

**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

**AMAZON'S PREHEARING BRIEF**

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## INTRODUCTION

Respondent Internet Corporation for Assigned Names and Numbers (“ICANN”) refused to allow the .AMAZON Applications to proceed solely because ICANN’s Governmental Advisory Committee (the “GAC”) issued “advice” against those Applications. The GAC’s actions were not “advice” in any ordinary sense of the word. As the record shows and the testimony of the GAC’s former chair confirms, the GAC adopted no reason or rationale for its advice, and reached no consensus on any relevant public policy or legal principle. Instead, the GAC’s “advice” was a political veto: representatives of Brazil and Peru, incorrectly contending that their countries had a sovereign right to control the word “Amazon,” successfully persuaded their colleagues to go along with the result they desired.

By deferring to the GAC’s veto without evaluating its reasons (or lack of reasons), ICANN’s New gTLD Program Committee (“NGPC”) violated ICANN’s governing documents: its Articles of Incorporation, its Bylaws, and the Guidebook that ICANN’s Board adopted to regulate the process of awarding new generic top-level domain names (“gTLDs”). ICANN has promised that it will exercise independent judgment, defend its enumerated core values, and adhere to mandatory duties of transparency, nondiscrimination, procedural fairness, and accountability. Those promises did not leave the NGPC free to deprive Amazon of access to an important Internet resource simply because the GAC said so. The NGPC was instead required to ensure that the GAC’s advice could be squared with ICANN’s own rules and values.

Brazil’s and Peru’s individual criticisms – which, again, the GAC as a deliberative body did not adopt – of the .AMAZON Applications were also fundamentally erroneous. The first error is that Brazil and Peru believed and told their colleagues that they had a right under either the Guidebook or under national or international law to control the use of the word “Amazon.”

Those beliefs were wrong. ICANN has now abandoned any contention that “Amazon” is a geographic name under the Guidebook. And the expert opinions of Professor Jérôme Passa (before the NGPC) and Professor Heather Forrest (before the Panel) confirm that neither Brazil nor Peru had any national or international legal right to control the name “Amazon.”

The second error is that Brazil and Peru asserted that granting the .AMAZON Applications would cause harm to the community of the Amazonas or Amazonia region in South America. But Amazon has been using “Amazon” as its primary brand name for decades without any evidence of harm to the members of that community, whose local languages do not use that English term. That consideration – along with the Guidebook’s clear instruction that the mere inability to use a particular gTLD does not constitute a material detriment – led an independent expert to reject the contention that the .AMAZON Applications threatened any material detriment to the community that Brazil and Peru purported to defend. In the face of that expert rejection, and with no evidence to the contrary, the NGPC erred in accepting Brazil’s and Peru’s unsupported contentions that harm of some sort would occur.

ICANN cannot defend the NGPC’s conclusion by relying on the Guidebook’s statement that unfavorable GAC advice will raise a “strong presumption” that an application will be denied. That presumption does not (and could not) authorize the NGPC to endorse the GAC’s decisions without ensuring they are consistent with the Articles, Bylaws, and Guidebook; without exercising its own independent judgment about what is best for all its constituencies (not just governments); or without investigating to ensure that the GAC’s position is consistent with and supported by the facts. Because the record shows clearly that the NGPC failed to do those things, this Panel should now declare that the NGPC failed to comply with the Articles, Bylaws, and Guidebook, and should direct the NGPC to grant the .AMAZON Applications.

## STATEMENT OF FACTS AND HISTORY

### I. ICANN, New gTLDs, and the Guidebook

This dispute concerns the responsibilities of ICANN, under its Articles of Incorporation (“Articles”), Bylaws, and New gTLD Applicant Guidebook (“Guidebook”). ICANN is a nonprofit corporation whose function is to “lessen[] the burdens of government and promot[e] the global public interest in the operational stability of the Internet.” Articles ¶ 3. ICANN allocates responsibility for top-level domain names of crucial significance to the Internet, including companies such as respondent Amazon E.U. S.a.r.l. (“Amazon”) and the hundreds of millions of Internet users who rely on its services. Because its functions are so important, ICANN has promised that it will “operate for the benefit of the Internet community as a whole,” *id.* ¶ 4; adhere to certain core values, Bylaws, art. I, § 2; avoid unjustified discrimination, *id.* art. II, § 3; operate transparently and use fair procedures, *id.* art. III, § 1, and remain “accountable to the community” for keeping its promises, *id.* art. IV, § 1.<sup>1</sup>

The fair procedures ICANN is accountable for following here are set forth in the Guidebook. The Guidebook was adopted in 2011 after years of “carefully deliberated policy development work by the ICANN community” and input “from a wide variety of stakeholder groups,” including “governments, individuals, civil society, business and intellectual property constituencies, and the technology community.” Guidebook, preamble. Its purpose is to enable

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<sup>1</sup> This brief generally cites the version of the Bylaws that took effect on April 11, 2013, while the .AMAZON Applications were pending but before this IRP was filed. *See generally* Amazon Request That the Panel Hear Live Witness Testimony Ex. 1, at 3-6 (Oct. 10, 2016) (discussing the various versions of the Bylaws in effect since 2012) (“Amazon Req.”). So far as the issues raised in this brief are concerned, Amazon believes that the controlling principles would be the same under any of the versions of the Bylaws that might be argued to apply, although as noted *infra* at pp. 49-50 the current Bylaws adopted on October 1, 2016 make even clearer the Panel’s authority to issue binding relief.

applicants to “understand what is required of them and what they can expect at each stage of the application evaluation process.” *Id.*, introduction at 1-2. Its process involves applying objective criteria and expert judgment to determine which gTLD applications will be accepted and which rejected. Relevant parts of that process are summarized below.<sup>2</sup>

**Initial Evaluation and Geographic Names.** Module 2 of the Guidebook creates an Initial Evaluation process that includes screening applicants’ background, determining their technical, operational, and financial capabilities to administer a gTLD, and reviewing their proposed strings to determine that they meet certain identified criteria. *Id.* at 2-2. One of the criteria used in the string review concerns whether a string is a “geographic name.” *See id.* § 2.2.1.4. Some geographic names, such as those of countries and territories, cannot be used as gTLDs at all, *see id.* § 2.2.1.4.1; others, such as the names of certain cities, counties, provinces, states, and regions, require documented support from the governments responsible for those areas, *see id.* § 2.2.1.4.2. Whether a name falls into these categories is determined using objective criteria – mainly, specified lists from the International Standards Organization (“ISO”). Part 6 of the Expert Report of Heather Ann Forrest (“Forrest Report”) gives a full description of the Guidebook process for geographic names and applies that process to the present facts.

**Formal Objections.** Module 3 provides for formal objections to proposed gTLDs, resolved through decisions made by “appropriately qualified” and “independent” experts. *Id.* § 3.4.4. Relevant here is a “Community Objection,” which must allege “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may

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<sup>2</sup> This brief refers to Version 2012-01-11 of the Applicant Guidebook that was in effect when the .AMAZON Applications were filed in April 2012. *See* C-015 (citations to C-\_\_ and CLA-\_\_ refer to Claimant’s Exhibits and Claimant’s Legal Authorities, respectively, submitted with Amazon’s Request for Independent Review on March 1, 2016, and continued consecutively with this filing).

be explicitly or implicitly targeted.” *Id.* § 3.2.1. Such an objection may be filed by an Independent Objector, an ICANN contractor who is supposed to act “solely in the best interest of the public who use the global Internet.” *Id.* § 3.2.5. To prevail in a Community Objection, the party representing the community must show “that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the [relevant] community.” *Id.* § 3.5.4. “[M]aterial detriment” does not include “[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector.” *Id.*

A formal objection is resolved using procedures that depend on the type of objection. In the case of a Community Objection, the objection is sent to an Independent Expert retained through the International Center for Expertise of the International Chamber of Commerce. *See id.* §§ 3.2.3, 3.4.4. The expert makes a “final expert determination[ ] . . . in writing” that “will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.” *Id.* § 3.4.6; *see also id.* Attachment to Module 3, arts. 1(d), 4(a), 21(d).

**GAC Advice.** Module 3 also provides for the GAC to provide “advice” on new gTLD applications. *See* Guidebook § 3.1. The GAC is a committee of representatives of various national governments and intergovernmental organizations whose function is to “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(a); *see also* Guidebook § 3.1. For new gTLD applications, GAC advice “is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” Guidebook § 3.1. If “[t]he GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed,” its advice



“create[s] a strong presumption for the ICANN Board that the application should not be approved.” *Id.* Such advice is to be “submitted by the close of the objection filing period.” *Id.* §§ 1.1.2.7, 3.1.

**Board Review.** Module 5 describes the process by which, after obtaining approval in the Initial Evaluation phase and surviving any formal objections, an application proceeds to the signing of a registry agreement. “Generally, th[at] process will include formal approval of the agreement without requiring additional Board review,” but “[u]nder exceptional circumstances, the Board may individually consider a gTLD application.” *Id.* § 5.1, at 5-4. “GAC Advice” on an application is one of the exceptional circumstances contemplated by Guidebook § 5.1. The Board’s individual consideration of an application, like all of its actions, must be “guide[d]” by ICANN’s “core values,” Bylaws, art. I § 2; avoid “inequitabl[e]” or unjustified “disparate treatment,” *id.* art. II, § 3; respect “procedur[al] . . . fairness,” *id.* art. III, § 1; and be “accountable to the commmunity,” *id.* art. IV, § 1.

**Independent Review.** The Board’s decision after individual consideration of an application, as with all Board “decision[s] or action[s],” is subject to “independent review” by a Panel such as this one. Bylaws art. IV, § 3, ¶ 2; Guidebook Module 6, ¶ 6, at 6-4 (“Applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.”).

