

Expert Report of

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1. Introduction

1.1. This Report is provided to assist the Panel in connection with Amazon EU S.À.R.L.'s ("Amazon") Request for Independent Review before the International Centre for Dispute Resolution. I have been asked by counsel for Amazon to provide my opinion on various issues relating to international law and ICANN policy, and in particular relating to geographic names, arising in this Request for Independent Review.

1.2. I understand that my duty is to assist the Panel. I have complied with, and will continue to comply with, that duty. I confirm that this is my own, impartial, objective, unbiased opinion which has not been influenced by the pressures of the dispute resolution process or by any party to these proceedings. I confirm that all matters upon which I have expressed an opinion are within my area of expertise. I confirm that I have referred to all matters which I regard as relevant to the opinions stated in this report. I have expressed and have drawn to the attention of the Panel all matters, of which I am aware, which might adversely affect my opinion. I confirm that, at the time of providing this written report, I consider it to be complete and accurate and constitute my true, professional opinion. I confirm that if, subsequently, I consider this report requires any correction, modification or qualification, I will notify the parties and the Panel forthwith.

1.3. I am receiving my standard hourly rate of USD \$450 for my work on this matter.

2. Affiliations and Qualifications

2.1. I am an attorney in good standing licensed by the State of New York, USA.

2.2. I am employed by the University of Tasmania in Tasmania, Australia, where I hold the position of Associate Professor. I am also employed by Australian Catholic University in Victoria, Australia, where I hold the position of Associate Professor, from which position I am on research leave during the period March 2015 to January 1, 2017. I am additionally employed as a casual academic by Murdoch University in Western Australia.

- 2.3. I hold the qualifications of Doctor of Law (*summa cum laude*) (Universität Bern, Switzerland), Master of Laws (Queen Mary and Westfield College, University of London), Juris Doctor (Marshal Wythe School of Law, College of William and Mary), and Bachelor of Arts, Language and International Trade (*French Hons*) (Clemson University).
- 2.4. Between 2008 and 2011, I undertook a doctoral thesis at the University of Berne, Switzerland under the supervision of Professor Thomas Cottier and Dr. Mirra Burri. My thesis, entitled “Protection of Geographic Names in International Law and Domain Name System Policy”, examines the recognition of rights in geographic names under international law and Internet Corporation for Assigned Names and Numbers (“ICANN”) policy on expansion of the Top-Level of the Internet Domain Name System (“DNS”). My research explores the range of potential bases of legal rights in geographic names, including intellectual property, unfair competition, sovereignty and statehood, geographical indications, unfair competition, and human rights, and evaluates the consistency of the treatment of geographic names in ICANN New gTLD Program policy with such rights. Principal conclusions of my study are: (1) international law does not recognize sovereign, exclusive or priority rights of States in geographic names; and (2) ICANN’s New gTLD Applicant Guidebook, the set of rules on “how the process [of ICANN’s New gTLD Program] works”,¹ does not “acknowledge the recognition under international law of non-State others’ rights in geographic names.”² My thesis was examined in 2012 and awarded the University of Berne’s highest honors, *summa cum laude*. In accordance with the university’s regulations,³ the degree Doctor of Laws (Dr.(iur.)) was awarded by the university following the publication of my thesis as a monograph in 2013, by the publishing house Wolters Kluwer.⁴
- 2.5. After nomination by the University of Berne, my thesis was awarded in 2014 with the Professor Walther Hug Prize.⁵ This is an annual national award presented to doctoral theses in law “which have already experienced at Swiss Universities the

¹ ICANN, New gTLD Program (Pamphlet) (2009) (copy on file with author) (“Pamphlet”).

² Heather Ann Forrest, *Protection of Geographic Names in International Law and Domain Name System Policy* (Wolters Kluwer, 2013) 304 (“*Protection of Geographic Names*”).

³ Universität Bern, Rechtswissenschaftliche Fakultät, http://www.rechtswissenschaft.unibe.ch/content/doktorat/index_ger.html.

⁴ Forrest, *Protection of Geographic Names*, *supra* note 2.

⁵ Stiftung Professor Walther Hug, Dissertationen des akademischen Jahres 2012/2013 zuerkannt 2014, at http://www.waltherhugstiftung.ch/?page_id=558.

highest honor and which are additionally distinguished by particular scientific qualities”.⁶

- 2.6. Following completion of my thesis, I took up a position (August 2011-August 2012) as a Senior Domain Name Industry Consultant with an Australia-based registry services provider. In this position, I contributed to the drafting of more than 130 new generic Top-Level Domain (“new gTLD”) applications submitted pursuant to the 2012 DNS expansion process managed by ICANN (the “New gTLD Program”). Through this work I put into practice an expert working knowledge of ICANN’s gTLD Applicant Guidebook in drafting applications for a broad range of geographic, generic and brand-related proposed new gTLDs. In this position I had no involvement in or knowledge of the new gTLD applications submitted by Amazon until all new gTLD applications received by ICANN were publicly disclosed by ICANN on June 13, 2012.⁷ In September, 2012, following the close of the new gTLD applications period, I returned to academia and took up a senior leadership position in the then-newly established Faculty of Law at Australian Catholic University. I have remained in academic employment since that time.
- 2.7. I have participated in ICANN policy development by attending ICANN public meetings and contributing to ICANN working group activities since 2008. I am currently serving a two-year term on the Generic Names Supporting Organization (“GNSO”) Council, the body “responsible for managing the policy development process of the GNSO”,⁸ as a representative of the Intellectual Property Constituency (“IPC”), a constituency group of the GNSO. I am additionally currently serving a one-year term as Vice Chair of the GNSO Council as the representative of the Non-Contracted Parties House of the GNSO. These positions will end concurrently at the 2016 ICANN Annual General Meeting taking place in late October and early November; at that time I will be eligible to be elected to one further two-year term of membership on the GNSO Council and, if re-elected to the Council, further one-year terms as GNSO Council Vice Chair. In these positions, I am expected to be familiar with ICANN’s Bylaws and Articles of Incorporation, as well as the GNSO Operating

⁶ Unofficial translation of Stiftung Professor Walther Hug, Professor Walther Hug Preis, at http://www.waltherhugstiftung.ch/?page_id=8.

⁷ ICANN, New Generic Top-Level Domains: New gTLD Reveal Day – Applied-For Strings (Jun. 13, 2012), at <https://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en>.

⁸ ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers as amended 30 July 2014, Art. X § 1, at <https://www.icann.org/resources/pages/governance/bylaws-en/11> (“Bylaws”).

Procedures⁹ and the various policy development processes ongoing within the GNSO.

- 2.8. I also currently serve as a GNSO co-chair of the Cross Community Working Group on the Use of Country and Territory Names as gTLDs (“CWG-UCTN”), an ICANN working group chartered by the GNSO and the Country-Code Names Supporting Organization (“ccNSO”) to, *inter alia*, “provide advice regarding the feasibility of developing a consistent and uniform definitional framework that could be applicable” to the use of country and territory names as Top-Level Domains.¹⁰ I was invited to serve in this role in recognition of my research on geographic names in ICANN policy and my having served as GNSO Observer in the ccNSO Study Group on the Use of Country and Territory Names as gTLDs, which recommended the formation of the CWG-UCTN.¹¹
- 2.9. All of my participation in ICANN is on a volunteer basis; along with the other members of the GNSO Council, I receive travel support from ICANN to enable my participation in face-to-face public ICANN meetings, but I do not receive any other benefits from ICANN or any other party for my ICANN participation.
- 2.10. My Curriculum Vitae, together with a list of publications, is attached to this report as Appendix A.

3. Summary

- 3.1. At the request of counsel for Amazon, I have prepared this report of my opinions based on my education, professional experience and research regarding legal rights in geographic names and ICANN policy, and also on my review of certain documents regarding Amazon’s applications for the gTLD .AMAZON and Chinese and Japanese language equivalents (“the .AMAZON Applications”).¹² The opinions expressed in this report are my own and should not be attributed to any employer or organization, or any ICANN constituency, stakeholder group, working group, or other body. All documents that I have considered in forming my opinions are cited in this report.

⁹ ICANN, GNSO Operating Procedures (Mar. 12, 2014), at <http://gns0.icann.org/en/drafts/op-procedures-12mar14-en.pdf>.

¹⁰ Country Code Names Supporting Organization (ccNSO), Cross-Community Working Group on Use of Country/Territory Names as TLDs, at <http://ccnso.icann.org/workinggroups/ccwg-unct.htm>.

¹¹ See ICANN, ccNSO Study Group on the use of Country and Territory Names Final Report (Sep. 2013), at <http://ccnso.icann.org/workinggroups/unct-final-08sep12-cn.pdf>, 4.

¹² These documents are listed in Appendix B of this report.

3.2. I begin this report by providing an introduction to ICANN and its gTLD Applicant Guidebook, which sets out the terms and conditions of applying for new gTLDs in a process managed by ICANN in accordance with its Articles of Incorporation,¹³ Bylaws,¹⁴ and contract with the United States Government.¹⁵ This introduction serves to contextualize the following issues relevant to the Request for Independent Review filed by Amazon, which are then developed sequentially in this report:

- 3.2.1. States do not have sovereign or intrinsic rights in geographic names under international law. Therefore, the .AMAZON Applications should not have been prevented from proceeding by or based on an Early Warning made by certain members of ICANN's Governmental Advisory Committee under Module 1 of the gTLD Applicant Guidebook on the basis of the respective governments' claims to inherent, exclusive or priority rights in the name "Amazon".
- 3.2.2. Module 2 of the gTLD Applicant Guidebook expressly defines geographic names and subjects names falling within two definitions to specified restrictions. "Amazon" is not a geographic name within the gTLD Applicant Guidebook definitions. Therefore, ICANN's Board should not have prevented the .AMAZON Applications from proceeding under Module 2 of the gTLD Applicant Guidebook on grounds that they comprise a restricted geographic name.
- 3.2.3. The gTLD Applicant Guidebook sets out sequentially the rules relevant to each step in the process of creating a new gTLD. Applications that satisfy the criteria set out in Module 2 are then potentially subject to the objection procedures and dispute resolution processes set out in Module 3 and string contention resolution processes set out in Module 4. An objection on "community" grounds under Module 3 was raised by Professor Alain Pellet, acting in the role of Independent Objector,¹⁶ against each of the .AMAZON

¹³ ICANN, Articles of Incorporation of Internet Corporation for Assigned Names and Numbers as revised November 21, 1998, at <https://www.icann.org/resources/pages/governance/articles-en> ("Articles").

¹⁴ ICANN Bylaws, *supra* note 8.

¹⁵ ICANN, Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (Sep. 30, 2009), at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> ("Affirmation of Commitments").

¹⁶ *Prof. Alain Pellet, Independent Objector (France) v. Amazon EU S.À.R.L. (LUXEMBOURG)*, CASE No. EXP/396/ICANN/13 (c. EXP/397/ICANN/14, EXP/398/ICANN/15) (Jan. 27, 2014), at

Applications. These objections were rejected in favor of applicant Amazon. No other objections were raised against the .AMAZON Applications under Module 3 of the gTLD Applicant Guidebook. Module 4 does not apply to the .AMAZON Applications because no competing applications for .AMAZON, .亚马逊 or .アマゾン were filed. Therefore, the .AMAZON Applications should not have been prevented from proceeding on grounds that they failed to overcome any objection under Module 3 or are subject to the string contention resolution processes of Module 4.

3.2.4. Module 3 of ICANN’s gTLD Applicant Guidebook additionally describes the process by which the Governmental Advisory Committee (“GAC”) may advise ICANN’s Board that an application should not proceed. While Module 3 states that “the GAC can provide advice on any application”,¹⁷ and further provides that GAC consensus advice “will create a strong presumption for the ICANN Board that the application should not be approved”,¹⁸ this language must be interpreted in light of Module 3 and the Guidebook as a whole. Module 3 cannot logically be interpreted as prioritizing GAC advice that conflicts with an Expert Determination in a Community Objection raised by the Independent Objector, who acts “solely in the best interests of the public who use the global Internet”.¹⁹ The .AMAZON Applications should therefore not have been prevented from proceeding on the basis of GAC advice that was contradicted by the Expert’s Determination of the Community Objections raised by the Independent Objector against the .AMAZON Applications.

3.2.5. The gTLD Applicant Guidebook was intended to provide new gTLD applicants with an unambiguous set of rules upon which to base their applications. ICANN is required by its Bylaws,²⁰ Articles of Incorporation,²¹ and contract with the United States Government²² to carry out its responsibilities in a fair, equitable, accountable and transparent manner. By

<https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf> (“Independent Objection”).

¹⁷ ICANN, gTLD Applicant Guidebook version 2012-06-04, at <http://newgtlds.icann.org/en/applicants/agb> (“Guidebook”), 3-3.

¹⁸ *Id.* at 1-11.

¹⁹ *Id.* at 3-9.

²⁰ ICANN, Bylaws, *supra* note 8.

²¹ ICANN, Articles, *supra* note 13.

²² ICANN, Affirmation of Commitments, *supra* note 15.

acting on advice of the GAC and/or individual GAC members' concerns that contradict or circumvent the specific provisions of the Applicant Guidebook, ICANN diverged markedly from the expectations of the Internet community as to how it would interpret and apply the gTLD Applicant Guidebook. In doing so, ICANN failed to satisfy the requirements of fairness, equity, accountability and transparency imposed upon it by its governance documents. The .AMAZON Applications should therefore not have been prevented from proceeding on the basis of GAC advice or individual GAC members' concerns that contradict or circumvent the rules expressly stated in the gTLD Applicant Guidebook.

