4) (*also* Ex. R-39).

<sup>3</sup> 2013 Supplementary Procedures, ¶ 2 (Request Ex. 4) (*also* Ex. R-39).

ICANN accountability mechanisms, pursuant to ICANN's Bylaws. The community's dissatisfaction with the cost and delays that were experienced in ICANN's first IRP (filed by ICM Registry), which had recently concluded, were reflected in public comments and analyzed by independent governance experts. This community and expert input led to the reform in evidentiary procedures that finally became effective in the April 2013 Supplementary Procedures.

The reforms have, to a great extent, achieved the intended streamlining. In sixteen of the seventeen IRP proceedings initiated since the 2013 change, the prohibition of live testimony has not been breached. Amazon focuses on the one exception – *DCA Trust* – in which the Panel improperly allowed live testimony. ICANN strenuously resisted that Panel's decision to permit live testimony, which was outside of that Panel's authority. Further, in the aftermath of the *DCA Trust* declaration, the issue was briefed in the *Dot Registry* IRP, resulting in that Panel adhering to the letter and spirit of the 2013 Supplementary Procedures, ruling that there “will be no live percipient or expert witness testimony of any kind permitted at the hearing.”<sup>4</sup> In all other cases, claimants' counsel respected the community-developed limitation to pre-filed written evidence.

Amazon suggests it is raising particularly profound positions that make live testimony appropriate. However, the live testimony Amazon proposes has little if any pertinence to the issue of whether the Board acted with sufficient grounds. The challenged actions describe the Board's rationales and list the evidence considered, and do so entirely in writing. The limitation on live testimony reflects the considered community judgment that the overall process will benefit from limiting evidence to pre-filed written submissions, thereby minimizing costs, reducing surprise, and facilitating presentation of thoughtful argument based on a well-understood record. That judgment should be respected.

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<sup>4</sup> Procedural Order No. 12, *Dot Registry* IRP, ICDR Case No. 01-14-0001-5004 (Ex. R-40).

## ARGUMENT

### I. The Applicable IRP Procedures And ICANN's Bylaws Preclude Live Testimony.

*What the Procedures Require.* The 2013 Supplemental Procedures require, unequivocally, that all evidence be submitted in advance of the hearing, thereby precluding in-hearing live testimony. Paragraph 4 of the Supplementary Procedures, which governs the “Conduct of the Independent Review,” states:

The IRP Panel should conduct its proceedings by electronic means to the extent feasible . . . . In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . ***the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.***<sup>5</sup>

This prohibits live testimony in two ways: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to “argument only”; and (2) the phrase stating that “all evidence, including witness statements, must be submitted in advance.”<sup>6</sup> The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony.<sup>7</sup> The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases compellingly demonstrate that the applicable Supplementary Procedures establish a streamlined hearing procedure not involving live testimony.<sup>8</sup>

The 2013 Supplementary Procedures were put in place at the direction of the ICANN

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<sup>5</sup> 2013 Supplementary Procedures, ¶ 4 (emphasis added) (Request Ex. 4) (*also* Ex. R-39).

<sup>6</sup> *Id.*

<sup>7</sup> *See Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1260 (Fed. Cir. 2010) (noting the distinction between “attorney argument” and “record evidence”) (Ex. R-41).

<sup>8</sup> Paragraph 4 of the Supplementary Procedures is based on similar language in Article IV, § 3.12 of the Bylaws in effect when this proceeding was commenced, which provides that “[i]n the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.” Bylaws, Art. IV, § 3.12 (Ex. C-64) (emphasis added).

Board to conform to the applicable amended version of Bylaws Art. IV, § 3. By their terms, they apply to all IRP requests the ICDR receives thereafter.<sup>9</sup> This resulted in use of the Supplementary Procedures in conjunction with ICDR’s International Arbitration Rules (“ICDR Rules”)<sup>10</sup> where the Supplementary Procedures do not address particular matters. However, Paragraph 2 of the ICDR’s ICANN-specific Supplementary Procedures requires that “[i]n the event there is any inconsistency between these Supplementary Procedures and [the ICDR Rules], these Supplementary Procedures will govern.”<sup>11</sup> In sum, while ICANN has approved the use of the ICDR Rules when the Supplementary Procedures are silent, it is clear that they are subordinate to the Supplementary Procedures and the Bylaws if an inconsistency can be found.