## **II. The .AMAZON Applications**

Amazon is a leading Internet company whose services benefit hundreds of millions of customers around the world. It sells its own products and the products, devices, and services of third parties through trusted websites. First Witness Statement of Scott Hayden ¶ 5. Amazon owns more than 24,000 second-level domain names containing the AMAZON brand, and uses several to direct customers to goods and services. *Id.* ¶ 6. As of August 2013, AMAZON and

other AMAZON-formative trademarks were registered more than 1300 times in more than 149 countries, including Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, and Venezuela. *See* C-043, at 3; *id.* App. B, at 1. By March 2016, the number of such registrations had increased to more than 1800 in more than 170 countries. Hayden Statement ¶ 7.

In April 2012, Amazon applied to ICANN for the gTLDs .AMAZON and its Chinese and Japanese character equivalents (“the .AMAZON Applications”), which it plans to use to innovate and enhance service to its customers around the world. *Id.*

#### **A. The Initial Evaluations**

The .AMAZON Applications each passed the Initial Evaluation phase with the highest possible score of 41 points – 30 points on technical and operational requirements, and 11 points on financial requirements. *See* C-024, at 2; C-025, at 2; C-037, at 2; *see also* Guidebook, Attachment to Module 2, Evaluation Questions and Criteria, at A-4 (scoring system). As part of the Initial Evaluations, ICANN’s Geographic Names Panel found that each proposed gTLD “d[id] not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.” C-024, at 1; C-025, at 1; C-037, at 1. As a result, the .AMAZON Applications “pass[ed] the Geographic Names review with no additional steps required.” Guidebook § 2.2.1.4.4.

#### **B. The Early Warning**

The governments of Brazil and Peru opposed the .AMAZON applications. They expressed their opposition through an “Early Warning,”<sup>3</sup> contending that (1) “Amazon” was a

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<sup>3</sup> The Guidebook describes an Early Warning as “an indication that the application is seen as potentially sensitive or problematic by one or more governments.” Guidebook § 1.1.2.4. An Early Warning “is not a formal objection, nor does it directly lead to a process that can result in rejection of the application.” *Id.*

“geographic name[ ]” and (2) granting Amazon exclusive rights to the gTLD would harm the community inhabiting the Amazonia or Amazonas region of South America by

prevent[ing] the use of this domain for purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome[, and by] hinder[ing] the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.

C-022. Amazon met with representatives of Brazil and Peru and made good-faith, but ultimately unsuccessful, efforts to resolve their concerns. *See* C-040, at 13 (acknowledgment from Brazil’s representative that Amazon had met and negotiated in good faith).

During its numerous unsuccessful negotiations with Brazil and Peru, Amazon offered to make public interest commitments that would address the concerns stated by those two governments. Hayden Statement ¶¶ 18-22; Letter from S. King to H. Dryden (July 4, 2013), C-035 (describing public interest commitments and other negotiation proposals); Letter from S. King to S. Crocker et al. (July 4, 2013), C-036 (containing the proposed public interest commitments). Amazon proposed not to oppose future gTLDs for the terms currently used by the people of South America to promote the interests of the region, such as “Amazonia,” currently in use as the name of a Brazilian website dedicated to promoting the interests of the region ([www.amazonia.org.br](http://www.amazonia.org.br)). Hayden Statement ¶ 21. It further proposed to reserve domains within the applied-for .AMAZON gTLDs to redirect users to official government websites. *Id.* ¶ 21. If accepted, those commitments would have become contractually binding. *Id.* ¶ 22.

### **C. The Community Objection Proceedings**

In March 2013, Independent Objector Professor Alain Pellet filed a Community Objection arguing that the .AMAZON Applications “target[ed], at least implicitly, the community of the Amazon region,” and “create[d] a likelihood of material detriment to the rights

and legitimate interests of the Amazon community,” based on what he called the “risk of exclusive misappropriation” of the Amazon gTLD. C-023 at 5, 8-9, 15-16.

The Objection was resolved in Amazon’s favor by ICC Independent Expert Professor Luca G. Radicati di Brozolo. *See* C-047. The Expert initially considered and upheld Amazon’s contention that the Objector had a conflict of interest because he had represented Brazil and Peru in other legal proceedings. *Id.* ¶¶ 49, 53 (finding that the Objector’s conflict raised “justifiable doubts as to his independence”). In addition to that finding, the Expert reached – and rejected – the merits of the Objection, determining among other things:

- that the inability of people in the region to use the .AMAZON strings was “not crucial to the protection of the Amazon Community’s interests,” because no one in the alleged community had applied for them, *id.* ¶ 100;
- that any such inability would not in any event constitute material detriment under the standards established by the Guidebook, *id.* ¶ 101 (citing Guidebook § 3.5.4);
- that the brand “Amazon” has been used by Amazon for “nearly two decades,” including in the Amazon region, with “no evidence, or even allegation, that this has caused any harm to the Amazon Community’s interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage,” *id.* ¶ 102; and
- that “other equally evocative strings” existed that the alleged community could use instead to promote its interests, *id.* ¶ 103 (“‘Amazonia’ springs to mind.”).

Professor Radicati di Brozolo accordingly dismissed the Objection. *Id.* ¶ 109.

#### **D. The GAC Advice**

Brazil, Peru, and their allies continued to argue against the .AMAZON Applications, urging the GAC to issue advice against them. *E.g.*, Redacted - Information Designated  
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The issue was

discussed in a closed GAC meeting in Beijing in April 2013. There is no public record of that

discussion, but it is generally understood (and a number of documents suggest) that the United States objected and therefore prevented the GAC from reaching consensus. *E.g.*,

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The GAC's next meeting occurred in Durban in July 2013. Before the meeting took place, the United States released a statement that it would "abstain and remain neutral" on the .AMAZON Applications, among others, while simultaneously stating that as a matter of policy it still did "not view sovereignty as a valid basis for objecting to the use of terms" and had "concerns about the effect of such claims on the integrity of the process." C-034. The statement added that "the United States is not aware of an international consensus that recognizes inherent governmental rights in geographic terms." *Id.* Five South American countries (Argentina, Brazil, Chile, Peru, and Uruguay) released a statement indicating that they believed that "Amazon" was a "geographic name" and urging their colleagues in the GAC to "give a clear mandate . . . approving the GAC advice proposals submitted by Brazil and Peru for '.amazon', addressed to the ICANN Board in order to reject this application." C-039, at 2.

Brazil, Peru, and other GAC members then argued against the .AMAZON Applications at the Durban meeting. Brazil argued that "Amazon" was "a very important cultural, traditional, regional and geographic name." C-040, at 10. Peru similarly argued that "there is no doubt that this is a geographic name," arguing that Amazon is the name of political departments in Venezuela, Columbia, Peru, and Brazil, that Amazon in Spanish is the name of cities "of our countries," and that Amazon in English is the name of a city in Guyana. *Id.* at 14-15. Peru further asserted (erroneously, as was later shown) that "Amazon" is on an ISO list (the 3166-2 list) of geographic names, so that "there is no doubt whatsoever that this is a geographic name."

*Id.* at 15. Other countries echoed these concerns. *See, e.g., id.* at 18 (Russia “share[s] their [Brazil and Peru’s] concerns in using geographical terms when registering” domains).<sup>4</sup>

At the end of its meeting in Durban in July 2013, well after the close of the deadline for objections,<sup>5</sup> the GAC issued consensus advice opposing Amazon’s applications. The document the GAC issued – referred to in the record as the “Durban Communiqué” – did not contain any reasoning or adopt the arguments raised in the Early Warning or during the GAC’s discussion of the applications. C-041, § IV.1.1.a.i.1 (July 18, 2013) (“Durban Communiqué”). The testimony of Heather Dryden, who served as the chair of the GAC when the Durban Communiqué was issued, confirms that the GAC’s procedures at the time did not involve reaching consensus on any reason or rationale for the advice it issued. *See DCA, CLA-005; infra* pp. 29-30. The GAC’s procedures also did not involve any opportunity for Amazon to address the GAC or even to submit written materials to be considered by its members (which Amazon attempted to do). *See Hayden Statement* ¶ 36.

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<sup>5</sup> At the GAC’s request, ICANN’s Board extended the formal objection period, which ended in March 2013, for all new gTLD applications until after the GAC’s “Asia-Pacific meeting in April 2013,” adding that it “look[ed] forward to receiving [GAC] advice in a timely fashion.” C-021. The Durban meeting took place three months after even the extended deadline.

**E. The NGPC's Decision**

After the GAC issued the Durban Communiqué, Amazon urged the Board not to adopt the GAC's advice and to permit the .AMAZON Applications to proceed. *See* C-043. Amazon argued that the GAC had wrongly attempted to assert rights over the name "Amazon" that Brazil and Peru did not possess under international or national law, *see id.* at 6-14; that adopting the GAC advice would violate ICANN's obligations of transparency, nondiscrimination, and fairness under its Articles and Bylaws, *see id.* at 14-18; and that the Board should adhere to its previously developed policy embodied in the Guidebook, *see id.* at 18-21. Amazon and Peru also made other supplemental submissions.

The Board's New gTLD Program Committee ("NGPC") took one further step to develop the record before making its decision about the .AMAZON Applications. It commissioned a new third-party expert analysis by Professor Jérôme Passa of the Université Panthéon-Assas.

On March 31, 2014, Professor Passa opined that, under intellectual property law, ICANN was neither “oblige[d] to reject” nor “oblige[d] to accept” the .AMAZON Applications. C-048, at 14. Like Professor Radicati di Brozolo before him, Professor Passa observed that granting the .AMAZON Applications “would not . . . be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve ‘.amazon’, could always if they so wished reserve a new gTLD such as ‘.amazonia’ or ‘.amazonas’ which would create no risk of confusion with ‘.amazon’.” *Id.* at 10. Echoing the findings of the Geographic Names Panel, which had ruled that “Amazon” is not a geographic name under the Guidebook, Professor Passa also found that Amazon “does not appear to correspond to the name of the Amazonia region in any language,” *id.* at 3, and the names “Amazonia” “Amazonas” and “Amazonie” do not “constitute a geographical indication within the meaning of intellectual property law,” *id.*, that would support an objection to “.amazon.” Professor Passa limited his opinion to intellectual property law, and did not opine on the “regulations adopted by ICANN,” *id.* at 2, such as the Articles, Bylaws, or Guidebook.