4. Introduction to ICANN and the gTLD Applicant Guidebook

- 4.1. ICANN is a California non-profit public benefit corporation responsible for coordinating “the allocation and assignment of the three sets of unique identifiers for the Internet”, including “Domain names (forming a system referred to as ‘DNS’),” and “policy development reasonably and appropriately related to” this function.²³
- 4.2. By a resolution of June 26, 2008,²⁴ ICANN’s Board of Directors (the “Board”) adopted the recommendations²⁵ of the Generic Names Supporting Organisation (“GNSO”), the body within ICANN “responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains”,²⁶ supporting the introduction of new generic Top-Level Domains (“gTLDs”) to the DNS (the “New gTLD Program”).
- 4.3. ICANN staff then embarked on implementation of the GNSO’s recommended policy framework. This process progressed from a first draft version of the “gTLD Applicant Guidebook”, dated October 24, 2008,²⁷ to a final version, dated June 4, 2012.²⁸ All references to the gTLD Applicant Guidebook in this report are to the final version 2012-06-04 (the “Guidebook”) unless otherwise stated.

²³ ICANN, Bylaws, *supra* note 8, at Art. I § 1.

²⁴ ICANN, Resolutions: Resolution 2008-06-26 - GNSO Recommendations on New gTLDs, at <https://features.icann.org/2008-06-26-gnso-recommendations-new-gtlds>.

²⁵ ICANN Generic Names Supporting Organisation, Final Report on the Introduction of New Generic Top-Level Domains (Aug. 8, 2007), at <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fi-part1-08aug07.htm> (“GNSO Final Report”).

²⁶ ICANN Bylaws, *supra* note 8, at Art. X § 1.

²⁷ ICANN, New gTLD Program: Draft Applicant Guidebook (Draft RFP) (Oct. 24, 2008), at <http://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

²⁸ ICANN, Guidebook, *supra* note 17.

4.4. The Guidebook is organized into six “Modules”. Module 1 provides an “Introduction to the gTLD Application Process”.²⁹ Module 2 “describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”³⁰ Module 2 is followed by an Annex entitled “Separable Country Names List”,³¹ an Attachment entitled “Sample Letter of Government Support”, and an Attachment entitled “Evaluation Questions and Criteria”. Module 3 deals with objection procedures and “describes two types of mechanisms that may affect an application”: “[t]he procedure by which ICANN’s Governmental Advisory Committee may provide GAC Advice on New gTLDs” and “[t]he dispute resolution procedure triggered by a formal objection to an application by a third party”, including by the Independent Objector.³² Module 3 is followed by an Attachment entitled “New gTLD Dispute Resolution Procedure”. Module 4 “describes situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”³³ Module 5 “describes the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.”³⁴ Finally, Module 6 sets out the Top-Level Domain Application Terms and Conditions.

4.5. The Guidebook thus sets out sequentially the rules relevant to each step in the process of creating a new gTLD. An applied-for gTLD that successfully completes evaluation by satisfying the criteria set out in Module 2 and that avoids or achieves a successful outcome in the objection and dispute resolution and string contention resolution processes set out in Modules 3 and 4, respectively, progresses to the processes set out in Module 5, leading to entry into the DNS root zone. Specific provisions of each Module relevant to the .AMAZON Applications will be identified and discussed in detail in the subsequent paragraphs of this report.

5. The .AMAZON Applications should not have been prevented from proceeding by an Early Warning made by GAC members on the basis of governments’ claims to inherent, exclusive or priority rights in the name “Amazon”.

²⁹ *Id.*, at 1-2.

³⁰ *Id.* at 2-2.

³¹ The Annex is found in the Guidebook two pages after the page identified 2-35.

³² ICANN, Guidebook, *supra* note 17, at 3-2 (emphasis in original).

³³ *Id.* at 4-2.

³⁴ *Id.* at 5-2.

5.1. Module 1 of the Guidebook provides the GAC with the option of issuing a “GAC Early Warning notice” to provide an “applicant with an indication that the application is seen as potentially sensitive or problematic by one or more governments.”³⁵ Module 1 additionally provides that issuance of a GAC Early Warning notice “is not a prerequisite to” the GAC providing the Board with consensus advice “that a particular application should not proceed”.³⁶ On November 20, 2012, GAC representatives of Brazil and Peru raised an “Early Warning” against the .AMAZON application.³⁷ Brazil supported this notice with reference to “[t]he principle of protection of geographic names”.³⁸ International law does not, however, recognize such a principle, whether through the doctrines of sovereignty or statehood, intellectual property rights, laws recognising names of source and origin, or unfair competition law. Each of these potential bases of legal rights is explored in turn in the subsequent paragraphs.

5.2. The .AMAZON Applications should not be prevented from proceeding on the basis of inherent sovereign rights.

5.2.1. International 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.³⁹ Rather, the default legal rule is that a State does *not* have the right to control the use outside its borders even of its own name, much less the name of a sub- or supra-national region that may be identified as being situated within that State’s territory (or within the territory of several States). In particular, as relevant here, there is no State that has any pre-existing right of ownership or control over the use of the name “Amazon” as a gTLD, or for any other purpose.

5.2.2. There is no sovereign right of ownership or exclusive use by a State of the name by which it is formally or informally referred. Sovereignty and statehood do not comprise or confer specific rights in a name.⁴⁰ The widely accepted⁴¹

³⁵ *Id.* at 1-7.

³⁶ *Id.* at 1-11.

³⁷ ICANN, GAC Early Warning –Submittal Amazon-BR-PE-58086 (Nov. 20, 2012), at <https://gacweb.icann.org/display/gacweb%5B%7D+Early+Warnings?preview=/27131927/27197933/Amazon-BR-PE-58086.pdf> (“Early Warning”).

³⁸ *Id.* at 3.

³⁹ *Id.*

⁴⁰ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 170-189.

⁴¹ *Id.* at n.645, quoting Restatement (Third) of the Foreign Relations Law of the United States (1987) § 201 comment a.

definition of “State” provided by Article 1 of the Montevideo Convention on Rights and Duties of States,⁴² which is reflected in the definition of “State” in § 201 of the Restatement (Third) of Foreign Relations Law of the United States,⁴³ makes no mention of a name, and having a name or rights in a name is not essential to any of the Convention’s four stated criteria of statehood.⁴⁴ A State’s possession of a legal personality is not contingent upon having a name; while names are customarily used, they are not necessary to entering into legal relations with other legal persons (including other States) or admission to the United Nations.⁴⁵ The Rules of the International Court of Justice do not specifically require that a *name* be used to “indicate the party making” a claim or “the State against which the claim is brought” in that Court,⁴⁶ and it is no barrier to bringing a claim that the territory that is the subject of a dispute is not referred to by a single, agreed-upon name.⁴⁷ Sovereignty can plausibly be understood, subject to Article 2(7) of the Charter of the United Nations,⁴⁸ to be exercised in the voluntary selection and use of a country name within State borders; attempts to control other States’ adoption or use of a name, by contrast, may be inconsistent with the basic principles of sovereignty.⁴⁹

5.2.3. As there is no such sovereign right of States to country names, it logically follows that there is no specific sovereign right of States giving ownership or exclusive use of sub-national geographic names, including the names of counties, cities, regions or geological features such as ports and waterways. This

⁴² Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Dec. 26, 1933, entered into force Dec. 26, 1934), 165 L.N.T.S. 19, Art. 1: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”

⁴³ “Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”

⁴⁴ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 172-173.

⁴⁵ See *id.* at 174-175.

⁴⁶ International Court of Justice, Rules of Court (adopted Apr. 14, 1978, entered into force Jul. 1, 1978), Art. 38(1) (“When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.”).

⁴⁷ See, e.g., *Island of Palmas Case (or Miangas)*, Hague Court Reports 2d. 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829 *cited in* Forrest, *Protection of Geographic Names*, *supra* note 2, at n.656.

⁴⁸ Charter of the United Nations, Art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”). See Forrest, *Protection of Geographic Names*, *supra* note 2, at 178-179.

⁴⁹ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 178-179.

must be so, because recognition of exclusive rights in sub-national geographic names would be entirely unworkable given the high probability of overlapping interests. It is relevant here to note that Uniform Domain Name Dispute Resolution Policy (“UDRP”) panels have rejected governments’ claims to sovereign or intrinsic exclusive rights in sub-national geographic names used as second-level domain names.⁵⁰

5.2.4. Further, no treaty, custom or general principle of international law recognizes a sovereign right of States to ownership or exclusive use of supra-national geographic names such as macro-geographic regions and inter-State geological features. Again, such a rule would be unworkable given the inevitability of overlapping interests, as illustrated by such examples as the Himalaya mountain range, which is situated in the territories of India, Nepal, Bhutan, China and Pakistan; the Columbia River, which flows through Canada and the United States; the “Cataratas Iguazú” (Iguazu Falls), which are situated in the territories of Brazil and Argentina; and the Pacific Ocean, which borders more than sixty countries and territories. Applying the last of these examples, international law does not provide any of those sixty countries and territories with the right to prevent the use of the name “Pacific” by any other of those countries and territories, or indeed any other party, notwithstanding the fact that the Pacific Ocean is the largest ocean on the planet with 135,663 kilometers of coastline⁵¹ along which millions of people live and work, is “a major contributor to the world economy”,⁵² and provides a home to tens of thousands, or even hundreds of thousands, of species.⁵³

⁵⁰ See, e.g., *Port of Helsinki v. Paragon Int’l Projects Ltd.*, WIPO Case No. D2001-0002 (Feb. 12, 2001), <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0002.html> (“The Panel cannot agree with the contention that a unique geographical name should be considered as belonging to the legal authority of the geographical area in question under the Policy.”); *City of Hamina v. Paragon Int’l Projects Ltd.*, WIPO Case No. D2001-0001 (Mar. 12, 2014), at <http://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0001.html> (“The Administrative Panel takes definite exception to the Complainant’s view that rights to a unique geographical name should, evidently as a matter of principle, be regarded to belong to the owner of the geographical area in question.”). See generally, Heather Ann Forrest, “Domain Name Allocation and Government Super-Prioritization: Lessons Learned from the UDRP Keep ICANN Out of the Business of Deciding What Is or Is Not a Country” (2015) 18(1) VANDERBILT J. ENT. & TECH. L. 1 (“Lessons Learned from the UDRP”).

⁵¹ United States Government, Central Intelligence Agency: The World Factbook – Pacific Ocean (last updated Feb. 11, 2016), at <https://www.cia.gov/library/publications/the-world-factbook/geos/zn.html>.

⁵² *Id.*

⁵³ The “First Census of Marine Life” conducted in 2010 reported on findings of “33,000 known species in Australian waters” alone, constituting “only 10–20 percent of estimated total species”. Census of Marine Life, “First Census of Marine Life: Highlights of a Decade of Discovery” (2010), at <http://www.coml.org/pressreleases/census2010/PDF/Highlights-2010-Report-Low-Res.pdf>, 11.

5.2.5. In summary, as there are no recognized sovereign rights of ownership or exclusive use of national, sub-national, or supra-national geographic names, there is no State that has such rights in the name “Amazon.” The .AMAZON Applications therefore should not have been prevented from proceeding by an Early Warning notice under Module 1 of the Guidebook on the basis of sovereign rights of any country in the name “Amazon”.

5.3. The .AMAZON Applications should not have been prevented from proceeding on the basis of intrinsic intellectual property rights of any country in the name “Amazon”.

5.3.1. International intellectual property law does not provide States with intrinsic rights in geographic names. It is important to note as a starting point that geographic names are not per se “intellectual property”, as that term is defined by the Convention Establishing the World Intellectual Property Organization.⁵⁴ Except for the specific legal category of geographical indications and related source-identifying names (discussed in paragraphs 5.4.1 through 5.4.3 below), geographic names are not identified as falling within the scope of the major multilateral treaties on intellectual property: the Trade Related Aspect of Intellectual Property Rights Agreement (“TRIPS Agreement”), the Paris Convention for the Protection of Industrial Property (“Paris Convention”), and the Berne Convention for the Protection of Literary and Artistic Works.⁵⁵

5.3.2. International law has since the Paris Convention of 1883 recognized rights in trademarks; names also fall within the scope of “signs” protectable as a trademark under TRIPS Agreement Art. 15(1). Neither the TRIPS Agreement or Paris Convention nor other multilateral trademark treaties of global effect expressly prohibit the registration as a trademark of signs constituting geographic names. A trademark application cannot be automatically refused on the basis that the applied-for mark has a geographic significance; the harmonized global standard of trademark registrability provided by TRIPS Agreement Art. 15(1) requires that a sign be distinctive. This recognizes that signs can have or acquire multiple meanings in the consumer’s mind and encourages competition and differentiation in the marketplace.

⁵⁴ Convention Establishing the World Intellectual Property Organization (July 14, 1967, entered into force Apr. 26, 1970), 828 U.N.T.S. 3. See Forrest, *Protection of Geographic Names*, *supra* note 2, at 148.

⁵⁵ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 146-148.