*How and Why the 2013 Procedures Were Developed.* The restriction on live testimony was adopted as a result of a highly visible review of ICANN’s processes. ICANN’s Bylaws have long required, as an important accountability mechanism, periodic reviews of ICANN’s structure and operations so that they may be adjusted to meet evolving needs.<sup>12</sup> Elaborating on this requirement, in 2009 ICANN entered an “Affirmation of Commitments” with the U.S. Department of Commerce by which it undertook (among other things) to promote accountability and transparency by “continually assessing and improving ICANN Board of Directors (Board) governance.”<sup>13</sup>

One of these periodic evaluations was launched by appointment of an Accountability and Transparency Review Team (“ATRT”) in April 2010. Among other aspects, the ATRT’s review

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<sup>9</sup> Supplementary Procedures, ¶ 2, last sentence. (Ex. R-39). Changes in procedures for adjudication typically apply to all proceedings initiated after their effective date. See, for example, U.S. Supreme Court orders amending the Federal Rules of Civil Procedure.

<sup>10</sup> ICANN Board Resolution 2012.12.20.18, dated 20 December 2012 (Ex. R-42). Several other IRP declarations have found that the 2013 Supplemental Procedures apply. See *Booking* IRP Final Declaration, ¶ 1 (CLA-1); *DCA* Declaration at ¶ 23 (CLA-2); and *Vistaprint* Declaration at ¶ 1 (CLA-4).

<sup>11</sup> 2013 Supplementary Procedures, ¶ 2 (Request Ex. 4) (*also* Ex. R-39).

<sup>12</sup> *E.g.* Archived Bylaws, Art. IV, § 4, dated 30 September 2009 (Ex. R-43).

<sup>13</sup> Affirmation of Commitments § 9.1, dated 30 September 2009 (Forrest-011).

evaluated how the then-existing IRP had performed in actual operation. From when the IRP was created until 2010, only one IRP had been initiated. Specifically, in June 2008, ICANN received its first IRP request, which was filed by ICM Registry, LLC (“*ICM IRP*”).<sup>14</sup> That IRP involved extensive discovery and a five-day hearing that included lengthy live witness testimony. The *ICM IRP* wound up costing the parties millions of dollars each, and the IRP Panel took over a year and a half to render its declaration, which it finally issued in February 2010.<sup>15</sup> This level of cost and delay was repeatedly noted in the ATRT’s review as impairing the effectiveness of the Independent Review Process.<sup>16</sup>

At the end of 2010, the ATRT issued 27 recommendations, one of which (Recommendation 23) recommended that ICANN convene a committee of independent experts to conduct “a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms [IRP, Reconsideration, and Ombudsman] and of their inter-relation, if any (i.e., whether the three processes provide for a graduated review process), determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability.”<sup>17</sup>

After consultation with governance experts and organizations regarding the types of expertise that would be useful towards this review and an ensuing community discussion, ICANN issued a call for expressions of interest in serving on this Accountability Structures Expert Panel (“ASEP”). Three experts were selected – one a former Judge of the Supreme Court of South Africa with notable governance background; one a noted jurist from Australia with

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<sup>14</sup> ICM’s Request for Independent Review Process, dated 6 June 2008 (Ex. R-44).

<sup>15</sup> *ICM IRP* Declaration of Independent Review Panel, dated 19 February 2010 (CLA-3).

<sup>16</sup> *E.g.*, Berkman Center for Internet & Society, An Independent Review - Accountability and Transparency at ICANN, dated 20 October 2010 (Ex. R-45).