ICANN's witness, Akram Atallah, has testified that the NGPC discussed the .AMAZON Applications at six meetings between receipt of the GAC advice and its decision to block the applications. Witness Statement of Akram Atallah ¶¶ 41-42. He has also stated in written testimony that the GAC conducted "extensive deliberations" leading it to accept the GAC's advice." *Id.* ¶ 42. The minutes of these meetings do not indicate any reasoning or rationales beyond those discussed in the Early Warning. R-26 through R-31. The NGPC meetings at which the substance of the GAC advice appears to have been discussed – if at all – occurred on April 29, 2014 and on May 14, 2014. ICANN staff proposed at each of these meetings that the NGPC should consider "whether it would benefit from additional information regarding the basis for the GAC's advice" and if so seeking such information from the GAC.<sup>6</sup> The NGPC declined to seek any additional information from the GAC. Written discovery has revealed nothing further about the matters discussed in those meetings.

On May 14, 2014, the NGPC voted to "accept[] the GAC advice" with respect to the .AMAZON Applications, directing that the applications should "not proceed." C-054, at 6-7. The NGPC stated that it made its decision without "the benefit of the rationale relied upon by the GAC in issuing its consensus advice," and it referred to the "reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru." *Id.* The NGPC stated that it had considered Amazon's good-faith efforts to resolve the concerns of Brazil and Peru. *Id.* at 10-11. The NGPC further stated that it had "considered" § 5.1 of the Guidebook, which allows the Board to "individually consider" an application under "exceptional circumstances," but did not further discuss what "exceptional circumstances" were present here.

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<sup>6</sup> NGPC Briefing Materials (Apr. 29, 2014), C-099, at 13; NGPC Briefing Materials (May 14, 2014), C-100, at 22.

*Id.* at 11. The NGPC did not identify any basis in the Guidebook or in international or national law for rejecting the .AMAZON Applications.

After the NGPC issued its decision, Amazon made unsuccessful attempts to seek reconsideration of the decision, to obtain review of the decision from ICANN’s Ombudsman, and to reach a negotiated agreement with ICANN through a cooperative engagement process. After those attempts failed, Amazon initiated this Independent Review.

### STANDARD OF REVIEW

This Panel is responsible for “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with” those governing documents. Bylaws, art. IV, § 3, ¶¶ 3, 11. In a new gTLD proceeding, that includes whether the NGPC has acted “consistent[ly] . . . with the policies and procedures established in the Guidebook.” *Booking.com*, CLA-001, ¶¶ 54, 109.<sup>7</sup> Review is “*de novo*, objective and independent,” *DCA Trust Final*, CLA-002, ¶¶ 65, 70, 76, in order to “objectively determin[e] whether or not the Board’s actions are in fact consistent with the Articles, Bylaws, and Guidebook,” without “any presumption of correctness.” *Corn Lake*, CLA-030, ¶ 8.18.<sup>8</sup> Objective review is particularly important in new gTLD proceedings because the Guidebook

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<sup>7</sup> *Booking.com B.V. v. ICANN*, Final Declaration, ICDR Case No. 50-20-1400-0247 (Mar. 3, 2015) (“*Booking.com*”), CLA-001; *see also DotConnectAfrica Trust v. ICANN*, Final Declaration ¶¶ 75, 77, ICDR Case No. 50 2013 001083 (July 9, 2015) (“*DCA Trust Final*”) (following *Booking.com*), CLA-002.

<sup>8</sup> *Corn Lake, LLC v. ICANN*, Final Declaration ¶ 8.18, ICDR Case No. 01-15-0002-9938 (Oct. 17, 2016) (“*Corn Lake*”) (objective review is “well established”), CLA-030; *see Booking.com*, CLA-001, ¶ 111; *Vistaprint Ltd. v. ICANN*, Final Declaration ¶ 126, ICDR Case No. 01-14-0000-6505 (Oct. 9, 2015) (“*Vistaprint*”) (“objectively and independently, without any presumption of correctness”), CLA-004; *DCA Trust Final*, CLA-002, ¶ 76; *ICM Registry, LLC v. ICANN*, Declaration of the IRP ¶ 136, ICDR Case No. 50 117 T 00224 08 (Feb. 19, 2010) (“*ICM Registry*”) (“objectively, not deferentially”), CLA-003.

purports to extinguish any right to a judicial challenge to ICANN’s actions outside ICANN’s own accountability mechanisms. *DCA Trust Final*, CLA-002, ¶ 111 n.62.

This Panel should also consider whether the Board “act[ed] without conflict of interest”; “exercise[d] due diligence and care in having a reasonable amount of facts in front of [it]”; and “exercise[d] independent judgment in taking [a] decision[] believed to be in the best interests of [ICANN].” Bylaws, art. IV, § 3, ¶ 4; *see* Amazon Req. Ex. 4 § 8 (Supp. Procedures for ICANN Review Process) (if “the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available,” that is a “proper ground[] for review”). These standards are not the “exclusive basis” for review, but a “default rule . . . in the absence of relevant provisions of ICANN’s Articles and Bylaws”; they supplement, rather than replace, the “Panel’s task . . . to *compare* the Board’s action . . . to the governing documents and to *declare* whether they are consistent.” *Corn Lake*, CLA-030, ¶ 8.14 (citing *Vistaprint* ¶ 123).

## 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.
Bylaws art. IX, § 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. IX, § 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 . . . .

## ARGUMENT

### I. The NGPC Improperly Deferred to the GAC's Unreasoned, Political Veto

ICANN had no reason for blocking the .AMAZON Applications that can be reconciled with the Articles, Bylaws, and Guidebook. Merely that the GAC said so is not enough. Instead, the GAC must give a reason for its advice that the NGPC can consider. The NGPC must then exercise its own independent judgment to ensure that the GAC's reason is consistent with the Articles, Bylaws, and Guidebook, supported by the record on the particular application before it, and in the best interests of the entire Internet community. Those things did not happen here. Instead, the evidence shows clearly (and the NGPC acknowledged) that the GAC adopted no reasons for its decision. Under those circumstances, the NGPC's deference to the GAC granted it a political veto inconsistent with the NGPC's obligations to "determine . . . an appropriate and defensible balance among competing values," Bylaws, art. I, § 2; to operate according to "procedures designed to ensure fairness," *id.* art. III, § 1; and to remain "accountable to the community for operating in a manner that is consistent with [its] Bylaws," *id.* art. IV, § 1.

It is not enough for ICANN to respond by pointing to the "strong presumption" in the Guidebook that unfavorable GAC advice will block a gTLD application. A presumption, whatever its strength, implies that a determination remains to be made about whether the presumption has been overcome. The NGPC was required to make that decision in a manner consistent with the Articles, Bylaws, and Guidebook, including by exercising "due diligence and care" and its own "independent judgment." *Id.* art. IV, § 3, ¶ 4. The Guidebook presumption could not and did not relieve the NGPC of those obligations, and the record makes clear that through its unquestioning deference to the GAC it failed to meet them.

**A. The GAC Must Give Reasons for Advising Against an Application, and the NGPC Must Consider Those Reasons Before Accepting GAC Advice**

Because “the Internet is . . . owned by no single nation, individual or organization,” ICANN is required to “operate for the benefit of the Internet community as a whole.” Articles ¶¶ 3, 4. The GAC is meant to assist ICANN in doing so by advising about the “interaction between ICANN’s policies and various laws and international agreements or where [ICANN activities] may affect public policy issues.” Bylaws, art. IX, § 2, ¶ 1(a). In playing that role, the GAC, by its own account, “is not a decision making body”; its function is instead to “provide advice and communicate issues and views to the ICANN Board” and to “operate as a forum for the discussion of government and other public policy issues and concerns.” GAC Operating Principles, C-074, art. I, principles 2, 4. There is no provision in the GAC’s Operating Principles providing for a hearing to be given to a party whose interests may be affected by GAC advice.

Against that backdrop, four provisions of the Bylaws show that the GAC had to give reasons for advising against the .AMAZON Applications, and that the NGPC had to consider those reasons before it could accept the GAC’s advice to block the Applications. Throughout this analysis, it is important that the GAC itself is a “constituent body” of ICANN that has certain direct obligations under ICANN’s Bylaws, *see DCA Trust Final*, CLA-002, ¶¶ 100-101 (noting that ICANN conceded and the panel found that the GAC is a “constituent body” subject to art. III, § 1), and that the GAC itself is responsible for operating consistently with the Articles, Bylaws, and Guidebook.

**1. Exercise of Judgment and Defensible Balance of Competing Values.** As an “ICANN body making a recommendation,” the GAC was bound to “exercise its judgment to determine which [of ICANN’s] core values are most relevant and how they appl[ied],” as well as to “determine, if necessary, an appropriate and defensible balance among competing values.”

Bylaws, art. I, § 2. Further, when the NGPC considered the GAC’s advice, the NGPC was responsible both for ensuring that the GAC’s decision complied with Article I, § 2 and for itself making its own decision in compliance with that provision. Previous IRP decisions construing Article I, § 2 have explained that in order for ICANN Board’s “balancing of . . . competing values [to] be seen as ‘defensible’” under this provision, “it should be justified and supported by a reasoned analysis,” to ensure that it is a “reasoned judgment” rather than an “arbitrary exercise of discretion.” *Vistaprint*, CLA-004, ¶ 190, quoting *GCC Interim*, CLA-029, ¶ 76.<sup>9</sup>

The decision of the *GCC* panel is instructive. In that case, the GAC failed to reach consensus on an application for the .PERSIANGULF gTLD. The reason consensus failed was that some GAC members (from countries that use the phrase “Arabian Gulf”) opposed the gTLD, while others (from countries that use the phrase “Persian Gulf”) supported it. *GCC Final*, CLA-031, ¶¶ 2-3, 31-32. Because the GAC did not issue a consensus objection, the NGPC permitted the .PERSIANGULF application to proceed without further analysis. *Id.* ¶¶ 33-34. The panel declared that the GAC’s process itself departed from “ICANN’s core values of transparency and fairness,” *id.* ¶ 130, and that the NGPC’s failure to “discuss[] any factors whatsoever in [its] decision” could not “be reconciled . . . with Article 1, Section 2,” *id.* ¶ 142 (emphasis omitted).