5.3.3. International trademark law also does not differentiate between public and private trademark applicants or owners or prioritize public trademark applicants or owners. An intrinsic trademark right (indeed, an intrinsic sovereign right⁵⁶) of States in country names is refuted by the precise language of Art. 6*ter* (1)(a) and 1(b) of the Paris Convention: country names are conspicuously absent from the language of Art. 6*ter* (1)(a), which removes from trademark eligibility member States' emblems, while names are expressly specified in Article 6*ter* (1)(b), which protects international intergovernmental organizations' emblems, abbreviations and names. Relying on the principle of *expressio unius est exclusio alterius*, the World Intellectual Property Organization ("WIPO") has interpreted Art. 6*ter* (1)(a) and 1(b) as not providing "an existing legal basis for the protection of country names in the DNS".⁵⁷ This conclusion can be extended to sub-national names on the basis of the intentions, recognized by WIPO's Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, behind Art. 6*ter*.⁵⁸

5.3.4. Notably, proposals raised in the 1980 Diplomatic Conference for the Review of the Paris Convention⁵⁹ and reintroduced in 2009⁶⁰ to revise Article 6*ter* (1)(a) to include country names have not been successful and have not resulted in amendments to that Convention or any other multinational treaty of global

⁵⁶ WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, "Article 6*ter* of the Paris Convention: Legal and Administrative Aspects", WIPO Doc. SCT/15/3 (Oct. 14, 2005) ("SCT/15/3"), 4 (explaining the reason for exclusion from trademark registration or use as being "that registration or use of such emblems would encroach upon the right of the State concerned to control the use of the symbols of its identity and sovereignty.").

⁵⁷ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 162 & n.599, quoting WIPO, "The Recognition of Rights and the Use of Names in the Internet Domain Name System: Report of the Second WIPO Internet Domain Name Process" (Sep. 3, 2001) ("WIPO II Report"), ¶ 281, at <http://www.wipo.int/export/sites/www/amc/en/docs/report-final2.pdf>.

⁵⁸ WIPO, SCT/15/3, *supra* note 56, at 4 ("The negotiations at the 1925 Revision Conference of The Hague give evidence of the intention of the States party to the Paris Convention to include, in the protection resulting from Article 6*ter*(1)(a), the emblems of States included in a federal State party to the Paris Convention, as well as escutcheons of reigning houses. It was understood, however, that emblems of lower public bodies, such as provinces or municipalities, should be excluded from the scope of the provision. As to official signs and hallmarks indicating control and warranty, it is to be noted that Article 6*ter*(1)(a) only covers signs and hallmarks that are adopted by the State itself. Their adoption by a lower public body or an organization established under public law would be insufficient for those signs or hallmarks to qualify for protection under Article 6*ter*." (footnotes omitted).

⁵⁹ See WIPO, WIPO II Report, *supra* note 57, at ¶¶ 281-83 (discussing WIPO, *Basic Proposals (Supplement to Document PR/DC/3), Memorandum by the Director General*); WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, *Submission by the Russian Federation*, WIPO Doc. SCT/21/5 (Mar. 2, 2009), at http://www.wipo.int/edocs/mdocs/sct/en/sct_21/sct_21_5.pdf), Annex 1, ¶ 1.

⁶⁰ WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, "Proposal by Jamaica", WIPO Doc. SCT/21/6 (Mar. 30, 2009), at http://www.wipo.int/edocs/mdocs/sct/en/sct_21/sct_21_6.pdf.

effect.⁶¹ Opposition by GAC representatives, whether individually through an Early Warning notice or collectively through GAC consensus advice, on the basis of a “principle of protection of geographic names” does not accurately reflect the current state of international law.⁶² Further, such opposition suggests an attempt to achieve through ICANN what has not been achieved through the bodies empowered to facilitate States’ development of international law, such as WIPO. In terms of international law-making capacity, ICANN is not comparable to WIPO or the World Trade Organization, two international treaty organizations through which member States may agree upon binding international treaties. While ICANN is required by its Articles of Incorporation to carry out its activities in accordance with international law, it is a domestic corporation, not a treaty-based intergovernmental organization.⁶³

5.3.5. An intrinsic, exclusive, or priority trademark right of States under international law is further disproved by countless existing trademarks with geographical significance registered in jurisdictions around the world, such as YUKON,⁶⁴

⁶¹ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 163-167.

⁶² A summary of WIPO work on Art. 6ter and a description of the current practices of WIPO Member States in relation to country names is provided in World Intellectual Property Organization Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, “Revised Draft Reference Document on the Protection of Country Names Against Registration and Use as Trademarks” SCT/34/2 (Oct. 15, 2015), at http://www.wipo.int/edocs/mdocs/sct/en/sct_34/sct_34_2.pdf (reporting a variety of approaches across member States to the use and registration of the names of States as trademarks, with more than half of responding States indicating, *inter alia*, that the names of States are not excluded from use as trademarks).

⁶³ See ICANN, Articles, *supra* note 13, at Art. 4 (“The Corporation 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 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.”). On the role of non-State actors in international law and Internet DNS norm generation, *see generally*, Forrest, *Protection of Geographic Names*, *supra* note 2, at 129-137.

⁶⁴ See, e.g., United States Registered Trademark 4555562, registered by Champagne Edition Inc.; United States Registered Trademark 4041327, registered by Great Lakes Industrial Controls, Inc.

SAHARA,⁶⁵ YOSEMITE,⁶⁶ ANDES,⁶⁷ TAHOE,⁶⁸ RIVIERA,⁶⁹ EVEREST,⁷⁰ and EVERGLADES.⁷¹

5.3.6. In summary, opposition to the .AMAZON Applications on the basis of intrinsic priority or exclusive intellectual property rights is not supported by international law. In fact, such opposition may be viewed as an attempt to secure through ICANN processes rights that are not recognized in international law in the face of unsuccessful attempts to have such rights recognized in legitimate fora and through other means. ICANN is not itself a State; as such, it is not empowered to create international law.⁷² International law does not currently recognize an intrinsic intellectual property right of Brazil, Peru, or any other State in the name “Amazon”; the .AMAZON Applications therefore should not have been prevented from proceeding on the basis of intrinsic intellectual property rights of any country in the name “Amazon”.

5.4. The .AMAZON Applications should not have been prevented from proceeding on the basis of laws recognizing source- or origin-identifying names.

5.4.1. Source- and origin-identifying geographic names are separately recognized under international law as geographical indications, indications of source and appellations of origin.⁷³ Different scopes of protection apply to each of these, with some degree of overlap: all “appellations of origin”, as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their

⁶⁵ See, e.g., German Registered Trademark 934795 and 1104062, registered by KCL GmbH; German Registered Trademark 2007950, registered by Zimmermann-Graeff & Müller GmbH & Co. KG

⁶⁶ See, e.g., United Kingdom Registered Trade Mark UK00002001590, Hi-Tec Sports PLC.

⁶⁷ See, e.g., Australian Registered Trade Mark 1513133, registered by Johnson Health Tech Co., Ltd.

⁶⁸ See, e.g., Canada Registered Trade Mark TMA635347, registered by Tracker Marine, L.L.C.; Canada Registered Trade Mark TMA407216, registered by Motors Liquidation Company; Canada Registered Trade Mark TMA665248, registered by Kohler Co.; Canada Registered Trade Mark TMA793914, registered by AZEK Building Products, Inc.

⁶⁹ See, e.g., European Community Trade Mark EU000509281, registered by Riviera (Société par Actions Simplifiée).

⁷⁰ See, e.g., Japan Registered Trade Mark 1457495; Japan Registered Trade Mark 4700632; Japan Registered Trade Mark 4974382.

⁷¹ See, e.g., European Community Trade Mark EU008720435, registered by Elbeka Electro B.V.

⁷² See, e.g., *The Case of the S.S. ‘Lotus’*, Ser. A., no. 10, p. 18 P.C.I.J. 18 (P.C.I.J. 1927) (“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”), quoted in Forrest, *Protection of Geographic Names*, *supra* note 2, at 119.

⁷³ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 191-213.

International Registration,⁷⁴ are considered to fall within the TRIPS Agreement's Art. 22(1) definition of "geographical indications", while at the same time are also "considered to be a *species* of the *genus* 'indications of source'",⁷⁵ as defined by the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods.⁷⁶ Notably, all of these sources of legal rights, plus the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications,⁷⁷ stem from the use of names in connection with goods, which led WIPO to conclude that these rights do not support a blanket rule restricting their use as second-level domain names.⁷⁸ This conclusion applies with equal force to the use of geographical indications and related names as gTLDs.

5.4.2. It is further notable that the name "Amazon" is not registered in the Lisbon International System of Appellations of Origin⁷⁹ by any of the twenty eight States (including Peru) signatory to the Lisbon Agreement.⁸⁰

5.4.3. The .AMAZON Applications therefore should not have been prevented from proceeding on the basis of claims to inherent rights of any country in the name "Amazon" arising from international laws recognizing geographical indications, appellations of origin or indications of source.⁸¹

5.5. Unfair competition law does not provide States with exclusive or priority rights in geographic names that could be called upon to prevent the .AMAZON Applications from proceeding under the Guidebook.

⁷⁴ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Oct. 31, 1958, entered into force Sep. 25, 1966), 923 U.N.T.S. 205.

⁷⁵ Georg Hendrik Christiaan Bodenhausen, *Guide to the Application of the Paris Convention for the Protection of Industrial Property as revised at Stockholm in 1967* (United Bureaux for the Protection of Intellectual Property, 1968) (emphasis in original), *quoted in* Forrest, *Protection of Geographic Names*, *supra* note 2, at 194.

⁷⁶ Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, Art. 1(1) (Apr. 14, 1891), 828 U.N.T.S. 163.

⁷⁷ Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (adopted May 20, 2015, not yet in force).

⁷⁸ WIPO, WIPO II Report, *supra* note 57, at ¶¶ 237-245.

⁷⁹ See WIPO, Search Appellations of Origin (Lisbon Express), at www.wipo.int/ipdi/en/search/lisbon/search-struct.jsp.

⁸⁰ See WIPO, WIPO-Administered Treaties: Contracting Parties, Lisbon Agreement (Total Contracting Parties: 28), at www.wipo.int.

⁸¹ This conclusion is consistent with those reached by Professor Jérôme Passa, in Report of Professor Jérôme Passa, (Mar. 31, 2014), at <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>, 9 ("In conclusion, there is no rule of the law on geographical indications which obliges ICANN to reject the application for reservation of the gTLD 'amazon' filed by the Amazon company due to the existence of the geographical name of the Amazonia region.").

5.5.1. Private parties' control of domain names having geographical significance is permitted by Art. 10*bis* of the Paris Convention, which obligates States to ensure "effective protection against unfair competition". This is particularly clear where the domain name in question is a trademark; gTLDs comprising trademarks serve the various purposes of unfair competition law, which include promoting honesty in commercial dealing, promoting and protecting investment by business, promoting competition and efficiency in the marketplace, and protecting consumers.⁸² Decisions under ICANN's UDRP finding rights or legitimate interests of a private registrant in geographic second-level domain names and the existence of countless geographic second-level domain name registrations in the global DNS support this conclusion.⁸³

5.5.2. The Paris Convention gives three concrete examples of prohibited acts of unfair competition, and assigning a gTLD does not implicate any of them. Pursuant to Paris Convention Art. 10*bis* (3), the use of a gTLD cannot reasonably be found per se likely to create a likelihood of confusion "with the establishment, the goods, or the industrial or commercial activities" of a national government, as a "competitor", under Art. 10*bis* (3)(i). Nor can all gTLDs having a geographic significance be considered per se "allegation[s]" as required by Art. 10*bis* (3)(ii), as this would be inconsistent with the ordinary meaning of "allegation" and wrongly impute to all new gTLD applicants disparaging intent.⁸⁴ Finally, Art. 10*bis* (3)(iii) is not relevant to gTLDs given its restriction to misleading use in connection with goods.⁸⁵

5.5.3. Thus, principles of unfair competition law do not support States' claims to inherent exclusive or priority rights in geographic names. Rather, those

⁸² See Forrest, *Protection of Geographic Names*, *supra* note 2, at 217-226, citing, *inter alia*, WIPO, "Protection Against Unfair Competition: Analysis of the Present World Situation", WIPO Publication No. 725(E) (1994), 10.

⁸³ See, e.g., Junta de Andalucía Consejería de Turismo, Comercio y Deporte. Turismo Andaluz, S.A. v. Andalucía.Com Limited, WIPO Case No. D2006-0749 (Oct. 13, 2006), at <http://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-0749.html> ("where, as here, a respondent is using a geographic indication to describe his product/business or to profit from the geographic sense of the word without intending to take advantage of complainant's rights in that word, then the respondent has a legitimate interest in respect of the domain name"); Her Majesty the Queen in right of her Government in New Zealand v. Virtual Countries, Inc., WIPO Case No. D2002-0754 (Nov. 27, 2002), <http://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0754.html> (the "Panel would have required a lot more evidence than the Complainant has put before the Panel to persuade it that the Respondent has no rights or legitimate interests in respect of the Domain Name"). See generally, Forrest, "Lessons Learned from the UDRP", *supra* note 50.

⁸⁴ Forrest, *Protection of Geographic Names*, *supra* note 2, at 239-241.

⁸⁵ *Id.* at 241-243.

principles support the use of trademarks as gTLDs for the benefit of consumers and trademark owners. Indeed, if private control of geographic names in the DNS were considered to fall within Paris Convention Art. 10*bis*, this would invalidate ICANN's approval and delegation of numerous new gTLDs that have geographic significance.⁸⁶ The .AMAZON Applications should therefore not have been prevented from proceeding on the basis of inherent exclusive or priority rights of any country in the name "Amazon" arising under unfair competition law.