<sup>17</sup> Final Recommendations of the Accountability and Transparency Review Team, dated 31 December 2010 (Ex. R-46).

governance and ombudsman experience; and a U.S.-based governance expert and speaker on corporate leadership and workplace issues.<sup>18</sup>

After significant and substantive research and review of the operation of ICANN's accountability mechanisms, including written public comment and in person consultation, in October 2012 the experts recommended refinements to the IRP, with a focus on effectiveness, efficiency, ease of access, and expeditious resolution, as well as maintaining and enhancing ICANN's accountability to the community and the global public interest. The ASEP recommended: "If there is need for a hearing, in the discretion of the IRP Panel, the hearing should be limited to argument only; all evidence (including witness statements, expert statements, etc.) shall be submitted in writing."<sup>19</sup>

After public comment on the report and proposed Bylaws revisions, on 20 December 2012, the ICANN Board approved the revised Bylaws, to become effective after the Board considered a report it requested from the ICANN President and CEO on the status of implementation arrangements.<sup>20</sup> After implementation was ready (including agreeing with the ICDR on the 2013 Supplementary Procedures), the Bylaws revisions were declared effective on 11 April 2013.<sup>21</sup>

In sum, the 2013 Supplementary Procedures were the culmination of a three-year-long, highly public consultation in the ICANN community to reduce the high costs and delays in the Independent Review Process, thereby addressing the concerns of the ICANN community arising from the *ICM* IRP. By the express terms of the Supplementary Procedures, these procedures and limitations applied to all IRP proceedings commenced thereafter (such as the present IRP,

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<sup>18</sup> Respectively Mervyn King S.C., Graham McDonald, and Richard Moran. For biographies, see Accountability Structures Expert Panel (ASEP) (Ex. R-47).

<sup>19</sup> Report by Accountability Structures Expert Panel (ASEP), slide 44, dated October 2012 (Ex. R-48).

<sup>20</sup> ICANN Board Resolution 2012.12.20.18, dated 20 December 2012 (Ex. R-42).

<sup>21</sup> ICANN Board Resolution 2013.04.11.06, dated 11 April 2013) (Ex. R-49).



commenced almost three years later), but not to IRP proceedings then pending.<sup>22</sup> Amazon was fully aware of the application of the 2013 Supplementary Procedures and agreed to such treatment in commencing the current IRP proceeding, stating in its Notice of Independent Review: “The claimant agrees that such Independent Review shall be conducted pursuant to the International Arbitration Rules (‘Rules’) of the International Dispute Resolution Procedures *as supplemented per ICANN’s Bylaws*. ”<sup>23</sup>

*As Most Prior Panels Have Recognized, the Prohibition of Live Testimony Should Be Enforced.* In its Request, Amazon highlights the action of only one Panel—in the *DCA Trust* IRP—that permitted live testimony. The *DCA Trust* decision to allow such testimony was wrong in this respect. That Panel concluded that the Supplementary Procedures did not “override[] the general and broad powers that Articles 16 and 36 of the ICDR Rules,”<sup>24</sup> which give Panels authority to “determine the manner in which the IRP proceedings are to be conducted.”<sup>25</sup> This conclusion, however, disregards the express statement in the 2013 Supplementary Procedures that the Supplementary Procedures supersede the ICDR Rules in case of conflict.<sup>26</sup> In the *DCA Trust* IRP, as here, there was a clear conflict: the Supplementary Procedures expressly limit the evidence to pre-filed written submissions and limit hearings to arguments. In so doing, they conflict with any broader authority over the conduct of hearings that Rules 16 and 36 may give panels. Moreover, the *DCA Trust* Panel’s approach is contrary to the ICDR Rules themselves, which recognize that the procedures are always “subject to modifications that the parties may

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<sup>22</sup> *I.e. Manwin Licensing International v. ICANN*, ICDR Case No. 50 117 T 0812 11 (filed 16 November 2011) (Ex. R-50). In its request for live testimony, Amazon notes that additional changes to witness procedures are now being considered. Any such changes, however, will apply only to future proceedings.

<sup>23</sup> Amazon’s Notice of Independent Review, dated 1 March 2016 (emphasis added).

<sup>24</sup> *DCA Trust* Third Declaration on the IRP Procedure, p. 6, ¶ 20 (Ex. R-51). The ICDR Rules have changed since the *DCA Trust* proceeding. See Article 20 in the current rules concerning conduct of the proceedings (Ex. R-52).

<sup>25</sup> *DCA Trust* Third Declaration on the IRP Procedure, p. 6, ¶ 20 (Request Ex. 8) (*also* Ex. R-51).