*GCC* is important not for the substantive merits of the Gulf countries’ objection to the .PERSIANGULF application – which the panel explained were “irrelevant” to its decision, *id.* ¶ 139 – but for its recognition of the principle that the NGPC’s obligations under Article I, § 2 go

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<sup>9</sup> *Gulf Cooperation Council v. ICANN*, Interim Declaration on Emergency Request for Interim Measures of Protection ¶ 76, ICDR Case No. 01-14-0002-1065 (Feb. 12, 2015) (“*GCC Interim*”), CLA-029; *see also* *Gulf Cooperation Council v. ICANN*, Partial Final Declaration, ¶¶ 142-143, ICDR Case No. 01-14-0002-1065 (Oct. 24, 2016) (“*GCC Final*”), CLA-031; *see also* *Vistaprint*, CLA-004, ¶ 190.



beyond merely checking to see whether or not the GAC has given consensus advice and then blocking or not blocking the application in question. *See id.* ¶ 141 (concluding that the NGPC’s adoption of “a bare-bones resolution, based on a bare-bones GAC Communiqué and Scorecard” had “[a]ll[en] far short of the mission and core values enshrined in ICANN’s Articles of Incorporations and Bylaws”).

In the present case, several of ICANN’s enumerated core values supported Amazon’s position, including ICANN’s goals of “promoting competition in the registration of domain names”; of adhering to “open and transparent policy development mechanisms” such as the public process that produced the Guidebook, under which Amazon had received a perfect score; and of “applying documented policies” – again, such as the Guidebook – “neutrally and objectively.” Bylaws, art. I, § 2, ¶¶ 6-8. To the extent that the GAC and the NGPC believed that another value, policy, or “exceptional circumstance,” Guidebook § 5.1 (standard for Board review of an application), should displace the ordinary Guidebook process here, each failed to explain why that balance was struck and to defend the result it reached.

**2. Justification of Disparate Treatment.** The operations of the GAC must be consistent with ICANN’s commitment not to “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. II, § 3. Because the GAC advises against less than one percent of applications,<sup>10</sup> and does not give any consideration to the vast majority, its selective intervention threatens “inequitabl[e]” (and certainly “disparate”) treatment each time it

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<sup>10</sup> As of this filing, the GAC’s Register of Advice shows advice with respect to 17 named applications (including the 3 .AMAZON Applications), of which 4 were “consensus . . . GAC Objection Advice.” *See* <https://gacweb.icann.org/display/GACADV/GAC+Register+of+Advice>. ICANN’s website with statistics on new gTLDs shows 1930 total applications submitted and 1215 delegated. *See* <https://newgtlds.icann.org/en/program-status/statistics>.

acts. Accordingly, ICANN must ensure that some “substantial and reasonable cause” justifies “singl[ing] out” applications disfavored by the GAC. That means that the GAC must explain why it believes those particular applications (and not others) should be blocked and the NGPC must exercise its own independent judgment in considering that explanation.

The decision in *Vistaprint* is on point. Vistaprint had applied for the gTLD .WEBS, but its application failed because an independent expert found that .WEBS was confusingly similar to the competing gTLD .WEB, so that both applications could not proceed. *See Vistaprint*, CLA-004, ¶¶ 23-24. Vistaprint sought reconsideration of that determination from ICANN’s Board Governance Committee (“BGC”), but the BGC rejected its request. *See id.* ¶¶ 31-39. Vistaprint initiated an IRP and pointed to instances in which ICANN’s Board had granted further review of other competing gTLD applications such as .CAR and .CARS, .CAM and .COM, and .通販 and .SHOP, because of inconsistencies in expert determinations. *See id.* ¶¶ 94, 181.

Without itself deciding whether the differences in treatment might be justified, the *Vistaprint* panel declared that the Board was required to “exercise . . . judgment . . . on th[e] question of whether there is any inequitable or disparate treatment regarding Vistaprint’s .WEBS gTLD application[.]”; that by failing to do so the “Board would risk violating its Bylaws, including its core values”; and that the Board’s resolution of the disparate-treatment issue had to be “justified and supported by a reasoned analysis.” *Id.* ¶ 190 (quoting *GCC Interim*). It further explained that even if ICANN’s counsel could come up with a better explanation after the fact, doing so would not solve the problem. *See id.* (“[T]he arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board.”).

The same reasoning applies here both to the GAC itself and to the NGPC's consideration of the GAC's advice. As Amazon explained in its initial Request for Independent Review, the record of this application shows that inequitable treatment from the GAC's actions is not only possible but very real – as illustrated by ICANN's different treatment of the .AMAZON Applications on the one hand, and the Brazilian oil company Ipiranga's application for the gTLD .IPIRANGA on the other, which Amazon called to the NGPC's attention in its response to the GAC's Durban Communiqué.<sup>11</sup> The NGPC did not acknowledge the point at all. For that reason alone, under the plain language of Article II, § 1, and the persuasive reasoning of *Vistaprint*, this Panel should find that the NGPC's failure to address this issue violated the Bylaws.

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<sup>11</sup> See C-043, at 16-17. The Ipiranga, like the Amazon, is a river; it shares its name with a district in the city of São Paulo; and it is historically and politically significant to Brazil (and even mentioned in the Brazilian national anthem). *Id.*

ICANN’s counsel has argued before this panel that the different treatment of .IPIRANGA and the .AMAZON Applications was justified because Amazon drew an objection from the GAC and Ipiranga did not. ICANN Resp. to Req. for IRP ¶ 64 (Apr. 13, 2016). As *Vistaprint* explains, argument of counsel cannot take the place of a reasoned decision by the NGPC. In any event, counsel’s argument is not a justification of the disparate treatment; it is a mere restatement of the fact that the two applications were treated differently. *See GCC Final*, CLA-031, ¶ 144 (rejecting the argument that the presence or absence of an objection justifies disparate treatment as “mechanistic indeed”).<sup>12</sup> If the GAC had given reasons for its advice, the NGPC and this Panel could have examined those reasons to see whether the disparate treatment was justified. Because it did not, everyone (including ICANN’s counsel) is reduced to speculation.

**3. Procedures To Ensure Fairness.** As a “constituent bod[y]” of ICANN, the GAC is required to “operate to the maximum extent feasible . . . consistent with procedures designed to ensure fairness.” Bylaws, art. III, § 1. The NGPC likewise had its own obligation of procedural fairness under Article III, Section 1, which included an obligation to ensure that the GAC and the gTLD proceeding as a whole complied with basic requirements of fairness.

The recent *dot Sport* decision<sup>13</sup> confirms that the Board (here, the NGPC) is responsible for ensuring the procedural fairness of gTLD applications – and that its remit goes beyond

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<sup>12</sup> The same point applies to the .YAMAXUN application, a gTLD that is another version of Amazon’s name in Chinese and is now operational. The different treatment of .亚马逊 and .YAMAXUN illustrates how making application results turn on the presence or absence of GAC objections will inevitably lead to arbitrary results. *See* Hayden Statement ¶ 29 n.4.

<sup>13</sup> *dot Sport Limited v. ICANN*, Final Declaration, ICDR Case No. 01-15-0002-9483 (Jan. 31, 2017) (“*dot Sport*”), CLA-032.

determining whether written procedures were followed and includes ensuring “the neutrality, objectivity, integrity and fairness of the decision-making system.” *dot Sport*, CLA-032, ¶ 7.71. In that case, dot Sport’s application for the .SPORT gTLD had been blocked by a Community Objection heard by an expert under the ICC rules. *See id.* ¶¶ 6.8-6.13. After the expert proceeding, dot Sport learned that the expert had failed to disclose a conflict of interest. *See id.* ¶¶ 6.17, 6.25. It presented that evidence to the BGC in two reconsideration requests, but the BGC refused reconsideration in part because it found no violation of the ICC rules or any other applicable written procedure. *See id.* ¶¶ 6.19. The *dot Sport* panel declared that the BGC’s failure “properly to consider . . . allegations of apparent bias” breached its duty to “up[h]old the integrity of the system, in accordance with its Core Values.” *Id.* ¶ 7.90.

Here, the relevant procedural norms included two basic requirements of procedural fairness, universally recognized under international and national laws: notice and an opportunity to be heard. *See* UNCITRAL Model Law on International Commercial Arbitration, arts. 18, 24(2) (1985); *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Amazon received notice through the Early Warning procedure that Brazil and Peru might seek GAC advice against the .AMAZON Applications, but Amazon had no opportunity to be heard before the GAC and was “denied the opportunity” to “distribute materials” to GAC members telling its side of the story.<sup>14</sup> Yet the NGPC treated the GAC’s opposition to the .AMAZON Applications as essentially dispositive. Before this Panel, ICANN’s justification for blocking the Applications is that the NGPC made its decision “because of GAC advice,” ICANN 4/13/16 Resp. ¶ 27, and that alone was enough. Thus, Amazon had no opportunity to be heard when it counted, before

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<sup>14</sup> *See* Hayden Statement ¶ 36 (“We . . . asked the GAC to grant us the opportunity to distribute to the GAC background materials about the .AMAZON Applications and the proposals we had made but the GAC Chair rejected our request.”).

the GAC. Its later opportunity to be heard before the NGPC was meaningless because, so far as the NGPC was concerned, the GAC had already made the only relevant decision.