5.6. In conclusion, international law does not recognize an inherent right of States in geographic names through sovereignty or statehood, intellectual property law, laws recognizing geographical indications, appellations of origin, or indications of source, or unfair competition law. On the contrary, the recognition of private parties' rights through intellectual property law, laws recognizing geographical indications, appellations of origin, indications of source, and unfair competition law inherently disproves any claim of States to exclusive rights in geographic names.

The .AMAZON Applications therefore should not have been prevented from proceeding by an Early Warning relying upon GAC members' claims to sovereign or other inherent rights in the name "Amazon".

6. The .AMAZON Applications should not have been prevented from proceeding on the grounds that "Amazon" is a restricted geographic name under Module 2 of the gTLD Applicant Guidebook.

6.1. The Guidebook provides two definitions of geographic names that may be restricted from becoming new gTLDs: one for "Country or Territory Names", and one for "Geographic Names Requiring Government Support". Those definitions are clear and determinate. "Amazon" does not fall within the scope of either definition. As a result, the .AMAZON Applications should not have been prevented from proceeding on the grounds that the name "Amazon" falls within either of those definitions.

⁸⁶ Examples include CASINO (Casino, New South Wales, Australia); CHRISTMAS (Christmas, Florida, USA; Christmas, Michigan, USA; Christmas, Mississippi, USA); COOL (Cool, California, USA; Cool, Texas, USA); IPIRANGA (Ipiranga River and District, São Paulo, Brazil); LASALLE (LaSalle, Montreal, Canada); GLADE (Glade, British Columbia, Canada); RUGBY (Rugby, United Kingdom; Rugby, New South Wales, Australia); DUNS (Duns, Scotland, United Kingdom); CODES (Codes, Spain); WARMAN (Warman, Saskatchewan, Canada); MONASH (Monash, Australian Capital Territory, Australia; Monash, South Australia, Australia); LOTTE (Lotte, North Rhine-Westphalia, Germany); ROCHER (Rocher, Ardèche, France); and BAND (Band, Mures, Romania).

- 6.2. As noted in paragraph 4.4 above, Module 2 of the Guidebook “describes the evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”⁸⁷ This process, referred to as “Initial Evaluation”, “consists of two types of review”: “String review” and “Applicant review”.⁸⁸ String review is composed of three “elements”, the third of which is relevant to the subject matter of this report: “Whether evidence of requisite government approval is provided in the case of certain geographic names.”⁸⁹ The rules relevant to this element are contained in section 2.2.1.4, which is headed “Geographic Names Review”. The Guidebook makes clear that the rules set out in section 2.2.1.4 are intended to be mandatory: it describes them as “[t]he requirements and procedures ICANN *will follow* in the evaluation process.”⁹⁰
- 6.3. The treatment of geographic names is bifurcated under heading 2.2.1.4: section 2.2.1.4.1 deals with “Country or Territory Names”, while section 2.2.1.4.2 deals with “Geographic Names Requiring Government Support”.
- 6.4. The definition of “Country or Territory Names” is set out in paragraphs i through vii in section 2.2.1.4.1. “A string shall be considered to be a country or territory name if:”
- i. it is an alpha-3 code listed in the ISO 3166-1 standard.
 - ii. it is a long-form name listed in the ISO 3166-1 standard, or a translation of the long-form name in any language.
 - iii. it is a short-form name listed in the ISO 3166-1 standard, or a translation of the short-form name in any language.
 - iv. it is the short- or long-form name association with a code that has been designated as “exceptionally reserved” by the ISO 3166 Maintenance Agency.
 - v. it is a separable component of a country name designated on the “Separable Country Names List,” or is a translation of a name appearing on the list, in any language. See the Annex at the end of this module.
 - vi. it is a permutation or transposition of any of the names included in items (i) through (v). Permutations include removal of spaces, insertion of punctuation, and addition or removal of grammatical articles like “the.” A transposition is

⁸⁷ ICANN, Guidebook, *supra* note 17, at 2-2.

⁸⁸ *Id.* at 2-4.

⁸⁹ *Id.*

⁹⁰ *Id.* at 2-16 (emphasis added).

considered a change in the sequence of the long or short-form name, for example, “RepublicCzech” or “IslandsCayman.”

vii. it is a name by which a country is commonly known, as demonstrated by evidence that the country is recognized by that name by an intergovernmental or treaty organization.⁹¹

6.5. In applying this definition of “Country or Territory Names” to the applied-for

strings .AMAZON, .亚马逊 and .アマゾン, I have reviewed the ISO 3166-1 “English country names and code elements” standard⁹² and conclude that “Amazon” in English, Chinese and Japanese: (1) is not a 3-letter code listed in that standard; (2) is not a long-form name listed in that standard; and (3) is not a short-form name listed in that standard. I am not aware of “Amazon” being a translation of the long-form or short-form name in any language of any long- or short-form name listed in the ISO 3166-1 standard.

“Amazon” in English, Chinese or Japanese is also not the long- or short-form name associated with any code designated as “exceptionally reserved” by the ISO 3166 Maintenance Agency.⁹³ “Amazon” is not listed in the Annex to Module 2 entitled “Separable Country Names List” in connection with Brazil,⁹⁴ Peru,⁹⁵ or any other country or territory on that list. The name “Amazon”, comprising only one word and containing no spaces, punctuation or grammatical articles, is not a “permutation” of any of the names included in items (i) through (v) of the definition set out in section 2.2.1.4.1. The name “Amazon” is likewise not a “transposition”, as it comprises only one word and thus cannot be sequentially modified as in the examples provided in paragraph (vi). Finally, I

⁹¹ *Id.* at 2-16 to 2-17.

⁹² This standard allocates two-letter “country codes” to the official name of each of the countries listed in the United Nations Terminology Bulletin Country Names and the Country and Region Codes for Statistical Use of the United Nations Statistics Division. See ISO, Online Collection: Country Codes, at <https://www.iso.org/obp/ui/#iso:pub:PUB500001:en>. See generally, Forrest, *Protection of Geographic Names*, *supra* note 2, at 46.

⁹³ ISO, Online Browsing Platform (search – Country Codes: Other codes: Other code types: Exceptionally reserved), at <https://www.iso.org/obp/ui/>. See also, ISO, Glossary for ISO 3166 - Codes for countries and their subdivisions, at http://www.iso.org/iso/country_codes_glossary.html (defining “exceptionally reserved codes” as “codes that have been reserved for a particular use at special request of a national ISO member body, governments or international organizations. For example, the code UK has been reserved at the request of the United Kingdom so that it cannot be used for any other country.”).

⁹⁴ The Separable Country Names List entry for Brazil set out in the Guidebook as an Annex to Module 2 contains three entries for Brazil: Fernando de Noronha Island, Martim Vaz Islands, and Trinidad Island. Each of these is identified as “Class C”, which is explained as follows: “The ISO 3166-1 Remarks column containing synonyms of the country name, or sub-national entities, as denoted by ‘often referred to as,’ ‘includes’, ‘comprises’, ‘variant’ or ‘principal islands’.” Classes are further explained as having hierarchical significance: “if a term can be derived both from Class A and Class C, it is only listed as Class A.”

⁹⁵ The Separable Country Names List set out as an Annex to Module 2 of the Guidebook contains no entries connected with Peru.

am not aware through my study of international law, which includes such issues as the recognition of statehood and membership in the United Nations,⁹⁶ of any evidence of any country or territory being commonly known by the name “Amazon”, nor has my review of materials associated with the .AMAZON Applications, including the Early Warning lodged by Brazil and Peru,⁹⁷ disclosed any such evidence. I therefore conclude that the string “.AMAZON” does not fall within the definition of “Country or Territory Names” in section 2.2.1.4.1 of the Guidebook. My conclusion is consistent with the Initial Evaluation Reports of the .AMAZON Applications, which notify Amazon that its applications have successfully passed Initial Evaluation⁹⁸ and state, in relevant part: “The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.”⁹⁹

6.6. Module 2 of the Guidebook provides at section 2.2.1.4.4 for a “Geographic Names Review Panel” to “determine whether each applied-for gTLD string represents a geographic name”.¹⁰⁰ It is important to note that the Guidebook mandated that all applications, not only those self-designated by applicants as constituting geographic names, were evaluated by the Geographic Names Panel.¹⁰¹ The Guidebook provides the following clear and unequivocal assurance to applicants whose applications have been determined not to constitute a “geographic name” as defined by the Guidebook: “For any application where the GNP [Geographic Names Panel] 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*.”¹⁰² I am not aware of any attempt having been made by any party to challenge

⁹⁶ See Forrest, *Protection of Geographic Names*, *supra* note 2, at 170-188.

⁹⁷ ICANN, Early Warning, *supra* note 37.

⁹⁸ “Congratulations! Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.” ICANN, New gTLD Program: Initial Evaluation Report (Jul. 12, 2013), at <http://newgtlds.icann.org/en/program-status/application-results/ie-1-1315-58086-en.pdf>; ICANN, New gTLD Program: Initial Evaluation Report (Mar. 22, 2013), at <http://newgtlds.icann.org/en/program-status/application-results/ie-1-1318-83995-en.pdf>; ICANN, New gTLD Program: Initial Evaluation Report (Apr. 5, 2013), at <http://newgtlds.icann.org/en/program-status/application-results/ie-1-1318-5591-en.pdf> (together, the “IE Reports”).

⁹⁹ *Id.*

¹⁰⁰ ICANN, Guidebook, *supra* note 17, at 2-20 to 2-21.

¹⁰¹ *Id.* at 2-16 (“All applied-for gTLD strings will be reviewed according to the requirements in this section, regardless of whether the application indicates it is for a geographic name.”); *Id.* at 2-21 (“The GNP will review all applications received, not only those where the applicant has noted its applied-for gTLD string as a geographic name.”).

¹⁰² *Id.* at 2-21 (emphasis added).

the determination of the Geographic Names Panel in respect of the .AMAZON Applications.

6.7. Section 2.2.1.4.2 of the Guidebook next defines geographic names which “must be accompanied by documentation of support or non-objection from the relevant governments or public authorities”:¹⁰³

1. An application for any string that is a representation, in any language, of the capital city name of any country or territory listed in the ISO 3166-1 standard.
2. An application for a city name, where the applicant declares that it intends to use the gTLD for purposes associated with the city name.

City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected. However, the process does provide a means for cities and applicants to work together where desired.

An application for a city name will be subject to the geographic names requirements (i.e., will require documentation of support or non-objection from the relevant governments or public authorities) if:

- (a) It is clear from applicant statements within the application that the applicant will use the TLD primarily for purposes associated with the city name; and
 - (b) The applied-for string is a city name as listed on official city documents.
3. An application for any string that is an exact match of a sub-national place name, such as a county, province, or state, listed in the ISO 3166-2 standard.
 4. An application for a string listed as a UNESCO region or appearing on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list.¹⁰⁴

¹⁰³ *Id.* at 2-17 and 2-18.

¹⁰⁴ *Id.* at 2-17 to 2-18 (footnote omitted) (emphases in original).

6.8. At no other place in Module 2 or elsewhere in the Guidebook is this list expanded upon.

On the contrary, the statement which immediately precedes this list (“*The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities.*”¹⁰⁵ (emphasis added)) confirms that Module 2 section 2.2.1.4.2 provides a closed list upon which applicants should base their applications. This can be differentiated from, for example, the list of instruments embodying general principles of international law for the purposes of the Limited Public Interest Objection, which is introduced in section 3.5.3 of Module 3 as “[e]xamples of instruments containing general principles include:” and followed by: “Note that these are included to serve as examples, rather than an exhaustive list.”¹⁰⁶

6.9. In applying the definition of section 2.2.1.4.2 to the applied-for strings .AMAZON, .アマゾン and .アマゾン, I have reviewed the ISO 3166-1 standard and conclude that “Amazon”

is not a representation in English, Spanish, Portuguese, or to my knowledge any other language, of the name of the capital city of Brazil,¹⁰⁷ Peru,¹⁰⁸ or any other country or territory identified in the ISO 3166-1 standard. I have reviewed the .AMAZON Applications, which do not at any point expressly or impliedly identify “Amazon” as a city name or declare an intention to use the .AMAZON gTLD for purposes associated with a city name. On the contrary, the .AMAZON Applications unambiguously identify “Amazon” as a well-known trademark and the declared intention to use the .AMAZON gTLD is for purposes associated with this trademark. Thus even if a city named “Amazon” exists, the .AMAZON Applications do not make “clear from applicant statements within the application” that they reference such a city or are for “purposes associated with” such a city.

6.10. I have additionally reviewed the ISO 3166-2 standard of the names of principal subdivisions of countries coded in ISO 3166-1¹⁰⁹ and conclude that neither “AMAZON”, “アマゾン”, nor “アマゾン” is “an exact match” of the name of any subdivision of any

¹⁰⁵ *Id.* at 2-17.

¹⁰⁶ *Id.* at 3-20 to 3-21.

¹⁰⁷ The capital of Brazil is Brasília.

¹⁰⁸ The capital of Peru is Lima.