<sup>26</sup> 2013 Supplementary Procedures, ¶ 2 (Request Ex. 4) (*also* Ex. R-39).

adopt in writing.”<sup>27</sup> In giving Notice of Independent Review of this proceeding, Amazon agreed that the ICDR Rules are “as supplemented per ICANN’s Bylaws.”<sup>28</sup> When it did that, Amazon accepted and acknowledged that both the Bylaws and the Supplementary Procedures contained the evidentiary and hearing limitations that Amazon now seeks to avoid.

Notably, the very purpose of alternative dispute resolution is to allow the parties to adapt procedures to reflect the circumstances. The U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials:

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.<sup>29</sup>

With the exception of the *DCA Trust* proceeding, every IRP proceeding under the revised IRP Bylaws provisions and the 2013 ICDR-adopted ICANN Supplementary Procedures has proceeded without live testimony. In nearly all cases, the parties have respected the intent of the Supplementary Procedures to resolve disputes faster and with less cost. One exception where the limitations were contested was the *Dot Registry* IRP, where the Panel issued Procedural Order No. 8 asking for the parties to brief whether ICANN’s Articles of Incorporation or Bylaws “provide guidance as to the conduct of any such in-person hearing, including whether it is

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<sup>27</sup> ICDR Arbitration Rules, Art. 1(1) (Ex. R-52).

<sup>28</sup> Amazon’s Notice of Independent Review, dated 1 March 2016.

<sup>29</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011) (internal quotation marks and citations omitted) (Ex. R-53).

Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. “Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration. It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.” *Redfern and Hunter on International Arbitration* § 6.07, Blackaby & Partasides (5th ed. 2009) (Ex. R-54). There is nothing at all improper with arbitrations having limitations on evidence considered or on hearing procedures.

necessary or advisable at any such hearing for EIU or ICANN officials to be examined before or by the Panel?”<sup>30</sup> The parties submitted briefs, with the claimant seeking live testimony and ICANN opposing. After reviewing these briefs the Panel directed that there “will be no live percipient or expert witness testimony of any kind permitted at the hearing.”<sup>31</sup>

## **II. There Is No Benefit To Live Testimony.**

Amazon’s Request argues that live testimony is particularly necessary to this proceeding.<sup>32</sup> That argument is misguided. In this proceeding, the written record is particularly robust in describing what has happened and why. There is extensive written evidence on all three issues identified by Amazon, and that documentation is likely to more authoritatively address the issues than live testimony would.

*First*, Amazon contends<sup>33</sup> that the Board should not have adopted the Governmental Advisory Committee’s (“GAC’s”) advice because, although the GAC acted with consensus (i.e. deciding by general agreement in the absence of any formal objection) in advising against proceeding with the .AMAZON gTLDs, it did not offer any “consensus reasoning” for the advice. However, what is relevant under the Guidebook is consensus *advice*, not consensus *reasoning* for that advice:

If the Board receives GAC Advice on New gTLDs stating 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>34</sup>

This rule was present in the Guidebook’s development long before Amazon made its Applications; if Amazon objected to that part of the Guidebook it should have raised the matter

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<sup>30</sup> Procedural Order No. 8, *Dot Registry* IRP, ICDR Case No. 01-14-0001-5004 (Ex. R-55).

<sup>31</sup> Procedural Order No. 12, *Dot Registry* IRP, ICDR Case No. 01-14-0001-5004 (Ex. R-40).

<sup>32</sup> Request, pp. 8-13.

<sup>33</sup> See Request, p. 8.

<sup>34</sup> Guidebook § 1.1.2.7 (Ex. C-20).

long ago.<sup>35</sup> Indeed, the principle stated in the Guidebook is not at all surprising – members of panels making decisions, whether they be juries, appellate panels, or legislatures, often have differing reasons for reaching their conclusions. But these differences in reasoning do not nullify the conclusion.