**4. Accountability to the Community.** The core purpose of this proceeding is to ensure that ICANN is held “accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for [its] core values.” Bylaws, art. IV, § 1. That provision requires that the reasons for ICANN’s actions be apparent from the record it creates, so that the Internet community and Panels like this one can examine ICANN’s reasoning and compare it to the Articles, Bylaws, and Guidebook. ICANN’s obligation of accountability would be hollow if the GAC could advise against an application without giving reasons and the NGPC could comply merely because the GAC said so. *See DCA Trust Final*, CLA-002, ¶ 74 (“[A]ccountability requires an organization to explain or give reasons for its activities, [to] accept responsibility for them and to disclose the results in a transparent manner.”).

This proceeding illustrates the problem. Amazon has come forward with compelling evidence that a key contention supporting Brazil’s and Peru’s opposition to the .AMAZON Applications was their erroneous view that “Amazon” was a geographic name under the Guidebook. *See supra* pp. 10-11 and *infra* pp. 34-35. Amazon has further shown that treating “Amazon” as a geographic name is contrary to the Guidebook and to the findings of the Geographic Names Panel, *see infra* p. 34 – indeed, ICANN’s current position is that it has “never suggested” that Amazon is a Guidebook geographic name. ICANN Resp. to Req. That the Panel Hear Live Witness Testimony at 11 (Oct. 20, 2016). If the GAC had given reasons for its advice, and the NGPC had considered those reasons in its decision, the Panel could then examine those documents and determine from the record whether the GAC and the NGPC had acted on a

ground inconsistent with the Guidebook. Instead, the dispute has become a contested issue of fact requiring witness testimony – complicating this Panel’s task of ensuring accountability.

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Each of the four specific provisions under the Bylaws set forth above would alone require the GAC to adopt reasons for its advice and the NGPC to review and evaluate those reasons before it could accept the GAC’s advice and block an individual application. That conclusion is confirmed by reading those provisions together and in light of the NGPC’s general duties to “exercise due diligence and care in having a reasonable amount of facts in front of [it]”; and to “exercise independent judgment in taking [a] decision[] believed to be in the best interests of [ICANN].” Bylaws, art. IV, § 3, ¶ 4. Accepting the GAC’s advice without determining and evaluating the GAC’s specific reasons for giving that advice – or whether the GAC adopted any reasons at all – is not consistent with those principles. *See DCA Trust Final*, CLA-002, ¶ 113 (when faced with unreasoned GAC advice, the NGPC should, “at a minimum, [have] investigate[d] the matter further before rejecting [an] application”); *GCC Final*, CLA-031, ¶ 139 (criticizing the Board for failure to undertake even a “modicum of due diligence and independent investigation” with respect to the GAC’s decisionmaking process at its Beijing and Durban meetings). This Panel should reject ICANN’s position that the NGPC can deny applications on the GAC’s mere say-so.

**B. The GAC Adopted its Advice Through an Arbitrary Process Without Reaching Consensus on Any Reasoning, Factual Basis, or Policy**

There were no consensus reasons or rationale for the GAC advice – much less any reasons grounded in national or international law or in public policy. The lack of consensus reasoning is shown by the Durban Communiqué itself, which states only that “[t]he GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant

Guidebook on [certain] applications,” including Amazon’s. C-041, ¶ IV.1.1(a)(i). The NGPC similarly acknowledged that the GAC adopted no consensus reasoning, admitting that it lacked “the benefit of the rationale relied upon by the GAC in issuing its consensus advice.” C-054, at 10. Additional evidence confirms that the GAC had no consensus rationale.

**1. The Dryden Testimony Shows that the GAC Did Not Adopt Any Consensus Rationale or Policy**

Ms. Heather Dryden was the GAC chair when the GAC considered both the .AMAZON Applications and the .AFRICA application in *DCA Trust*. The GAC followed the same process in both applications in back-to-back meetings in Beijing and Durban. The representative from Brazil observed in the Durban meeting that he was asking for “GAC advice . . . in the same terms as we have approved last meeting in Beijing about dotAfrica.” C-040, at 13.

The Panel invited Ms. Dryden to submit a statement addressing the following questions:

1. Based on her interactions with representatives of the nations that attended the GAC meeting in Durban, what was the rationale for the consensus GAC Advice to the ICANN Board advising the Board to deny the three Amazon applications?

2. Was all or part of the rationale for the GAC objection to the applications based on “Amazon” as a geographic name?

Panel Order No. 2, at 4 (Nov. 17, 2016). Ms. Dryden has not responded to the Panel’s invitation (except with a bare acknowledgement of the request, *see* C-085), but her previous testimony describing the GAC’s process confirms that the GAC issued advice on particular applications without reaching any consensus on any particular reasons for that advice. Ms. Dryden explained to the *DCA Trust* panel that:

- Views expressed by individual countries, including in Early Warning statements, are not adopted by the GAC, *see* CLA-005, at 298:21-24 (“None of the GAC decision-making takes place in any other form than . . . when the GAC is making a decision.”); *id.* at 306:21-24 (“Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that’s not a GAC view.”);



*id.* at 319:20-22 (“The sum of the GAC’s advice is reflected in its written advice in the communiqué.”).

- Although the Guidebook contains “three criteria” for GAC advice,<sup>15</sup> and although Ms. Dryden had described those criteria in her written testimony, *see id.* at 304:24-305:6, the GAC did not actually use those criteria in making its decisions, *see id.* at 304:18-305:24 (“That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.”).
- The GAC does not inquire whether its decisions are consistent with the Guidebook or ICANN’s rules, *see id.* at 307:10-308:2 (“The practice among governments is that governments can express their view, whatever it may be. And so there’s a deference to that. . . . [I]f a country . . . says it has a concern, that’s not really something . . . that’s evaluated, in the sense you mean, by the other governments. That’s not the way that governments work with each other.”).
- The GAC’s decisions are “political” in character, *see id.* at 313:17-25 (“[I]t’s a political bucket, the GAC, so it is a political decision that was taken. . . . It’s all about politics.”).

Ms. Dryden’s testimony makes clear that the NGPC was wrong to rely on reasons given by Brazil and Peru in their Early Warning statement as though that were the advice of the GAC itself. The statements of Brazil, Peru, and their supporters at the GAC meeting themselves were likewise not part of any consensus that the GAC adopted, because the “sum of the GAC’s advice is reflected in its written advice in the communiqué.” *Id.* at 319:20-22. And Ms. Dryden’s testimony further shows that the GAC’s role in the gTLD process at the relevant time was unmoored from its role under the Bylaws and Guidebook to advise on national or international law or of public policy. Instead, the GAC’s support or opposition to particular applications was “all about politics.” *Id.* at 313.

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<sup>15</sup> *See* Guidebook § 3.1 (“The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.”).

Based on that testimony, the *DCA Trust* panel concluded that “the GAC did not act with transparency or in a manner designed to insure fairness,” *DCA Trust Final*, CLA-002, ¶ 102; that the “actions and in actions of the Board” in accepting the GAC’s advice “were not procedures designed to insure the fairness required by Article III, Sec. 1” of the Bylaws, *id.* ¶ 109; and that to comply with “the clear ‘Transparency’ obligations found in ICANN’s Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application,” *id.* ¶ 113. This Panel should reach the same conclusion here.

## **2. ICANN Knew That There Was No GAC Consensus on Policy**

Had the NGPC investigated the GAC’s advice against the .AMAZON Applications, it would have found ample reason for concern. For example, the NGPC might have considered the separate statement of the United States, which disagreed with the positions asserted by Brazil and noted their inconsistency with previous positions taken by ICANN and the GAC. That statement makes clear that there was no GAC consensus on whether “sovereignty [is] a valid basis for objecting to the use of terms” and that there is no “international consensus that recognizes inherent governmental rights in geographic terms.” C-034. Despite its declared adherence to that principle, the United States decided to “abstain and remain neutral” on the .AMAZON Applications, among certain others. *Id.*

ICANN was well aware – and the NGPC either was or should have been aware as well – that the United States and other members of the GAC did not believe that the position successfully advocated by Brazil and Peru was consistent with the Guidebook or supported by any legal or policy principle.

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may have related to a then-pending proposal by Russia and Iran at the United Nations to transfer authority for assigning domain names from ICANN to the United Nations' telecommunications regulatory body, the ITU.<sup>17</sup>

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<sup>17</sup> *See, e.g.*, Testimony of FCC Commissioner Robert M. McDowell Before the House Committee on Energy and Commerce (Feb. 5, 2013) (describing ITU governance proposal), <http://docs.house.gov/meetings/IF/IF16/20130205/100221/HHRG-113-IF16-Wstate-McDowellR-20130205.pdf>; Philip S. Corwin, USG Provides First Official Statement on Montevideo, Brazil, and ITU Plenipotentiary (Jan. 24, 2014), [http://www.circleid.com/posts/20140124\\_usg\\_provides\\_first\\_official\\_statement\\_on\\_montevideo\\_brazil/](http://www.circleid.com/posts/20140124_usg_provides_first_official_statement_on_montevideo_brazil/). Brazil had expressed support for such proposals. <http://www.internetgovernance.org/2011/09/17/india-brazil-and-south-africa-call-for-creation-of-new-global-body-to-control-the-internet/>; <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan043559.pdf>.

Internal United States government communications recently disclosed under the Freedom of Information Act confirm that the United States' withdrawal of its support for Amazon was reached after "careful[] negotiation[s]," C-087, between different agencies including the U.S. Department of State, and also involved lobbying by "the Brazilians, Peruvians, and Ecuadorians," C-088 (redacted document describing an "interagency agreed position"). For her part, the U.S.'s representative to the GAC acknowledged that "the applicants," including Amazon, "actually played by the book," but expressed concern that she would be "shouted down" by her colleagues for saying so. C-089, at 2.

All this confirms that, at the relevant time, the GAC's decisions were "all about politics." CLA-005, at 313; Redacted - Information Designated Confidential In This IRP

For the NGPC to defer to the GAC's political veto without independently examining its reasoning or factual basis was inconsistent with ICANN's core values of transparency, fairness, and accountability. And for ICANN now to claim that the Guidebook's "presumption" in favor of GAC advice justifies the

For example, Veni Markovski was ICANN's Vice President responsible for relations with the United Nations, *see* <https://www.icann.org/profiles/veni-markovski>, and Nigel Hickson was ICANN's Vice President for Europe, *see* [https://icannwiki.org/Nigel\\_Hickson](https://icannwiki.org/Nigel_Hickson).