¹⁰⁹ ISO notes that “codes denoting the subdivision are usually obtained from national sources and stem from coding systems already in place in the country”. ISO, Glossary for ISO 3166, *supra* note 93.

country or territory identified in that standard, including Brazil and Peru.¹¹⁰ I note here the letter dated December 24, 2013 from Fernando Rojas Samanez, Vice Minister of Foreign Affairs of Peru, to the Chairman of ICANN's Board of Directors, Dr Steve Crocker.¹¹¹ This letter highlights "the department of Amazonas, located in Peru", and its inclusion in the ISO 3166-2 standard. While the Guidebook does not define "exact match", the use of this phrase in section 2.2.1.4.2 must be interpreted in light of, and therefore contrasted with other provisions of, the section 2.2.1.4 in which it falls. Notably, categories ii, iii and v under 2.2.1.4.1 refer to "translations",¹¹² while category 1 under 2.2.1.4.2 provides for "a representation, in any language".¹¹³ Category vii in the definition of "Country or Territory Names" in section 2.2.1.4.1 also provides for "commonly known" names.¹¹⁴ The phrase "exact match" does not in this context have the meaning Mr Rojas Samanez implies. Rather, "exact match" is correctly interpreted in this context as requiring a determination as to whether the precise name "Amazon" appears in the ISO 3166-2 standard as the name of any subdivision of any country or territory identified in that standard. It does not do so. If translations were to be included in this category of name, this would have been expressly stated in the Guidebook as was done elsewhere in the two definitions of section 2.2.1.4.

- 6.11. Interpreting "exact match" as encompassing translations of the name of any subdivision of any country or territory identified in the ISO 3166-2 standard is also not consistent with the following instruction provided at the end of the section 2.2.1.4.2 definition of "Geographic Names Requiring Government Support": "Strings that include but do not match a geographic name (as defined in this section) will not be considered geographic names as defined by section 2.2.1.4.2, and therefore will not require documentation of government support in the evaluation process."¹¹⁵ The requisite "match" in the context of category 3 of section 2.2.1.4.2, "any string that is an exact

¹¹⁰ See ISO, Online Browsing Platform (select Country Names), at <https://www.iso.org/obp/ui/#>. I note in particular that "Amazon" is not an "exact match" of the name of the Brazilian state identified in the Portuguese language as "Amazonas" (<https://www.iso.org/obp/ui/#iso:code:3166:BR>); the Peruvian region identified in the Spanish language as "Amazonas", also identified in the Quechua language as "Amarumayu" and the Aymara language as "Amasunu" (<https://www.iso.org/obp/ui/#iso:code:3166:PE>); the Colombian department identified in the Spanish language as "Amazonas" (<https://www.iso.org/obp/ui/#iso:code:3166:CO>); or the Venezuelan state identified in the Spanish language as "Amazonas" (<https://www.iso.org/obp/ui/#iso:code:3166:VE>).

¹¹¹ Letter from Fernando Rojas Samanez, Vice Minister of Foreign Affairs of Peru, to Mr Steve Crocker, Chair, ICANN Board (Dec. 24, 2013), at <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-24dec13-en.pdf>.

¹¹² ICANN, Guidebook, *supra* note 17, at 2-16.

¹¹³ *Id.* at 2-17.

¹¹⁴ *Id.* at 2-16 to 2-17.

¹¹⁵ *Id.* at 2-18.

match of a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard” (emphasis in original), is an “exact match”. The plain meaning of “exact” as defined in the Oxford English Dictionary is: “Not approximated in any way; precise.”¹¹⁶ The name precisely identified in the ISO 3166-2 standard is “Amazonas”; the Amazon Applications are for the name “Amazon”, which is not “Amazonas”. As such, category 3 in the definition of “Geographic Names Requiring Government Support” in section 2.2.1.4.2 of the Guidebook does not implicate the name “Amazon”, and further, the use of the name “Amazon” as a gTLD does not preclude an application for “Amazonas”, “Amarumayu,” or “Amasunu” as a gTLD.

6.12. Having contrasted the use of the term “exact match” in category 3 of the definition in section 2.2.4.1.2 of the Guidebook and the use of the term “match” in the instructions provided at the end of the section 2.2.1.4.2, it should for completeness be considered whether the use of the term “match” (as opposed to “exact match”) in the instructions widens any of categories 1, 2, or 4 to include the name “Amazon”. For category 1 “capital city name”, I have concluded above “Amazon” is not a representation in English, Spanish, Portuguese, or to my knowledge any other language, of the name of the capital city of Brazil, Peru, or any other country or territory identified in the ISO 3166-1 standard, and additionally conclude that the name “Amazon” is not similar to the capital city name of Brazil, Peru, or any other country or territory identified in the ISO 3166-1 standard. My conclusion in analyzing category 2, “city name”, above is also unaffected, as even if a city named “Amazon” exists, the .AMAZON Applications do not make “clear from applicant statements within the application” that they reference such a city or are for “purposes associated with” such a city.

6.13. Finally, for category 4 “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings” list, none of .AMAZON, 亚马逊 or .アマゾン is identified as a UNESCO region or is similar to any of the five identified UNESCO “regional groups”,¹¹⁷ nor does the name “Amazon” or any name similar to “Amazon” appear on the “Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other

¹¹⁶ Oxford Dictionaries, British & World English: exact, at <http://www.oxforddictionaries.com/definition/english/exact>. I note that the definition in American English is the same. See Oxford Dictionaries, US English: exact, at http://www.oxforddictionaries.com/definition/american_english/exact.

¹¹⁷ ICANN, Guidebook, *supra* note 17, at 2-18, citing UNESCO, Worldwide: UNESCO Regions, at <http://www.unesco.org/new/en/unesco/worldwide/>.

groupings” list.¹¹⁸ I therefore conclude that the .AMAZON Applications do not fall within the definition of “Geographic Names Requiring Government Support” in section 2.2.1.4.2 of the Guidebook. This conclusion is consistent with the Initial Evaluation Reports of the .AMAZON Applications, which as noted above state in relevant part: “The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.”¹¹⁹ As I have noted in paragraph 6.6 above in the conclusions to my evaluation under Guidebook section 2.2.1.4.1, I am not aware of any attempt having been made by any party to challenge the determinations of the Geographic Names Panel in respect of the .AMAZON Applications. This conclusion is also consistent with the 2010 resolution of the ICANN Board on the use of the ISO 3166-2 standard made during the Applicant Guidebook drafting process: “Sub-national place names: Geographic names protection for ISO (International Organization for Standardization) 3166-2 names should not be expanded to include translations. Translations of ISO (International Organization for Standardization) 3166-2 list entries can be protected through community objection process [sic] rather than as geographic labels appearing on an authoritative list.”¹²⁰

6.14. Section 2.2.1.4.2 places the responsibility of interpreting the definition it contains first and foremost on new gTLD applicants: “In the event of any doubt, it is in the applicant’s interest to consult with relevant governments and public authorities and enlist their support or non-objection prior to submission of the application, in order to preclude possible objections and pre-address any ambiguities concerning the string and applicable requirements.”¹²¹ Reliance on existing, externally maintained international standards and external lists prudently reduces the degree of “doubt” that applicants face in interpreting the definition provided by section 2.2.1.4.2. As a practical matter, interpreting section 2.2.1.4.2 of the Guidebook as placing all applications into “doubt” renders the use of these lists, the Geographic Names review, and the entirety of section 2.2.1.4 of the Guidebook irrelevant and redundant.

6.15. Further, interpreting section 2.2.1.4.2 of the Guidebook as placing all applications into “doubt” would render the entire New gTLD Program unworkable and ineffective, as is suggested by the comments in the definition itself, as quoted above, highlighting brand

¹¹⁸ *Id.*, citing <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

¹¹⁹ ICANN, IE Reports, *supra* note 98.

¹²⁰ ICANN, Resolutions: 2010-09-25 - New gTLDs - Directions for Next Applicant Guidebook (Sep. 25, 2010), at <https://features.icann.org/2010-09-25-new-glds-directions-next-applicant-guidebook>.

¹²¹ ICANN, Guidebook, *supra* note 17, at 2-18.

and generic use of city names.¹²² Certainly, if “city names are not universally protected”, other sub-national names commonly used as brands or generic terms can also not workably be “universally protected” against private use as a gTLD. The expansion of the Internet could be brought to a standstill by the potential characterization of all names as geographic.¹²³

6.16. The “Early Warning notice” made by the GAC representatives of Brazil and Peru against the .AMAZON application¹²⁴ raised the concern “that the application for the ‘.AMAZON’ gTLD has not received support from the governments of the countries in which the Amazon region is located.”¹²⁵ The Guidebook makes clear, however, that its section 2.2.1.4 is determinative on the issue of geographic names requiring government support,¹²⁶ and the Geographic Names Panel unambiguously concluded that the .AMAZON “application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.”¹²⁷ It is therefore irrelevant to the Initial Evaluation of the .AMAZON Applications that those applications were submitted without an expression of support or non-objection from the governments of Brazil and Peru, or any other governments. The applications for .AMAZON, .アマゾン or .アマゾン did not require an expression of support or non-objection from any government under the applicable rules.

6.17. Another concern raised by the governments of Brazil and Peru in their Early Warning notice against the .AMAZON application is that the name “Amazon” “matches part of the name, in English, of the ‘Amazon Cooperation Treaty Organization’.”¹²⁸ The existence of this treaty is irrelevant for the purposes of the Geographic Names Panel’s review, as treaty names are not provided for in either the definition of “Country or Territory Names” or “Geographic Names Requiring Government Support” in section 2.2.1.4 of the Guidebook. This concern therefore had no relevance to and correctly had no effect on the

¹²² *Id.* at 2-17 (“City names present challenges because city names may also be generic terms or brand names, and in many cases city names are not unique. Unlike other types of geographic names, there are no established lists that can be used as objective references in the evaluation process. Thus, city names are not universally protected.”).

¹²³ This would include reversing the delegations of many new gTLDs, including those identified in n. 86 above.

¹²⁴ ICANN, Early Warning, *supra* note 37.

¹²⁵ *Id.* at 1.

¹²⁶ ICANN, Guidebook, *supra* note 17, at 2-17 (“The following types of applied-for strings are considered geographic names and must be accompanied by documentation of support or non-objection from the relevant governments or public authorities”).

¹²⁷ ICANN, IE Reports, *supra* note 98.

¹²⁸ ICANN, Early Warning, *supra* note 37, at 1.

findings of the Geographic Names Panel, and thus the .AMAZON Applications' outcome in Initial Evaluation under Module 2 of the Guidebook.

6.18. In summary, the .AMAZON Applications were determined through the procedures set out in the Guidebook not to comprise strings constituting a “geographic name” as defined therein. My independent analysis of the Guidebook and application of section 2.2.1.4 to the .AMAZON Applications concurs with those determinations. I am not aware of any attempt having been made by any party to challenge those determinations. The Guidebook makes clear that an application that passes the Geographic Names Review will be subject to “no additional steps”.¹²⁹ The .AMAZON Applications therefore should not have been prevented from proceeding on the basis of their having failed Initial Evaluation under Module 2 of the Guidebook, and in particular, the Geographic Names review.

7. The .AMAZON Applications should not have been prevented from proceeding on the grounds that they failed to satisfy the requirements of Modules 3 and 4 of the gTLD Applicant Guidebook.

7.1. The Guidebook identifies for applicants “what is required of them and what they can expect [of ICANN] at each stage of the application evaluation process.”¹³⁰ Figure 1-1 in Module 1 of the Guidebook specifies that the next steps for applications following completion of the “Initial Evaluation” processes of Module 2 are “Extended Evaluation”, “Dispute Resolution” and “String Contention”.¹³¹ By the pictorial use of dotted lines, each of these three next steps is communicated as being steps “that may or may not be applicable in any given case”.¹³²

7.2. “Extended Evaluation” is explained in section 1.1.2.8 of Module 1 of the Guidebook as being “available only to certain applicants that do not pass Initial Evaluation.”¹³³ This step in the gTLD application process can be dealt with summarily here, because the .AMAZON Applications were each determined to have passed Initial Evaluation.¹³⁴ Therefore, the .AMAZON Applications were not and should not have

¹²⁹ ICANN, Guidebook, *supra* note 17, at 2-21.

¹³⁰ *Id.* at 1-2. *See also* ICANN, Pamphlet, *supra* note 1 (describing the Guidebook as “a step-by-step guide for future applicants for a new gTLD to understand what to expect during the application and evaluation periods and how the process works.”).

¹³¹ ICANN, Guidebook, *supra* note 17, at 1-4.

¹³² *Id.* at 1-3 to 1-4.

¹³³ *Id.* at 1-11.

¹³⁴ *See* ICANN, IE Reports, *supra* note 98.

been prevented from proceeding on the basis of requiring or failing to pass the “Extended Evaluation” process set out in Module 1 of the Guidebook.

7.3. “String Contention” refers to “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”¹³⁵ Specifically, “[s]tring contention occurs when either: 1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or 2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.”¹³⁶ This is the subject of Module 4 of the Guidebook. This step in the gTLD application process can also be dealt with summarily here, because neither of these two string contention situations arose in relation to any of the .AMAZON Applications. Specifically, no application for a string “identical” to .AMAZON, .アマゾン or .アマゾン was lodged or “successfully complete[d] all previous stages of the evaluation and dispute resolution processes”. Secondly, no similar application was lodged or “identified as creating a probability of user confusion if more than one of the strings is delegated.” The .AMAZON Applications therefore could not legitimately have been prevented from proceeding on the grounds that they failed to satisfy the requirements of Module 4 of the gTLD Applicant Guidebook.