Moreover, the reasoning of the GAC in this instance is no mystery; the GAC's deliberations on the Amazon strings are well documented. The GAC's 16 July 2013 plenary session in Durban, where the governmental concerns over the Amazon strings were discussed and consensus was reached, was conducted *in public*. (Amazon has even submitted the thirty-page transcript as Ex. C-40.) Moreover, the United States circulated a written statement a few days before the Durban session explaining why it decided not to block consensus.<sup>36</sup>

Unsurprisingly, these statements reflect a spectrum of approaches to the issue. Some countries felt that the Amazon strings should be treated as geographic names, thus requiring support of the individual governments in the region, and that the Applications should be rejected for their failure to have that support. Others felt the Amazon strings posed threats to public interests for which governments in the region are legitimately responsible, and that even if the Guidebook did not require individual governmental support for the specific Amazon strings, those strings raised concerns clear enough that governments should voice their opposition. All of this, however, is clearly documented in the declarations and exhibits the parties have submitted in this proceeding,

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<sup>35</sup> IRP Panels have recognized that challenges to the Applicant Guidebook are not permitted years after the Guidebook was finalized. *See Booking.com* Final Declaration, ¶ 129, dated 3 March 2015, ICDR Case No. 50-20-1400-0247 ("[T]he 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 [a Guidebook procedure]. 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. . . . [I]f Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented") (CLA-1); *Vistaprint* Final Declaration, ¶ 172, dated 9 October 2015, ICDR Case No. 01-14-0000-6505 ("[T]he Panel does agree with ICANN that the time for challenging the Guidebook's [procedures] – which w[ere] developed in an open process and with extensive input – has passed") (CLA-4).

<sup>36</sup> U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting, dated July 2013 (Ex. C-34).

and there is no reason to think that live testimony by the witnesses who have presented written testimony (Mr. Atallah, Mr. Hayden, and Dr. Forrest) could add anything, much less anything more authoritative than the written record.

*Second*, Amazon asserts<sup>37</sup> that ICANN is treating “Amazon” as a geographic name, contrary to the Guidebook. But ICANN has never taken this position. Section 2.2.1.4 of the Guidebook sets out specific standards regarding geographic name strings. Such strings will be either prohibited altogether (Section 2.2.1.4.1) or approved only upon the demonstration of support or non-objection from 60% of the relevant governments (Section 2.2.1.4.2). While the word “Amazon” undoubtedly has a geographic meaning<sup>38</sup> that implicates regional sensitivities, the Guidebook reflects the judgment that it is not a string that should, simply because of its geographic meaning, be prohibited outright or rejected solely upon the objection of particular governments.

ICANN has never suggested that the “Amazon” strings are “geographic” within the scope of Section 2.2.1.4. Indeed, the Geographic Names Panel (which evaluated every single new gTLD application submitted to ICANN) determined they are not.<sup>39</sup> Moreover, in its Response to Amazon’s IRP Request, ICANN reiterated this fact: the “Applications failed because of GAC advice, not because they sought strings that were geographic names within the scope of Section 2.2.1.4.”<sup>40</sup> Nevertheless, the fact that a string does not require individual governmental support under Section 2.2.1.4 has no relevance to whether the string is the proper subject of GAC advice. As the Guidebook notes, GAC advice relates generally to “applications that are identified by

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<sup>37</sup> See Request, p. 8.

<sup>38</sup> In addition to referring to a legendary tribe of women and, for the last two decades, an online retailer.

<sup>39</sup> New gTLD Program Initial Evaluation Reports for Amazon Applications (Exs. C-24, C-25 & C-37).

<sup>40</sup> ICANN’s Response to Amazon’s Request for Independent Review, ¶ 27.

governments to be problematic, e.g., that potentially violate national law or raise sensitivities.”<sup>41</sup>

There are many possible sources of these sensitivities, including cultural, tribal, linguistic, and geographic connotations of a term like “Amazon.”<sup>42</sup> Those sensitivities are not diminished because the string is not identified by Section 2.2.1.4 for special geographic treatment.

Live testimony of the three declarants would do nothing to illuminate these issues. Indeed, Amazon’s second issue boils down to an entirely legal question: whether a term outside the ambit of Section 2.2.1.4 (yet having geographic meaning and related cultural and other connotations) is a proper subject for GAC advice under the Guidebook. Amazon has not, as the Panel invited, shown how Mr. Atallah, Mr. Hayden, and Dr. Forrest have any useful knowledge on that point.