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NGPC's abdication of responsibility only shows how greatly the corrective intervention of this Panel is needed.

## **II. The Rationales Advanced by Brazil and Peru Were Inconsistent with the Guidebook and Unsupported by the Record Before the Board**

The NGPC's decision can and should fail this Panel's scrutiny solely because it deferred to unreasoned GAC advice generated through an arbitrary, politicized process. In the alternative, this Panel may proceed to consider whether the position of Brazil and Peru (even if adopted by the whole GAC) would have properly supported the NGPC's decision. If it reaches that issue, the Panel should declare that each of the arguments set forward by those two countries is inconsistent with the Articles, Bylaws, and Guidebook.

### **A. "Amazon" Is Not a "Geographic Name" Under the Guidebook**

#### **1. Amazon Is Not a "Geographic Name" Under the Guidebook Procedure and Criteria**

It is now undisputed that "Amazon" "does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4." C-037, at 1. That is the conclusion originally reached by ICANN's Geographic Names Panel, *see id.*; *see also* Exs. C-024, C-025; confirmed in detail by the independent analysis of Heather Forrest in this proceeding, *see* Forrest Report pt. 6; *id.* ¶ 6.18; and now conceded by ICANN, *see* Joint Stipulation of Amazon and ICANN (Mar. 3, 2017), C-102, ¶ 1 ("The strings that are the subjects of Amazon's applications . . . do not fall within the criteria for geographic names contained in Section 2.2.1.4 of the Applicant Guidebook."); ICANN 10/20/16 Resp. 12 ("[T]he string ['Amazon'] is not identified by Section 2.2.1.4 for special geographic treatment.").

By contrast, whether "Amazon" was a "geographic name" within the meaning of the Guidebook was hotly disputed in the GAC deliberations. Brazil, Peru, and their supporters frequently expressed the view that "Amazon" is a "geographic name" and so a "private

company” should not be able to use that name exclusively. *See, e.g.*, C-022, at 3 (Brazil invoking the “principle of protection of geographic names”); C-039, at 2 (Argentina et al. arguing that “.amazon’ is a geographic name that represents important territories of some of our countries”); C-040, at 14, 15 (Peru arguing at GAC Durban meeting that “there is no doubt that this is a geographic name”). During the GAC’s Durban meeting, a representative of Peru stated that “Amazon” was “in th[e] [ISO] 3166-2 list,” *id.* at 14-15 – an inaccurate assertion that would, if true, have made “Amazon” a geographic name under § 2.2.1.4.2 of the Guidebook. *See id.* at 24-25 (“There is no ambiguity in this case. . . . There was . . . no doubt that it was a codified name because it got the three-digit code.”).

Peru continued to voice its position that “Amazon” was a geographic name in further communications to ICANN’s Board after the Durban meeting. *See* C-045, at 1 (letter from Peru asserting that “the department of Amazonas, located in Peru, is registered in ISO 3166-2”); C-050, at 2 (letter from Peru asserting that “Amazon” is a “word[] that represent[s] a geographical location” that is “recognized by ISO codification”) Redacted - Information Designated Confidential In This IRP

Amazon responded to Peru’s letters to inform the Board of Peru’s mistake, explaining that Guidebook § 2.2.1.4.2 requires an “exact match” with an ISO 3166-2 listing and that “Amazon” and “Amazonas” do not meet this requirement. Peru responded further in relevant part by repeating its position. *See* C-091, at 2. Accordingly, the NGPC knew that the countries pushing for GAC advice were asserting that “Amazon” was a geographic name within the meaning of the Guidebook and that this premise was an error. To the extent it adopted the reasons given by some countries in the Early Warning and adopted by some in advocating for the GAC advice, it adopted that error as well.

**2. The Guidebook Procedure and Criteria for Determining Geographic Names Are Exclusive and the GAC May Not Add to Them**

**a. The Text, Purpose, and History of the Guidebook Show That the Guidebook Procedure and Criteria Are Exclusive**

The procedures for determining a geographic name set forth in the Guidebook are the exclusive procedure for protecting geographic names. That is clear from the text of the Guidebook itself, which acknowledges that “appropriate consideration [should be] given to the interests of governments or public authorities in geographic names,” but then provides that the “requirements and procedure ICANN *will follow* in the evaluation process are described in the following paragraphs.” Guidebook § 2.2.1.4 (emphasis added). After describing the substantive criteria for a geographic name – which, as explained above, “Amazon” undisputedly does not meet – the Guidebook then further states that “[a] Geographic Names Panel . . . *will determine* whether each applied-for gTLD string represents a geographic name.” *Id.* § 2.2.1.4.4 (emphasis added). And if the Geographic Names Panel “determines that the applied-for gTLD string is not a geographic name . . . the application *will pass* the Geographic Names review with no additional steps required.” *Id.* (emphasis added).

There is nothing ambiguous about that mandatory language, which defines a process of consulting certain lists, mostly embodied in international standards documents; assigns a decisionmaker (the Geographic Names Panel) to perform that process; and announces a final result of that process, which is the determination whether or not a proposed gTLD constitutes a geographic name. That precision was intentional: as the Guidebook explains at its very outset, it was meant to provide a “clear roadmap for applicants to reach delegation,” and to inform applicants “what is required of them and what they can expect at each stage of the application evaluation process.” Guidebook, preamble & introduction. The Guidebook further affirms that in pursuing its “key mandate[ ] . . . to promote competition in the domain name market,” ICANN

adopted a “goal [of] mak[ing] the criteria and evaluation as objective as possible.” Guidebook Attachment to Module 2, at A-1. Those declared purposes of clarity and objectivity support reading the Guidebook process for geographic names review as the sole method of determining whether a gTLD is a geographic name.

The history of the Guidebook further supports that reading. As the Forrest Report explains, the process that created the Guidebook began with policy recommendations from the Generic Names Supporting Organization (“GNSO”), which the ICANN Board adopted as ICANN policy. Forrest Rep. ¶ 4.2; Forrest-014. The GNSO explained the importance of using “transparent and predictable criteria” that are “fully available to the applicants prior to the initiation of the process” and make clear that “[n]ormally . . . no subsequent additional selection criteria should be used.” Forrest-015, at 4; *see id.* at 5 (“There must be a clear and pre-published application process using objective and measurable criteria.”); *see* Forrest Rep. ¶ 8.5.

In the course of implementing the GNSO criteria, ICANN’s various constituencies – including the GAC – had ample opportunities to make their voices heard. But as Professor Forrest explains, the Board and the GAC did not reach agreement on all points:

The Guidebook’s final text clearly evidences the Board’s having rejected certain requests, including, for example, paragraph 2.2 of the 2007 GAC Principles Regarding New gTLDs, which urges ICANN to “avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities.”

Forrest Rep. ¶ 8.3 (quoting Forrest-70, ¶ 2.2). As correspondence between the Board and the GAC in 2010 indicates, the geographic name provisions of the Guidebook reflected the need to preserve “clarity for applicants.”<sup>19</sup>

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<sup>19</sup> C-010, at 6 (Aug. 5, 2010 letter describing the “Board’s objectives” in adopting the “criteria for defining geographic names” as “clarity for applicants, and . . . appropriate safeguards for the benefit of the broad community”); C-011, at 6 (same).



**b. ICANN Fails To Show That the Guidebook Gives the GAC Discretion To Add New Geographical Names**

ICANN has erroneously relied in previous briefing on § 3.2 of the Guidebook, which states that “the GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.” ICANN 4/13/16 Resp. ¶ 20. That language does not authorize the GAC to amend, violate, or make ad hoc exceptions to other provisions of the Guidebook. Rather, it clarifies that the GAC is free to address topics that the Guidebook does *not* cover. For example, no provision of the Guidebook addresses domain names for religious topics (such as .ISLAM and .HALAL, both of which have been the subject of discussions before the GAC) or for adult content (such as .XXX, the subject of the pre-Guidebook *ICM Registry* dispute in 2010), which could be reasonably described as “potentially violat[ing] national law or rais[ing] sensitivities.” Guidebook § 3.1. The language that ICANN quotes can thus be given full effect and a sensible reading without permitting the GAC to reopen arbitrarily issues previously resolved by other provisions of the Guidebook.<sup>20</sup>

ICANN also errs in relying on an “Explanatory Memorandum” dated April 15, 2011, and an undated set of “Notes,” which state that “GAC advice can be applied to any application: e.g., sensitive, community, sector, or geographic strings of any type.” R-7, at 2; R-8, at 3; *see* Atallah Statement ¶ 13. To begin with, the April 15 memorandum is conspicuously labeled a “discussion draft” on which “[p]otential applicants should not rely,” R-7, at 1, and the undated notes do not indicate who wrote them or who approved them. Mr. Atallah points to no resolution or other action of the Board indicating that this language was ever adopted as ICANN policy –

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<sup>20</sup> In addition, the Geographic Names Panel is not part of the public objection and dispute resolution process (Module 3 of the Guidebook) but rather the initial evaluation process (Module 2). Accordingly, § 3.2 on its face fails to address the interaction between GAC advice and the work of the Geographic Names Panel.

unlike the Guidebook itself or the 2008 GNSO Principles. The contemporaneous draft of the Guidebook did not add the quoted language, *see* R-9, § 3.1, and neither did the final, operative version.