7.4. “Dispute Resolution” is the subject of Module 3 of the Guidebook, which is headed “Objection Procedures”. As noted in the introductory section of this report, this module “describes two types of mechanisms that may affect an application”: “[t]he procedure by which ICANN’s Governmental Advisory Committee may provide GAC Advice on New gTLDs” and “[t]he dispute resolution procedure triggered by a formal objection to an application by a third party”.¹³⁷ Both mechanisms are relevant to the .AMAZON Applications; each will be analyzed in detail in the paragraphs that follow. To aid comprehension of the interrelationship in the use of these mechanisms against the .AMAZON Applications, I first consider the Community Objections filed by Professor Alain Pellet acting as the Independent Objector,¹³⁸ and then the advice

¹³⁵ ICANN, Guidebook, *supra* note 17, at 4-2.

¹³⁶ *Id.*

¹³⁷ *Id.* at 3-2 (emphasis in original).

¹³⁸ Pellet, Independent Objection, *supra* note 16.

provided by the GAC to the Board that the .AMAZON Applications should not proceed.¹³⁹

7.5. The .AMAZON Applications should not have been prevented from proceeding under Module 3 of the Guidebook, as Amazon was not unsuccessful in any formal objection raised against the .AMAZON Applications under that Module.

7.5.1. Module 3 of the Guidebook sets out four “formal objection” grounds applicable to new gTLD applications and specifies that these are the “only” such “formal objection” grounds applicable.¹⁴⁰ These grounds are identified as follows:

- String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.
- Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.
- Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.
- Community Objection – There is a substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.¹⁴¹

7.5.2. The name “Amazon”, in English, Chinese or Japanese, was not at all similar to any of the top-level domains in the DNS prior to the applications period for new gTLDs. As such, it could not be deemed “confusingly similar to an existing TLD”. Consistent with this conclusion, no objection was filed against the .AMAZON Applications on grounds that they were “confusingly similar to an existing TLD”. Next, the name “Amazon”, in English, Chinese or Japanese, is not at all similar to any of the other applications lodged by other applicants in the New gTLD Program.¹⁴² As noted in paragraph 7.3 above in the context of

¹³⁹ ICANN GAC (Governmental Advisory Committee), GAC Register of Advice - 2013-07-18-Obj-Amazon, at <https://gacweb.icann.org/display/GACADV/2013-07-18-Obj-Amazon>.

¹⁴⁰ ICANN, Guidebook, *supra* note 17, at 3-3. *See also, id.*, at P-2. (“The grounds upon which an objection to a new gTLD may be filed are set out in full in Module 3 of the Applicant Guidebook.”).

¹⁴¹ *Id.* at 3-4.

¹⁴² For a complete listing of applications received, *see* ICANN, New Generic Top-Level Domains: New gTLD Current Application Status, at <https://gtdresult.icann.org/application-result/applicationstatus>.

Module 4’s rules on “String Contention”, no application confusingly similar to the .AMAZON Applications was lodged in the New gTLD Program. No objections were filed against the .AMAZON Applications on grounds that they were “confusingly similar to an existing TLD”. The .AMAZON Applications therefore should not have been prevented from proceeding on grounds that they were unsuccessful in any String Confusion Objection under Module 3 of the Guidebook.

7.5.3. Standing to object to an application on grounds of “existing legal rights” is reserved by the Guidebook only to “rightsholders”, which are defined as trademark owners and international intergovernmental organizations.¹⁴³ Notably, no Legal Rights Objections were filed by Brazil, Peru, any other government or any other party against the .AMAZON Applications. The .AMAZON Applications should therefore not have been prevented from proceeding on grounds that they were unsuccessful in any Legal Rights Objection under Module 3 of the Guidebook.

7.5.4. The Limited Public Interest Objection is directed at applied-for names that are “contrary to general principles of international law for morality and public order.”¹⁴⁴ The Guidebook provides a “non-exhaustive list”¹⁴⁵ of “[e]xamples of instruments containing such general principles”:¹⁴⁶

- The Universal Declaration of Human Rights (UDHR)
- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The International Convention on the Elimination of All Forms of Racial Discrimination
- Declaration on the Elimination of Violence against Women
- The International Covenant on Economic, Social and Cultural Rights
- The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

¹⁴³ ICANN, Guidebook, *supra* note 17, at 3-5 and 3-6.

¹⁴⁴ *Id.* at 3-20.

¹⁴⁵ *Id.* at 3-21.

¹⁴⁶ *Id.* at 3-20 to 3-21.

- The International Convention on the Protection of all Migrant Workers and Members of their Families
- Slavery Convention
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention on the Rights of the Child

7.5.5. No objection was filed by Brazil, Peru, any other government, or any other party, including groups, individuals or bodies acting on behalf of or otherwise associated with any region in Brazil, Peru or any other country against the .AMAZON Applications on grounds of Limited Public Interest. Nor did the Independent Objector,¹⁴⁷ despite having explicitly noted the availability to him of that objection.¹⁴⁸ No objection having been raised on Limited Public Interest grounds, the .AMAZON Applications therefore should not have been prevented from proceeding on grounds that they were unsuccessful in such an objection under Module 3 of the Guidebook.

7.5.6. The final ground of objection provided by Module 3 is the “Community Objection”. Section 3.5.4 of Module 3 of the Guidebook sets out “four tests” that an objector must satisfy in order to be successful:¹⁴⁹

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

¹⁴⁷ Objection Form to be Completed by the Objector, Prof. Alain Pellet, Independent Objector (France) v. Amazon EU S.À.R.L. (LUXEMBOURG), CASE No EXP/398/ICANN/15 (“Objection Form”) (checking the box, on page 4, to indicate “Community Objection” but not checking the box to indicate “Limited Public Interest Objection”, with the further note: “Check one of the two boxes as appropriate. If the Objection concerns more than one ground, file a separate Objection.”).

¹⁴⁸ Additional Written Statement of Prof. Alain Pellet, Independent Objector (France) v. Amazon EU S.À.R.L. (LUXEMBOURG), CASE No EXP/398/ICANN/15 (“Additional Statement”), 11 *quoting* ICANN, New gTLD Program Explanatory Memorandum: Description of Independent Objector for the New gTLD Dispute Resolution Process (Feb. 18, 2009), at <http://archive.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf> (“The IO... ‘is intended to address risks to the process by ensuring the proposed TLDs that are clearly encompassed by the limited Community-based and Morality & Public Order objection standards are not entered into the root’”).

¹⁴⁹ ICANN, Guidebook, *supra* note 17, at 3-22.

7.5.7. An objection was filed on community grounds against each of the .AMAZON Applications by Professor Alain Pellet, acting in the role of Independent Objector.¹⁵⁰ Before progressing to an analysis of the Expert’s Determination of these objections, it is helpful first to explain the role of “Independent Objector” (also referred to in the Guidebook as “IO”). The Guidebook provides in Module 3 for the filing of an objection pursuant to that Module by “the IO... against ‘highly objectionable’ gTLD applications to which no objection has been filed.”¹⁵¹ Further: “The IO is limited to filing two types of objections: (1) Limited Public Interest objections and (2) Community objections.”¹⁵² As just noted in paragraph 7.5.5 above, no objection was raised against the .AMAZON Applications on Limited Public Interest grounds. Professor Pellet’s objections against the .AMAZON Applications were on made community grounds; the three objections were consolidated,¹⁵³ presumably pursuant to section 3.4.2 of Module 3 of the Guidebook.¹⁵⁴

7.5.8. In rejecting the Independent Objector’s consolidated objections, Professor Luca G. Radicati di Brozolo, appointed by the International Chamber of Commerce to decide the objections, determined:

7.5.8.1. Although it was not necessary to reach a specific finding on the first element due to the Independent Objector having failed to demonstrate other elements of the objection, Amazon’s submission on “[t]he clear delineation of the community invoked by the IO”¹⁵⁵ was considered to have merit. Professor Luca G. Radicati di Brozolo noted that “the purported community is composed of several different countries and exhibits within itself a considerable diversity in terms of geography, economy, population and bio-diversity. This could rule out the idea of cohesiveness, [sic] that arguably lies at the core of the notion of community and might imply something more than a mere commonality of interests. Furthermore, the IO has not focused particularly on the existence of formal barriers, which is

¹⁵⁰ Pellet, Independent Objection, *supra* note 16.

¹⁵¹ ICANN, Guidebook, *supra* note 17, at 3-10.

¹⁵² *Id.*

¹⁵³ Pellet, Independent Objection, *supra* note 16, at 4 ¶ 4.

¹⁵⁴ ICANN, Guidebook, *supra* note 17, at 3-14 to 3-15 (“Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections. ... An example of a circumstance in which consolidation might occur is multiple objections to the same application based on the same ground.”).

¹⁵⁵ Pellet, Independent Objection, *supra* note 16, at 17.

one of the possible relevant criteria for the clear delineation test. The record is therefore mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied.”¹⁵⁶

7.5.8.2. The Independent Objector failed to demonstrate “substantial opposition” to the .AMAZON Applications by the “Amazon Community”.¹⁵⁷ It was noted that “the Applications triggered only a small number of comments, and that actually the Applications for the Chinese and Japanese translations of ‘Amazon’ triggered none at all.”¹⁵⁸ It was notably also highlighted that neither of the governments of Brazil or Peru made use of the Guidebook’s Module 3 objection processes.¹⁵⁹

7.5.8.3. The Independent Objector demonstrated the requisite “strong association between” the Amazon community (the “clear delineation” of which was nevertheless considered problematic, as described above) and the applied-for strings.

7.5.8.4. The Independent Objector failed to demonstrate the “likelihood of material detriment to a significant portion of the Amazon community”.¹⁶⁰ It was not shown that delegation of the .AMAZON applications would “lead to a loss of the link between the term Amazon and the Amazon region.”¹⁶¹ In other words, use of the names that are *actually* meaningful and significant to the people of the region in question, in their native languages, would not be precluded by delegation of the .AMAZON applications, just as the use of those names has not been precluded by Amazon’s long-standing use of its trademark or the domain name “amazon.com”.¹⁶² In short, Professor Radicati di Brozolo concluded that the delegation of

¹⁵⁶ *Id.* at 18.

¹⁵⁷ *Id.* at 21.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 20-21 (“As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure... [A]s noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant. This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments’ attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed.”).

¹⁶⁰ *Id.* at 21.

¹⁶¹ *Id.* at 23.

¹⁶² *Id.* (“Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would be available. ‘Amazonia’ springs to mind.”).

the .AMAZON applications would not alter the status quo. The community's lack of engagement with the New gTLD Program, whether by filing an application or objecting to the Amazon Applications, was considered significant: this "can be regarded as an indication that the inability to use the Strings is not crucial to the protection of the Amazon Community's interests."¹⁶³ Professor Radicati di Brozolo here also regarded as significant "the lack of serious opposition to the Application by those that might be considered to have the Community's interests at heart",¹⁶⁴ i.e., the governments of Brazil and Peru.

7.5.9. In summary, my conclusions on the application of Module 3 "formal objections" to the .AMAZON Applications are as follows: (1) The only objections to be filed against the .AMAZON Applications under Module 3, the sole source of objections in the New gTLD Program under the Guidebook, were the community objections filed by Professor Alain Pellet, acting as Independent Objector; (2) These objections were unsuccessful and the Expert Determination found in favor of applicant Amazon,¹⁶⁵ and (3) No objections were raised by Brazil, Peru or any other government or party under any of the available objection grounds. The .AMAZON Applications should therefore not be prevented from proceeding on grounds that they were unsuccessful in any "formal objection" under Module 3 of the Guidebook.

7.6. The .AMAZON Applications should not have been prevented from proceeding by GAC Advice to the ICANN Board that contradicts the Expert Determination in the Independent Objector's failed Community Objections under Module 3 of the Guidebook.

7.6.1. Modules 1 and 3 of the Guidebook recognize that the GAC may provide the Board with consensus advice "that a particular application should not proceed".¹⁶⁶ The procedures applying to the provision of this advice are set out in Module 3 of the Guidebook,¹⁶⁷ which describes the purpose of "[t]he process for GAC Advice on New gTLDs" as being "intended to address applications that are identified by governments to be problematic, e.g., that potentially violate

¹⁶³ *Id.*

¹⁶⁴ *Id.*, ¶ 104.

¹⁶⁵ *Id.*

¹⁶⁶ ICANN, Guidebook, *supra* note 17, at 1-11 and 3-3.

¹⁶⁷ *Id.* at 1-11.

national law or raise sensitivities.”¹⁶⁸ The Early Warning notice issued by GAC members Brazil and Peru that preceded the provision of GAC advice that the .AMAZON application should not proceed does not specify any concerns about potential violations of national law.¹⁶⁹ From this it may be concluded that the Early Warning against the .AMAZON Applications was made on the basis of “sensitivities” and, as noted earlier, the concern that the .AMAZON gTLD is for a geographic name.

7.6.2. “Sensitivities” is not clearly defined in any ICANN *consensus* policy, a fact which is acknowledged in a footnote of Module 1 of the Guidebook: “definitive guidance has not been issued”.¹⁷⁰ While the GAC as a whole or individual members may desire that, in the absence of “definitive guidance”, “sensitivities” should be interpreted as covering any matter of concern, including but not limited to such things as “nationality, race, or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group”,¹⁷¹ such a far-reaching interpretation is inconsistent with the Guidebook when read as a whole, especially taking into consideration the Board’s non-acceptance of certain of the GAC’s positions set out in the 2007 GAC Principles on New gTLDs.¹⁷² In other words, the term “sensitivities” should be interpreted consistently with the framework of the Guidebook as approved by the Board.