*Third*, Amazon contends<sup>43</sup> that the record before the Board contained no evidence that the Applications would harm the people of the region,<sup>44</sup> so that the Board was unreasonable in accepting the GAC’s advice. Initially, it must be noted that Amazon gets the burden of proof backwards: under the Guidebook, the issuance of consensus GAC advice gives rise to “a strong presumption” that the application should not be approved.<sup>45</sup> To overcome this presumption, there must be considerable contrary evidence that the public-policy sensitivities the strings raise are nonexistent, insubstantial, or outweighed by weighty other considerations negating those public sensitivities. Amazon did not present such evidence to the Board, focusing instead on

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<sup>41</sup> See Guidebook § 3.1 (Ex. C-20).

<sup>42</sup> See Guidebook § 1.1.2.4 , p. 1-8, n.1, for a non-exhaustive list of considerations that may raise sensitivities (Ex. C-20).

<sup>43</sup> See Request, p. 9.

<sup>44</sup> Amazon also states that “ICANN’s own experts agreed that there would be no such harm.” Request, p. 9. Here, Amazon is referring to the rejection of the Independent Objector’s “Community Objection” to the applications by the expert ICANN arranged to hear that objection. As explained in ICANN’s Response ¶¶ 32-35, that objection was rejected because the directly affected governments (Brazil and Peru) did not join the Independent Objection, leading the expert to opine that the governments’ non-participation reflected “their belief that their interests can be protected even if the Objection does not succeed.” As noted in ICANN’s Response, the Guidebook provides governments, acting through the GAC, an alternative (and ordinarily more appropriate) means to raise concerns such as those here.

<sup>45</sup> Guidebook § 3.1 (Ex. C-20).

matters, such as its own trademark rights, that spoke to private concerns. It failed in this regard despite having previously received Early Warnings describing the public-policy nature of the concerns from the governments of Brazil and Peru – public authorities responsible for the welfare of the people of the Amazon region. And, by the time the matter reached the Board, these concerns had been addressed by the GAC membership, which concluded by consensus that the Applications should not proceed.

As reflected by the very extensive written record, the Board (through the New gTLD Program Committee (“NGPC”)) received and evaluated many inputs in considering the GAC advice. It received numerous written submissions from Amazon and also from individual governments; it evaluated transcripts of the GAC proceedings; and it commissioned Professor Jérôme Passa to provide independent expert advice in writing on surrounding principles of international law. The NGPC issued detailed written statements of its rationale, both in making its original determination to accept the GAC advice and in denying Amazon’s reconsideration request. The Board Governance Committee similarly provided detailed statements of its rationale and reasoning in reviewing and recommending denial of Amazon’s reconsideration request. These decisions list the evidence the Board committees considered and provide written rationales stating how that evidence was evaluated. Since all the materials relied upon by the Board and its rationale are in writing, live testimony by the three declarants would not provide any further insight into whether the evidence before the Board permitted it to accept the GAC’s advice.

For the above reasons, there is no reason to believe that live testimony by Mr. Atallah, Mr. Hayden, or Dr. Forrest – which in any event the applicable ICANN Bylaws and ICDR-adopted Supplementary Procedures prohibit – would provide additional information relevant to the issues in dispute.

Remarkably, in a footnote in its Request,<sup>46</sup> Amazon states that it may ask the Panel to request the testimony of two other witnesses, the former ICANN President and the former GAC chair. The notion that the Panel should command the appearance of additional witnesses, particularly those who have gone on to pursuits away from ICANN, runs contrary to the nature of this IRP and the explicit rules and procedures under which the IRP must operate.

### CONCLUSION

The applicable Bylaws, procedures, and rules governing this IRP proceeding do not permit live testimony at the hearing. That alone is sufficient to deny Amazon's request. Furthermore, there is no reason shown that the three declarants would give any additional testimony that would further illuminate the relevant issues. Amazon's request for live testimony should be denied.

Respectfully submitted,

JONES DAY

Dated: 20 October 2016

By:  |   
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<sup>46</sup> Request, p. 13, n.16.