Any doubt about whether the Guidebook denies the GAC discretion to define new geographic names should be resolved by an e-mail (produced in discovery by ICANN) from Peter Dengate Thrush. Mr. Dengate Thrush was the Chairman of ICANN’s Board when the Guidebook was adopted and was personally responsible for addressing these issues with Ms. Dryden during discussions between the Board and the GAC.<sup>21</sup> Writing to other ICANN alumni in 2013, Mr. Dengate Thrush described the campaign for GAC advice against the .AMAZON Applications as “nonsense” without a “shred of credibility”; a “breach of the legitimate expectations of TLD applicants”; and “outside the hard wrought principles developed between board and GAC against GNSO advice granting the GAC rights in relation to geographic names.” C-092, at 1. He also argued that “[t]he board needs to defend ICANN principles against this kind of abuse.” *Id.* Mr. Dengate Thrush’s candid views should put to rest ICANN’s current contention that the NGPC’s blind deference to the GAC can be reconciled with the balance struck in the Guidebook in 2011.<sup>22</sup>

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<sup>21</sup> *See* ICANN, *Board of Directors*, at <https://www.icann.org/resources/pages/board-of-directors> (listing Mr. Dengate Thrush’s tenure as ending in June 2011); *see, e.g.*, Exs. C-010, C-011, C-013 (letters sent from the Board to the GAC by Mr. Dengate Thrush as Chair).

<sup>22</sup> Other documents produced in discovery confirm that other members of the ICANN community shared Mr. Dengate Thrush’s view of the dispute. *See* C-093 (e-mail among members of ICANN’s At-Large Advisory Committee describing the ruling as “a political decision, pure and simple”); Redacted - Information Designated Confidential In This IRP

C-094, at 18 (transcript of Commercial Stakeholders’ Group call in Durban: “[T]he geographical advice seems to be an expansion of entitlement. And it seems to be outside of even national law with some of the requests they’ve made in terms of Amazon and Patagonia.”); *id.* at 24 (“[F]or commercial stakeholders this should scare you because [the GAC is] . . . seeking to get

### 3. International Law Does Not Recognize Sovereign Rights in Geographic Names

Further, the purported basis on which Brazil and Peru attempted to treat “Amazon” as a geographic name was that, as sovereigns, they had an inherent right to control the use of geographic names associated with their territory – that, as the Early Warning puts it, their position is supported by a “principle of protection of geographic names.” C-022; *see also* C-095, at 2 (letter from Peru stating that the GAC’s advice was based on “the rights of countries to intervene in claims that . . . represent a geographical location of their own”). Despite those contentions, the record before the NGPC made clear that international law (and, for that matter, national law) recognizes no such principle or right.

The expert opinion of Professor Passa sought by the NGPC found “no rule of international, or even regional or national, law applicable in the field of geographical indications which obliges ICANN to reject the application,” C-048, at 14. The opinion of Professor Forrest confirms that result and finds more specifically that “[i]nternational law does not recognize ‘[t]he principle of protection of geographic names’ called upon by Brazil, or inherent name rights arising from territory as alluded to by both Brazil and Peru.” Forrest Rep. ¶ 5.2.1. Those expert findings are also consistent with the statement of the United States that it “is not aware of an international consensus that recognizes inherent governmental rights in geographic terms.” C-034. Neither Brazil nor Peru, nor any of their supporters, presented any authority to the GAC or the NGPC that would support their claim of rights; and ICANN has similarly presented no such authority to this Panel.

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something that [its members] cannot even get through their own international law treaties and through their own legislatures.”).

Brazil and Peru were thus wrong in contending that their opposition to the .AMAZON Applications was supported by any principle or right recognized by international or national law. To the extent that the NGPC based its decision on the erroneous belief that any such principle or right existed, it fell short of its obligations to act in “conformity with relevant principles of international law and applicable international conventions and local law,” Articles ¶ 4; and to show “due regard for [its] core value” of making “well-informed decisions based on expert advice,” Bylaws, art. I § 2, ¶ 7, art. IV, § 1 – here, the uncontested opinions of Professor Passa and Professor Forrest.

**B. The .AMAZON Applications Will Not Harm the Community of the Amazonas or Amazonia Region**

The other contention that runs through the submissions of Brazil, Peru, and their allies in the GAC is the claim that Amazon’s use of “.AMAZON” and its translations in Chinese and Japanese characters (but not the Chinese name transliterated to English) will harm the community of the Amazonas or Amazonia region (both names are used) by “prevent[ing] the use of this domain for purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome,” or by “hinder[ing] the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.” C-022, at 1; C-054, at 10. That contention, too, is contrary to the Bylaws and Guidebook.

**1. The Independent Expert Found No Risk of Material Detriment**

The contention that the .AMAZON Applications would harm the community of the Amazonas region was raised by ICANN’s Independent Objector in a Community Objection proceeding under the Guidebook procedures. That contention was heard and rejected by the ICC Independent Expert, Professor Radicati di Brozolo, who reached its merits even after finding that

the Independent Objector had a conflict of interest because Brazil and Peru were his clients.<sup>23</sup> His reasons for rejecting the claim of harm included the fact that no entity other than Amazon had applied for the strings, the fact that Amazon has used the domain and brand name “Amazon” for decades without any “evidence, or even allegation, that this has caused any harm . . . or has led to a loss of reputation” of the region, and the availability of “other equally evocative strings” like “Amazonia” that the purported Amazon Community could use instead to promote its interests. C-047, ¶¶ 99-103.

Professor Radicati di Brozolo’s decision was not mentioned in the public portion of the GAC’s Durban meeting and is not mentioned in the NGPC’s decision, even in the list at the end of materials considered. ICANN has stipulated that his report was in the record before the NGPC but that the NGPC did not “rely” on his findings. *See* Joint Stipulation, C-102, ¶ 2. Nothing in the record suggests that either the GAC or the NGPC gave his findings any weight whatsoever. That is contrary to § 3.4.6 of the Guidebook, which provides that an ICC Expert’s findings “will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.” The NGPC’s disregard for Professor Radicati di Brozolo also flouted ICANN’s values of making “well-informed decisions based on expert advice” and “applying documented policies neutrally and objectively, with integrity and fairness,” Bylaws, art. I § 2, ¶¶ 7, 8 – which is the point of retaining an independent neutral expert to look at evidence.

ICANN’s counsel has argued that the NGPC was justified in disregarding the ICC Expert’s opinion because one basis for his findings was an observation that there was no “serious

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<sup>23</sup> *See* C-047, ¶ 53 (“[O]bjectively considered, the links between the IO and two major representatives of the Amazon Community lead to justifiable doubts as to his independence in the eyes of the Applicant and of the broader public.”).

opposition to the Application by those that might be considered to have the Community's interests at heart," C-047, ¶ 104 – that is, Brazil and Peru. But ICANN exaggerates the significance of this finding, which Professor Radicati di Brozolo treated as “[i]ndirect confirmation” and “corroborat[ion],” *id.*, of the evidentiary findings he had made in the preceding paragraphs. It remained just as true before the NGPC as before the ICC Expert that:

- no one but Amazon had applied for the disputed strings, *see id.* ¶ 100;
- the Guidebook expressly prohibits finding harm based on “an allegation of detriment that consists only of the applicant being delegated the string instead of the objector,” *id.* ¶ 101 (quoting Guidebook § 3.5.4);
- there is no evidence that Amazon's nearly two-decade-old use of its trademark around the world, including in Brazil and Peru, has harmed the Amazonas or Amazonia community, *id.* ¶ 102;
- the change from “.amazon.com” to “.amazon” is not a plausible source of harm, *see id.* ¶ 103; and
- other gTLDs such as “.amazonia” or “.amazonas” remain available, *see id.*

The NGPC's failure even to address (much less rebut) those points cannot be squared with its duties under the Bylaws and the Guidebook. And by failing itself to look for evidence to support Brazil's and Peru's claims of harm to the Amazonia or Amazonas community, the NGPC also failed in its duty to “exercise due diligence and care in having a reasonable amount of facts in front of [it],” Bylaws, art. IV, § 3, ¶ 4(b).

## **2. The NGPC Failed To Address Amazon's Public Interest Commitments**

Even if there were some competent finding or evidence of harm to the Amazonia or Amazonas community (which there was not), and even if ICANN were not bound by an expert determination that no such harm was likely to occur (which it was), the NGPC would still have been obligated to consider whether any such harm would have been addressed appropriately by Amazon's voluntary proposed public interest commitments. Amazon had offered a range of

solutions, including support for future gTLDs for names like Amazonia, and reserving domains within the .AMAZON gTLD that would redirect users to government websites. Hayden Statement ¶¶ 21; *supra* p. 8 (describing negotiations). Instead of weighing these proposals as a factor in favor of granting the applications, the ICANN Board inexplicably cited Amazon’s efforts to find a negotiated solution as a “significant factor[]” supporting its decision to block Amazon’s applications. C-054, at 10-11.

ICANN has argued that the NGPC did not in fact hold Amazon’s public interest commitments against it, but instead “merely noted that Amazon had shown that it had sought to resolve the issue by agreement, as the Guidebook encouraged.” ICANN 4/13/16 Resp. ¶ 61. The natural meaning of a statement that the negotiations were a “significant factor” in a decision that blocked the .AMAZON Applications is that they were a factor weighing against Amazon – otherwise, they would not have been “significant” to the NGPC’s adverse decision. Even granting ICANN the assumption that the NGPC was merely mentioning Amazon’s proffered commitments in passing would underscore the NGPC’s failure to strike an “appropriate and defensible balance,” Bylaws, art. I, § 2, that was “justified and supported by a reasoned analysis,” *GCC Interim*, CLA-029, ¶ 76; *Vistaprint*, CLA-004, ¶ 190, among competing values. A decisionmaking body that leaves open to dispute whether a particular factor weighed for or against its conclusion has not produced a defensible, reasoned analysis.

### **III. The NGPC Failed To Consider Amazon’s and Internet Users’ Legitimate Interests Supporting the .AMAZON Applications**

The NGPC also failed to consider the strong legitimate interests counseling in favor of the .AMAZON Applications. Those interests include Amazon’s significant interest and investment over the years in promoting legitimate uses of its intellectual property, including the name Amazon – which Amazon has registered as a trademark more than 1800 times in more than

170 countries – in order to provide products and services to hundreds of millions of customers around the world, as described in the statement of Scott Hayden, Amazon’s Vice President and Associate General Counsel for Intellectual Property. Hayden Statement ¶ 7.