7.6.3. Firstly, “sensitivities” cannot not logically be interpreted to encompass concerns arising from the fact that an applied-for string constitutes a “geographic name”, as that term is defined in Module 2 of the Guidebook. This is because concerns relating to geographic names are conclusively addressed in the procedures of Module 2 of the Guidebook.

7.6.4. Secondly, the String Confusion, Legal Rights, Limited Public Interest, and Community objections available under Module 3 of the Guidebook as approved by the Board were conceived to encompass concerns relating to “sensitivities”, and indeed mirror the concerns raised in the GAC’s 2007 Principles Regarding

¹⁶⁸ *Id.* at 3-2.

¹⁶⁹ ICANN, Early Warning, *supra* note 37.

¹⁷⁰ ICANN, Guidebook, *supra* note 17, at 1-8.

¹⁷¹ *Id.*

¹⁷² ICANN, GAC Principles Regarding New gTLDs (Mar. 28, 2007), at <https://archive.icann.org/en/topics/new-gtlds/gac-principles-regarding-new-gtlds-28mar07-en.pdf>.

New gTLDs.¹⁷³ This is not to say that governments were required to use the Module 3 objection procedures against an applied-for gTLD, but to the extent that the “sensitivities” of governments are not encompassed by those objection procedures, these should have been raised with specificity.

7.6.5. Concerns about “nationality, race, or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group” are encompassed by the examples of instruments upon which the Limited Public Interest Objection may be based, including for example the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination. To this list one could also add the Convention on the Rights of Persons with Disabilities,¹⁷⁴ the Convention on the Protection and Promotion of the Diversity of Cultural Expressions,¹⁷⁵ the Convention for the Safeguarding of the Intangible Cultural Heritage,¹⁷⁶ the United Nations Declaration on the Rights of Indigenous Peoples,¹⁷⁷ and others. Interpreting “sensitivities” in isolation from and as not already covered by the Module 3 “formal objection procedures” is not logical, as this would render the Module 3 formal objection grounds redundant.

7.6.6. The Module 3 objection procedures were available to any party meeting the standing requirements set out in section 3.2.2 and described in detail in sub-sections 3.2.2.1 through 3.2.2.4.¹⁷⁸ Nowhere in section 3.2.2 or sub-sections 3.2.2.1 through 3.2.2.4 are governments specifically excluded from the standing requirements of the four formal objection grounds. The availability of the four stated objection grounds to governments is confirmed by the observation of

¹⁷³ *Id.* (expressing concern for the respect of the affirmation of “fundamental human rights” in the Universal Declaration of Human Rights, “national”, “cultural” and “religious” identity, “prior third party rights, in particular trademark rights as well as rights in the names and acronyms of inter-governmental organizations (IGOs)”, and avoidance of new gTLDs that are “confusingly similar to existing TLDs”).

¹⁷⁴ Convention on the Rights of Persons with Disabilities (Dec. 13, 2006, entered into force May 3, 2008) U.N. Doc. A/61/611.

¹⁷⁵ Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Dec. 18, 1990, entered into force Mar. 18, 2007) 33C/Res. 42.

¹⁷⁶ Convention for the Safeguarding of the Intangible Cultural Heritage (Oct. 17, 2003, entered into force Apr. 20, 2006) 32C/Res. 32.

¹⁷⁷ United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) G.A. Res. A/RES/61/295.

¹⁷⁸ ICANN, Guidebook, *supra* note 17, at 3-5 to 3-8.

Professor Radicati di Brozolo in his Expert Determination rejecting the Independent Objector's community objections to the .AMAZON Applications that neither the government of Brazil or Peru made use of the Guidebook's Module 3 objection processes,¹⁷⁹ a fact considered material to the failed demonstration of "likelihood of material detriment to a significant portion of the Amazon community".¹⁸⁰

7.6.7. Having left the task of objecting to the .AMAZON Applications to the Independent Objector, the governments of Brazil and Peru, and the GAC as a whole, like all other members of the community of worldwide Internet users on behalf of whom the Independent Objector raised his objection against the .AMAZON Applications, are bound by Professor Radicati di Brozolo's Expert Determination. The Guidebook characterizes Expert Determinations in section 3.4.6 of Module 3 as "final",¹⁸¹ and provides at 3.2: "an objector accepts the applicability of this gTLD dispute resolution process by filing its objection."¹⁸² The Independent Objector is not expressly excluded from this language of section 3.4.6.

7.6.8. Given that the Independent Objector "does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet",¹⁸³ section 3.4.6 of Module 3 of the Guidebook requires that "the public who use the global Internet" accept the applicability of the Module 3 dispute resolution processes. By corollary, this requires that GAC advice that purports to represent or protect the public interest be evaluated by the Board against a conflicting Expert Determination in a community objection raised by the Independent Objector. The Independent Objector himself makes this point in quoting an ICANN Explanatory Memorandum on the role and purpose of the

¹⁷⁹ Pellet, Independent Objection, *supra* note 16, at 20-21 ("As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure... [A]s noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant. This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments' attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed.").

¹⁸⁰ *Id.* at 21.

¹⁸¹ ICANN, Guidebook, *supra* note 17, at 3-16.

¹⁸² *Id.* at 3-4.

¹⁸³ *Id.* at 3-9.

Independent Objector: “The IO... ‘is intended to address risks to the process by ensuring the proposed TLDs that are clearly encompassed by the limited Community-based and Morality & Public Order objection standards are not entered into the root; and that the *risks of entities going outside the process (and potentially seeking to halt the process) are reduced.*’”¹⁸⁴ In this case, the role of the Independent Objector serves to address the risk of the GAC and its members “going outside the process (and potentially seeking to halt the process)”.

7.6.9. Consequently, a conflicting Expert Determination in a community objection raised by the Independent Objector must factor into the weight placed by the Board on GAC advice pursuant to Module 1 of the Guidebook, which provides: “If the Board receives GAC Advice on New gTLDs stating that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved. If the Board does not act in accordance with this type of advice, it must provide rationale for doing so.”¹⁸⁵ “Strong presumption” does not mean automatic rejection; rather, Module 3 of the Guidebook expressly states that “receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).”¹⁸⁶ In the context of applications the subject of an objection by the Independent Objector, “strong presumption” cannot mean automatic rejection or even prioritization of GAC advice because the Expert’s Determination must be taken into account by the Board.

7.6.10. This conclusion is supported by the precise wording of Module 3, section 3.1: “ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.”¹⁸⁷ The concerns raised by Brazil and Peru in the Early Warning notice which subsequently led to GAC advice are “pertinent

¹⁸⁴ Pellet, Additional Statement, *supra* note 148, at 11, *quoting* ICANN, New gTLD Program Explanatory Memorandum: Description of Independent Objector for the New gTLD Dispute Resolution Process (Feb. 18, 2009), <http://archive.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf> (emphasis added).

¹⁸⁵ ICANN, Guidebook, *supra* note 17, at 1-11.

¹⁸⁶ *Id.* at 3-3.

¹⁸⁷ *Id.*

to” the community objection raised by the Independent Objector against the .AMAZON Applications. The Independent Objector justified his community objections in light of the Early Warning provided by Brazil and Peru,¹⁸⁸ in which the comments of Peru make reference to the “social inclusion of its population”,¹⁸⁹ while the comments of Brazil make reference to “peoples, communities, historic heritages and traditional social networks”.¹⁹⁰ The element of community is common to both the Independent Objector’s objection and that Early Warning notice.¹⁹¹

7.6.11. Not only is Professor Radicati di Brozolo’s Expert Determination “pertinent to” the GAC Advice on the .AMAZON Applications, ICANN is bound by section 3.4.6 of the Guidebook to accept his advice: “The findings of the panel will be considered an expert determination and advice that ICANN *will accept* within the dispute resolution process.”¹⁹² To interpret the “sensitivities” upon which the GAC may make advice to the Board as inviting the avoidance of a “pertinent” and directly contradictory Expert Determination is thus inconsistent with the express terms of Module 3 of the Guidebook. The Board’s ability to rely on a “panel of qualified experts” in administering the “independent dispute resolution process”¹⁹³ of Module 3 in fact removes the Board from the need to make subjective determinations.

7.6.12. The Expert Determination made in CASE No. EXP/396/ICANN/13 (consolidated to include Case No. EXP/397/ICANN/14 and Case No. EXP/398/ICANN/15), which dismissed the Independent Objector’s Objections and found the applicant Amazon to be “the prevailing party in all consolidated cases”,¹⁹⁴ serves to limit the weight of or effects that could be given by the Board to GAC advice that is “pertinent to” that determination. The .AMAZON

¹⁸⁸ Pellet, Objection Form, *supra* note 147, at 5 (“The Guidebook further states that ‘[in] light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.’ Comments in opposition to the Application of Amazon S.à.r.l. for the gTLD .AMAZON have been made in the public sphere. The most important comments have been made by the governments of Peru and Brazil through a GAC Early Warning.”) (footnote omitted).

¹⁸⁹ ICANN, Early Warning, *supra* note 37, at 2.

¹⁹⁰ *Id.* at 3.

¹⁹¹ See Pellet, Objection Form, *supra* note 147, at 6 (“In other words, governments could consider that strings raise sensitivity if they focus or target a particular community. It would be odd if the IO, acting in the best interests of the public who use the global Internet, could not rely on such indications in the event a community objection is warranted.”).

¹⁹² ICANN, Guidebook, *supra* note 17, at 3-17 (emphasis added).

¹⁹³ *Id.* at 3-4.

¹⁹⁴ Pellet, Independent Objection, *supra* note 16, at 24.

Applications should, therefore, not have been prevented from proceeding on the basis of GAC Advice that was contradicted by the Expert’s Determination of the Community Objections raised against the .AMAZON Applications by the Independent Objector under Module 3 of the Guidebook.

8. The .AMAZON Applications should not have been prevented from proceeding on the basis of GAC consensus advice or individual GAC members’ concerns that contradict or circumvent the rules of the gTLD Applicant Guidebook.

8.1. The Guidebook identifies for new gTLD applicants “what is required of them and what they can expect [of ICANN] at each stage of the application evaluation process.”¹⁹⁵ Although called a “guidebook”, this instrument was consistently characterized throughout its protracted drafting process as the document upon which new gTLD applicants should base their actions and expectations, as illustrated by an ICANN brochure distributed in 2009, which states: “The Applicant Guidebook is a step-by-step guide for future applicants for a new gTLD to understand what to expect during the application and evaluation periods and how the process works.”¹⁹⁶ The Guidebook is “the implementation of Board-approved consensus policy concerning the introduction of new gTLDs”.¹⁹⁷ The Board fails to act fairly and equitably when it rejects a particular new gTLD application on the basis of an Early Warning or GAC advice that contradicts or avoids the Guidebook.

8.2. The role and extensive involvement of the entire Internet community, and in particular the GAC, in developing the Guidebook is highlighted by the Board in its June 20, 2011 resolution approving the May 30, 2011 version of Guidebook, with provision for “further updates and changes... as necessary and appropriate”:¹⁹⁸

Whereas, on 26 June 2008, the Board adopted the GNSO policy recommendations for the introduction of new gTLDs and directed staff to further develop and complete its implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the Board and community

¹⁹⁵ ICANN, Guidebook, *supra* note 17, at 1-2.

¹⁹⁶ ICANN, Pamphlet, *supra* note 1.

¹⁹⁷ ICANN, Guidebook, *supra* note 17, at 1-2.

¹⁹⁸ ICANN, Resolutions: Resolution 2011-06-20 – Approval of the New gTLD Program (Jun. 20, 2011), at <https://features.icann.org/2011-06-20-approval-new-gtld-program>.

to approve before launching the new gTLD application process

http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171.

Whereas, staff has made implementation details publicly available in the form of drafts of the gTLD Applicant Guidebook and supporting materials for public discussion and comment.

....

Whereas, the Board has conducted intensive consultations with the Governmental Advisory Committee (including in Brussels in February 2011, in San Francisco in March 2011, by telephone in May 2011, and in Singapore on 19 June 2011), resulting in substantial agreement on a wide range of issues noted by the GAC, and the Board has directed revisions to the Applicant Guidebook to reflect such agreement.

....

Whereas, ICANN has consulted with the GAC to find mutually acceptable solutions on areas where the implementation of policy is not consistent with GAC advice, and where necessary has identified its reasons for not incorporating the advice in particular areas, as required by the Bylaws; see <http://www.icann.org/en/minutes/rationale-gac-response-new-gtld-20jun11-en.pdf>.

Whereas, the ICANN community has dedicated countless hours to the review and consideration of numerous implementation issues, by the submission of public comments, participation in working groups, and other consultations.

Whereas, the Board has listened to the input that has been provided by the community, including the supporting organizations and advisory committees, throughout the implementation process.¹⁹⁹

8.3. These statements make it clear that the Guidebook is the product of a lengthy and extensive community process. They further make it clear that the Guidebook, as approved by the Board, constitutes a consensus, and indeed a compromise, on the part of the various stakeholders, including the GAC. The Board notably expressly

¹⁹⁹ *Id.*

acknowledged “areas where the implementation of policy is not consistent with GAC advice”, and in the body of the resolution notes “remaining issues” on which “the Board and the GAC were not able to reach a mutually acceptable solution”.²⁰⁰ The Guidebook’s final text clearly evidences the Board’s having rejected certain GAC 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.”²⁰¹ Notably, the Board’s rationale on “remaining issues” in the Guidebook makes no mention of any inadequacy of the definitions or procedures in respect of geographic names.²⁰²

8.4. The community having “dedicated countless hours”, as the Board notes, to the development of the Guidebook, and the Board having given due consideration to the advice of the GAC in the development of the Guidebook while not adopting that advice in all cases, applicants should reasonably have relied upon the Guidebook as a clear set of rules as to “what is required of them and what they can expect [of ICANN] at each stage of the application evaluation process”.²⁰³ Applicants cannot reasonably have been expected to anticipate the reintroduction of GAC advice not adopted by the Board through the Guidebook as an impediment to applications submitted and evaluated pursuant to the Board-approved Guidebook. In other words, while the Guidebook provides for input by the GAC through the Early Warning process and GAC advice, given the Guidebook’s clear definitions and procedures for applications constituting geographic names, applicants should not reasonably have been expected to anticipate that either an Early Warning notice or GAC advice would directly override or contradict the express terms and conditions of the Guidebook.