Mr. Hayden’s testimony describes the innovative and significant business plans that Amazon has for the gTLD .AMAZON. Amazon views the gTLD program as an opportunity to further its mission of serving its customers and innovating to serve them better. *Id.* It sees the .AMAZON applications as an opportunity to create, under the .AMAZON umbrella, websites that would enhance and strengthen service to Amazon’s consumers, sellers, enterprises, and content creators. *Id.* The NGPC should have weighed these interests in developing Amazon’s internet services in considering its applications.

ICANN has disparaged Amazon’s and its customers’ interests as nothing more than “private concerns” that by their nature could not prevail against “public-policy . . . concerns from the governments of Brazil and Peru.” ICANN 10/20/16 Resp. 13. That argument merely shows the extent to which ICANN has departed from its Articles and Bylaws. The Articles recognize as a key part of ICANN’s mission to “operate for the benefit of the Internet community as a whole” – not just governments – “and, to the extent appropriate and consistent with these Articles and its Bylaws, [employ] open and transparent processes that enable competition and open entry in Internet-related markets.” Articles ¶ 4. Avoiding undue political influence and giving appropriate protection to the interests of all Internet users is a key reason that ICANN was incorporated as a nongovernmental entity in the late 1990s rather than kept under the direct control of the United States.

The Bylaws similarly recognize “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest” as one of



ICANN's core values, Bylaws art. I, § 2, ¶ 6; and likewise instruct ICANN to "remain[] rooted in the private sector" even as it "duly tak[es] into account governments' or public authorities' recommendations." *Id.* art. I, § 2, ¶ 11; *see also* Guidebook, Attachment to Module 2, at A-1 (one of ICANN's "key mandates" is "to promote competition in the domain name market" and "build on processes that will ensure competition and consumer interests"). To be sure, in some situations, interests in competition, private investment, and consumer welfare may be counterbalanced by other policies. But those are precisely the situations in which ICANN (here, the NGPC) must weigh the competing interests and give a reasoned defense of its result. *See supra* pp. 19-22. The NGPC did not do that here.

As Mr. Hayden's testimony demonstrates, Amazon's business plans to expand its Internet services using the gTLD program would benefit not only Amazon's shareholders, but also millions of members of the general public who use Amazon's services, including consumers of online goods and services, third-party sellers who sell products through Amazon, and authors and other content creators whose books and artistic and cultural content (television, movies, music, software applications) are available through Amazon. Hayden Statement ¶ 5. These millions include many of the people of the Amazonas region; Amazon has a separate retail web site in Brazil (in addition to the United States, United Kingdom & Ireland, France, Canada, Germany, The Netherlands, Italy, Spain, Australia, Japan, China, India, and Mexico).

#### **IV. The Panel Should Declare that ICANN Has Violated Its Governing Documents and Direct ICANN To Grant the .AMAZON Applications**

This Panel can and should grant two forms of relief to Amazon in this proceeding. *First*, the Panel should declare that ICANN's Board and the NGPC have violated the Articles, Bylaws, and Guidebook; have failed to act with diligence and care in having a reasonable amount of facts in front of them; and have failed to exercise independent judgment in blocking the .AMAZON

applications. *Second*, the Panel should direct ICANN to allow the .AMAZON Applications to proceed. Both of those acts are within the Panel’s authority and are necessary to its function of holding ICANN “accountable to the community.” Bylaws, art. IV, § 1.

ICANN’s Bylaws charge this Panel with declaring whether the Board has acted consistently with the Articles of Incorporation and Bylaws. *Id.* art. IV, § 3, ¶ 4. The Bylaws give the Panel express authority to declare ICANN’s actions inconsistent with the Articles and Bylaws and to recommend that the Board take interim actions until it reviews and acts upon the Panel’s opinion, *id.* art. IV, § 3, ¶ 11, as well as providing that the Panel’s declarations are “final and . . . precedential,” *id.* art. IV, § 3, ¶ 21. The Bylaws further authorize the IRP provider – here, the ICDR – to “establish operating rules and procedures” for an IRP. *Id.* art. IV, § 3, ¶ 8.

As this Panel has already ruled, the applicable procedural rules governing this IRP are the ICDR’s International Dispute Resolution Procedures, R-52, as augmented by ICANN’s Supplementary Procedures.<sup>24</sup> Scheduling Order No. 1, ¶ 5 (Oct. 4, 2016). Article 30 of the ICDR Rules provides that arbitration awards are “final and binding” on the parties, and directs the parties to “carry out any such award without delay.” Nothing in the Bylaws or the Supplementary Procedures takes away this Panel’s Article 30 authority to issue a “binding” award that the parties must “carry out.” To the contrary, a separate provision of the Supplementary Procedures expressly declares that former Article 37, which governed certain forms of emergency relief, “will not apply”; the contrasting silence as to Article 30 implies that it remains in place.

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<sup>24</sup> For purposes of the relief the Panel is authorized to award, there is no difference between the 2011 Supplementary Procedures in effect when Amazon filed the .AMAZON Applications and the 2013 Supplementary Procedures in effect when Amazon filed this IRP.

ICANN has argued in the past that the decisions of IRP panels are merely advisory and do not bind ICANN, or that they are limited to declaratory relief and cannot include further remedies. Previous decisions have correctly rejected ICANN’s view. The *DCA Trust* panel<sup>25</sup> reasoned that (as explained above) nothing in the Supplementary Procedures took away the Panel’s general authority to make binding awards and that the “selection of the ICDR Rules as the baseline set of procedures . . . points to a binding adjudicative process,” *DCA Trust Procedural*, CLA-026, ¶¶ 98, 105; that ICANN, “[a]s the drafter and architect of the IRP Procedure,” could have adopted a “clearly announced” rule making panel decisions merely advisory, but failed to do so, *id.* ¶ 109; and that the putatively “exclusive nature of the IRP” remedy would “clearly . . . contradict[]” a purely advisory process, *id.* ¶ 111. As that panel further explained:

If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of “accountability.”

*Id.* ¶ 111 n.62.

The same panel further concluded in its final decision that it “ha[d] the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent” with the Articles and Bylaws. *DCA Trust Final*, CLA-002, ¶ 126. That panel cited the provision of Article IV, § 3 of the Bylaws, which authorizes independent review panels to “recommend that the Board stay any action or decision, or that the Board take any interim act[ion]” until the Board could review and act on the panel’s opinion. Bylaws, art. IV, § 3, ¶ 11(d). The *DCA Trust* panel reasoned that “both the

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<sup>25</sup> *DCA Trust*, Declaration on the IRP Procedure, ICDR Case No. 50 2013 001083 (Aug. 14, 2014) (“*DCA Trust Procedural*”), CLA-026.

language and spirit” of that provision gave it “authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board’s” violations. *DCA Trust Final*, CLA-002, ¶¶ 127-128. The panel therefore concluded that it had the authority to recommend that ICANN allow the claimant’s application to proceed. *Id.* ¶ 133.

The panel in *GCC* also recently rejected ICANN’s argument that the panel “lack[ed] authority to include affirmative declaratory relief.” *GCC Final*, CLA-031, ¶ 146. The panel cited the *DCA Trust* decision and emphasized that the independent review process “is designed to provide a remedy for any person ‘materially affected’ by suffering injury or harm causally connected to the relevant Board violation,” as another reason to conclude that the above-quoted Bylaws provision authorizing interim affirmative relief also “empowers [the panel] to recommend redress for such injury or harm.” *Id.* ¶ 147 (citing Bylaws, art. IV, § 3, ¶ 2) (emphasis in *GCC Final*). The panel thus concluded that it had the power to recommend a specific action on the disputed application. *Id.* ¶¶ 147, X.2 (recommending specific affirmative relief); accord *Corn Lake*, CLA-030, ¶ 11.1(c)-(d) (recommending affirmative relief).<sup>26</sup>

This Panel should follow the persuasive opinions in *DCA Trust* and *GCC* on this issue. Further support for those decisions is provided by the recent codification of their holdings in the 2016 version of ICANN’s Bylaws, which explicitly makes the “IRP . . . a final, binding arbitration process.” Amazon Req. Ex. 6, § 4.3(x). When this Panel issued its order permitting limited live testimony, it observed that the new Bylaws provided support for its conclusion

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<sup>26</sup> *But see Vistaprint*, CLA-004, ¶¶ 130-131, 140, 147-149 (acknowledging the “forceful arguments” of the *DCA Trust* panel that binding remedial authority was necessary “to ensure the efficacy of the IRP as an accountability mechanism,” but concluding that, while its decision was binding on ICANN as to whether ICANN has violated its Articles, Bylaws, and Guidebook, its decision was not binding as to the remedial action that ICANN must take).

regardless of whether they were formally retroactive. *See* Panel Order No. 2, at 3 n.1 (“[W]hether the new bylaws are retroactive or not, it is significant that ICANN itself has recognized on a going-forward basis that under some circumstances live testimony will be permitted.”). Just so with respect to this similar issue about the Panel’s authority: it is significant that ICANN has now recognized that IRP panels must be able to issue binding decisions in order to fulfill their important function of ensuring accountability.

Affirmative relief is particularly appropriate on this record because there is no possible dispute that the .AMAZON Applications would have proceeded but for the GAC’s intervention – Amazon had received a perfect score on its Initial Evaluation, had prevailed against the conflict-tainted Independent Objector before the ICC Expert, and was on the verge of a successful delegation when the GAC persuaded ICANN first to delay and then to block the .AMAZON Applications. The only reason for the NGPC to intervene was the GAC’s unreasoned, erroneous, and politically motivated advice. If the Panel concludes, as it should, that the GAC’s veto was an improper basis for the NGPC to deny the .AMAZON Applications, then no other basis remains for continued delay. As Mr. Hayden’s testimony shows, Amazon has already been blocked for years from moving forward with concrete plans to use .AMAZON and its equivalents. That injury should not be left unredressed any longer.

Respectfully submitted.



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