8.5. Such an outcome is not consistent with ICANN’s Core Values, which require decision-making “by applying documented policies neutrally and objectively, with integrity and fairness”.²⁰⁴ ICANN’s duties of fairness, transparency and accountability are integral to the Guidebook. In resolving²⁰⁵ to adopt the

²⁰⁰ *Id.*

²⁰¹ ICANN, GAC Principles Regarding New gTLDs, *supra* note 172.

²⁰² ICANN, Rationale: Remaining areas of difference between ICANN’s Board and Governmental Advisory Committee regarding implementation of the New gTLD Program (Jun. 20, 2011), at <https://www.icann.org/en/system/files/bm/rationale-gac-response-new-gld-20jun11-en.pdf>.

²⁰³ ICANN, Guidebook, *supra* note 17, at 1-2.

²⁰⁴ ICANN, Bylaws, *supra* note 8, at Art. I § 2 cl 8.

²⁰⁵ ICANN, Resolutions: Resolution 2008-06-26, *supra* note 24.

recommendations of the GNSO to commence a process of introducing new gTLDs to the DNS,²⁰⁶ the Board adopted GNSO Recommendation 1, which provides: “The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, *no subsequent additional selection criteria should be used in the selection process*”.²⁰⁷ This language is *precisely mirrored* in the 2007 GAC Principles on New gTLDs.²⁰⁸ Where the Board prevents a particular new gTLD application from proceeding on grounds not specified in the Guidebook, it acts inconsistently with its obligations under its governance documents, as well as its acceptance of GNSO Recommendation 9, which relevantly provides: “There must be a *clear and pre-published application process* using *objective* and measurable criteria”.²⁰⁹ Fairness, equity, transparency and objectivity require that the Guidebook procedures be applied as stated and agreed by the Board, not varied or added to based on the preferences of influential actors for a particular outcome.

9. Conclusions

9.1. In this report I have reached the following conclusions:

9.1.1. The .AMAZON Applications should not have been prevented from proceeding by or based on an Early Warning made by certain members of ICANN’s Governmental Advisory Committee under Module 1 of the gTLD Applicant Guidebook on the basis of the respective governments’ claims to inherent, exclusive or priority rights in the name “Amazon”, because such rights are not recognized in international law.

9.1.2. Module 2 of the Guidebook expressly defines geographic names and subjects names falling within that definition to specified restrictions. “Amazon” is not a geographic name falling within that definition. Therefore, ICANN’s Board should not have prevented the .AMAZON Applications from proceeding on

²⁰⁶ ICANN, GNSO Final Report, *supra* note 25.

²⁰⁷ *Id.* (emphasis added).

²⁰⁸ ICANN, GAC Principles Regarding New gTLDs, *supra* note 172, at 3 (“The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency, and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.”).

²⁰⁹ ICANN, GNSO Final Report, *supra* note 25, (emphasis added).

grounds that they comprise a restricted geographic name under Module 2 of the gTLD Applicant Guidebook.

9.1.3. An objection on “community” grounds under Module 3 was raised by Professor Alain Pellet, acting in the role of Independent Objector,²¹⁰ against each of the .AMAZON Applications. These objections were rejected, in favor of applicant Amazon. No other objections were raised against the .AMAZON Applications under Module 3 of the Guidebook. Module 4 does not apply to the .AMAZON Applications because no competing applications for .AMAZON, .アマゾン or .アマゾン were filed. Therefore, the .AMAZON Applications should not have been prevented from proceeding on the grounds that they failed to overcome any objection under Module 3 or are subject to the string contention resolution processes of Module 4.

9.1.4. Module 3 of the Guidebook should not be interpreted as prioritizing or inviting GAC advice that contradicts the Expert’s Determination in a community objection raised by the Independent Objector, who acts “solely in the best interests of the public who use the global Internet”.²¹¹ The .AMAZON Applications should not have been prevented from proceeding on the basis of GAC advice that was “pertinent to”²¹² and contradicted by the Expert’s Determination in the unsuccessful Community objections raised by the Independent Objector against the .AMAZON Applications.

9.1.5. By acting on GAC advice that contradicts and circumvents the Guidebook and, in particular the Expert’s Determination in the Community objection raised by the Independent Objector, to prevent the .AMAZON Applications from proceeding, ICANN has failed to satisfy the requirements of fairness, equity, transparency and accountability imposed upon it by its governance documents. The .AMAZON Applications should not have been prevented from proceeding by GAC consensus advice or individual GAC members’ concerns that are inconsistent with or avoid the rules expressly stated in the gTLD Applicant Guidebook.

Heather Ann Forrest, 26 February 2015



²¹⁰ Pellet, Independent Objection, *supra* note 16.

²¹¹ ICANN, Guidebook, *supra* note 17, at 3-9.

²¹² *Id.* at 3-3.

APPENDIX A

Associate Professor Dr Heather Ann FORREST Curriculum Vitae

CURRENT APPOINTMENTS

Faculty of Law, University of Tasmania (Jan 2016 – present) Associate Professor; (Jan - Dec 2015) Senior Lecturer; (Teaching: Intellectual Property Law, Media Law, Corporations Law)

Murdoch University (June-July 2015) Casual Lecturer (Teaching: Australian and International Intellectual Property Law)

PREVIOUS APPOINTMENTS

Deputy Head of School, Associate Professor and LLB Course Coordinator, Thomas More Academy of Law, Australian Catholic University (Aug 2012 – present, on leave 2015-2016); Associate Dean (Learning and Teaching) and Senior Lecturer (Aug 2012- Dec 2013) (Teaching: Legal Reading, Writing and Research; Commercial Law).

Casual Lecturer, Murdoch University (July 2014) (Teaching: Australian and International Intellectual Property Law)

Senior Domain Name Industry Consultant, AusRegistry International (Aug 2011 – Aug 2012)

Casual Lecturer, Deakin University (Jun – Nov 2012) (Teaching: International Intellectual Property Law)

Casual Lecturer, Australian National University (Feb – July 2010) (Teaching: Legal practice)

Senior Lecturer and Lecturer, University of New England (Feb 2007 – Aug 2011) (Teaching: Intellectual Property Law; International Trade Law; Introduction to Business Law; Advanced Legal Research; Law and Society)

Senior Associate and Associate, Kilpatrick Stockton LLP, London, United Kingdom (Jul 2001 – Jan 2007)

Summer Associate, Holland & Knight LLP, Atlanta, Georgia, USA (Jul 2000)

Summer Associate, Kilpatrick Stockton LLP, Atlanta, Georgia, USA (Jun – Jul 2000)

Teaching Assistant, College of William and Mary School of Law (Aug 1999 – May 2001)

Clerk to the Hon. Susan J Crawford, US Court of Appeals for the Armed Forces (May - Aug 1999)

EDUCATION

Universität Bern, Switzerland – Doctor of Laws, *summa cum laude* (2012)

University of New England, Australia – Graduate Certificate in Higher Education (2010)

University of London, Queen Mary College, UK – Master of Laws (Computer & Communications Law) (2002)

College of William and Mary, Virginia, USA – Juris Doctor (2001)

Clemson University, S. Carolina, USA – Bachelor of Arts, Language & Int'l Trade (*French Hons*) (1998)

HONOURS, AWARDS AND SCHOLARSHIPS

Professor Walther Hug Preis (Switzerland) (2014)
Drapers' Scholarship, The Drapers' Company (2001)
College of William and Mary Fellows Scholarship (2000-2001)
Dean's List & President's List, Clemson University (1996-1998)
Clemson University French Honors Society (1997-1998)
Clemson University Ambassador (1995)

PROFESSIONAL MEMBERSHIPS AND SERVICE

ICANN GNSO Council, member (Oct. 2014 – Nov. 2016)
ICANN GNSO Council, Vice Chair (Non-Contracted Parties House) (Oct. 2015 – Nov. 2016)
ICANN Intellectual Property Constituency, member (2009 - present)
ICANN Working Group on the Use of Country and Territory Names as gTLDs, GNSO Co-Chair and member (2014 – present)
ICANN Study Group on Use of Country and Territory Names, GNSO Observer (2012 - 2013)
Sprout Tasmania, Fork to Fork Committee Member (2015 - present)
Port Philip Council (Melbourne) Gasworks Arts Park Reference Committee (2012 - 2013)
Pro bono legal counsel, London International Festival of Theatre (2004 - 2005)
Clemson University Alumni Representative (2001 - present)

PROFESSIONAL CERTIFICATIONS AND AFFILIATIONS

Licensed Attorney, State Bar of New York, USA (2003 - present)
Member, New York State Bar Association (2003 - present)
Certificat Practique de Français Commercial et Économique

THESES

Protection of Geographic Names under International Law and ICANN Domain Name System Policy (Dr. (ius.)). Analysis of the potential bases of rights in geographic names under international law, including intellectual property, trade, geographical indication protection, unfair competition, human rights and common heritage of mankind, and the recognition of such rights in internet domain name policy.

Computer Software Protection in the Context of Shelf Life and Economic Justifications of Intellectual Property (LL.M.). A comparative doctrinal study of the protection of computer software under copyright, patent and related rights regimes in France and the United States.

Marshall, T (LL.B. Hons II) 2015, 'How does Australia's Anti-Money Laundering and Counter-Terrorism Finance regime deal with Bitcoin transactions and is this effective?'

Holgate, G (LL.B. Hons I) 2015, 'The Sharing Economy and Consumer Protection Law in Australia'.

Dolbey, K (LL.B. Hons I) 2015, 'A behavioural economics and legal analysis of payday lending regulations introduced by the *National Consumer Credit Protection Act 2009* (Cth)'.

Potter, W (PhD) 'Database protection and the impact of technology on Australian copyright law' (conversion from LL.M. (Research), ongoing).

Heath, J (LL.M.) 2012, 'The future of bit torrent technology in Australian and the United States intellectual property law'.

Potter, W (LL.B. Hons I) 2011, 'Illegal harmony: discord between the practice of music borrowing and Australian music copyright law'.

Kudnaogarm, P (PhD) 2009, *Intellectual Property Protection of Thai Traditional Medicine*.

Blackadder, P (LL.B. Hons IIA) 2008, 'Parody is a defence, but it is no laughing matter'.

Cheung, D (LL.M.) 2007: 'Being Willing, Ready and Able and the Prevention Principle'.

PUBLICATIONS

Books

Heather Ann Forrest, *Protection of Geographic Names in International Law and Domain Name System Policy* (Wolters Kluwer, 2013).

Collins, C & Forrest, HA, *Intellectual Property* (2nd ed, LexisNexis Butterworths, 2013).

Collins, C & Forrest, HA, *Intellectual Property* (LexisNexis Butterworths, 2008).

Book Chapters

Heather Ann Forrest, 'The Evolution of Domain Names and their Impacts on Trademark Rights', in *Intellectual Property Governance for the 21st Century: Global Evolution* (Springer, in press).

Heather Ann Forrest, 'Severability of Trademarks and Goodwill under Australian Law', in *Relational rights and responsibilities: Perspectives on contractual arrangements in franchising*, Bond University Press, 2011).

Journal Articles

Heather Ann Forrest, 'Domain Name Allocation and Government Super-Prioritization: Lessons Learned From the UDRP Keep ICANN Out of the Business of Deciding What Is or Is Not a Country' (2015) 18(1) *Vanderbilt Journal of Entertainment and Technology Law* 1.

Heather Ann Forrest, 'Geographic Internet domains: Challenges for the developing DNS' (2014) 1(1) *Australian Journal of Telecommunications and the Digital Economy*.

Heather Ann Forrest, 'Rights protection mechanisms in new gTLDs: The multi-stakeholder governance model at work' (2013) 63(3) *Telecommunications Journal of Australia*.

Wellett Potter and Heather Ann Forrest, 'Musicological and legal perspectives on music borrowing: Past, present and future' (2011) 22 *Australian Intellectual Property Journal* 137.

Heather Ann Forrest, 'The New Frontier: Country Brands and their Legal Status under Australian Trade Mark Law' (2009) 20 *Australian Intellectual Property Journal* 1.

Heather A Forrest and Andrew Terry, 'Where's the beef? Why Burger King is Hungry Jack's in Australia and other complications in building a global franchise brand' (2008) 28(2) *Northwestern Journal of International Law and Business* 171.

Heather Ann Forrest, 'Jurisprudence Meets Epistemology: Facilitating Legal Understanding and Meaningful Learning in Legal Education with Concept Maps' (2008) 18 *Legal Education Review* 73.

Heather Ann Forrest, 'Utility Model: Widening the Economic Divide between "Legacy" and "New" EU Member States' (2004) 32 *International Business Lawyer* 216.

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APPENDIX B

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