

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN'S RESPONSE TO
AMAZON EU S.À R.L.'S REQUEST FOR INDEPENDENT REVIEW PROCESS**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to the Request for Independent Review Process (“IRP Request”) submitted by Amazon EU S.à r.l. (“Amazon”) on 1 March 2016.

1. Amazon challenges the ICANN Board of Directors’ decision to follow the advice of ICANN’s Governmental Advisory Committee (“GAC”) that Amazon’s applications for three generic top-level domains (“gTLDs”) should not be granted. A gTLD is the right-most element of an Internet domain name address, such as “com” in the address <http://www.amazon.com>.

2. In early 2012, Amazon submitted three applications (“Amazon Applications”), one for .AMAZON and one for each of its equivalents in Chinese and Japanese characters.

3. Under the ICANN Bylaws, as well as the Applicant Guidebook (“Guidebook”) governing the process for evaluating applications for new gTLDs, the GAC is responsible for providing advice on ICANN’s activities as they relate to the legal and public policy concerns of governments, and particularly aspects of new gTLDs “that potentially violate national laws or raise sensitivities.”¹ Amazon’s Applications were halted after ICANN accepted the GAC’s advice, reached by consensus of its members, that Amazon’s Applications should not proceed.

4. When Amazon submitted its Applications, it knew they would be evaluated according to the procedures set forth in the Guidebook. The Guidebook stressed the importance of applicants addressing concerns raised by governments, which might lead to the GAC issuing consensus advice against an application. The Guidebook allows the GAC to issue an “Early Warning[, which] should be taken seriously as it raises the likelihood that the application could be the subject of GAC advice on New TLDs.”² Section 3.1 of the Guidebook then describes

¹ Guidebook (4 Jun. 2012 version) § 1.1.2.4, Ex. C-20. The Guidebook is sometimes referred to as the “AGB.”

² Guidebook (4 Jun. 2012 version) § 1.1.2.4, Ex. C-20.

“GAC Advice on New gTLDs” that can follow:

GAC members [i.e. governments] can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.³

That section elaborates on the significant consequence of “consensus advice”:

GAC advice may take one of the following forms:

I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.⁴

5. As described below, the Guidebook’s procedures were followed in full. Amazon was afforded multiple opportunities to present arguments and materials in support of its Applications to both the GAC and the ICANN Board, submitting hundreds of pages of arguments and supporting materials. The GAC deliberated the issues in reaching its decision to issue consensus advice. Upon receiving that advice, the ICANN Board, acting through its New gTLD Program Committee (“NGPC”), independently reviewed the circumstances, in view of submissions made by Amazon and others. After carefully considering (and then, at Amazon’s request, reconsidering) the matter, the Board ultimately decided to accept the GAC consensus advice.

6. While it is understandable that Amazon, faced with “injur[y to its] business model,”⁵ continues to pursue its Applications through the Independent Review Process, Amazon’s arguments should be rejected because:

a. In highlighting the fact that its Applications passed the reviews for geographic names and community objections, Amazon wrongly deprecates the GAC’s separate role in raising governmental concerns about applications. Those concerns led to GAC consensus advice against the Applications, which the ICANN Board evaluated and

³ *Id.* at § 3.1.

⁴ *Id.*

⁵ IRP Request ¶ 7.

ultimately accepted. This meant that Amazon's Applications could not proceed, even though they passed other parts of the evaluation.

b. Despite Amazon's claims that ICANN bowed to "political pressure" from Brazil and Peru⁶ and "abdicated its independent decision-making role,"⁷ the record shows that ICANN's NGPC independently investigated the circumstances, considered extensive arguments made by Amazon, and even commissioned an independent legal expert to advise whether denial of Amazon's Applications was inconsistent with international law – the primary legal contention Amazon was then making. The NGPC was careful, thorough, neutral, and objective in its decision to accept the GAC consensus advice.

c. Amazon's charge of discriminatory treatment, based on approval of two other gTLD applications (remarkably, one was Amazon's) does not involve discrimination at all because no objections were ever made to those two gTLDs, and thus ICANN was never called upon to determine whether any objections to them should be sustained.

d. Amazon's allegation that NGPC members were conflicted from acting on Amazon's reconsideration request is misplaced. The very nature of *re*consideration is that those who decided an issue are asked to consider it a second time, ordinarily based on previously unconsidered information. The fact that the originally deciding members participated in the reconsideration is not a conflict, much less a disqualifying conflict. If that were the rule, the Board would simply be unable to reconsider its decisions.

7. Finally, the relief that Amazon seeks – a binding declaration that its Applications be approved – is not available in this IRP proceeding. IRP panels are limited to declaring whether a Board action was inconsistent with ICANN's Articles of Incorporation or Bylaws, and do not

⁶ IRP Request ¶ 3.

⁷ IRP Request ¶ 7.

have authority to require ICANN's Board to take particular actions.

SUMMARY OF RELEVANT FACTS⁸

I. ICANN

8. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. As set forth in its Bylaws, ICANN's mission "is to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems."⁹ Among these identifiers are the particular top-level domains used in the Internet's domain name system ("DNS"), including the gTLDs.¹⁰

A. The Multistakeholder Approach

9. The policies for assignment and operation of gTLDs draw the interest of many groups, which often have differing priorities. Businesses want names that draw traffic to their websites. Consumers want names they can use to navigate to services they expect. Intellectual-property interests are concerned about trademark infringement and confusion. Privacy advocates are particularly concerned about unwarranted disclosures of personal information. Internet engineers seek a stable DNS environment, without unneeded complexity. And governments by their nature have a broad range of interests ranging from facilitating law-enforcement to promoting economic growth to preserving cultural values. These differing goals are often in tension, presenting challenges in coordinating the DNS to best serve the public interest.

10. ICANN was formed in response to the U.S. Government's 1998 issuance of its Statement of Policy on the Management of Internet Names and Addresses.¹¹ That document laid

⁸ The materials here cited are authenticated and explained in the accompanying Witness Statement of Akram Atallah.

⁹ Bylaws, Art. I, § 1, Ex. R-1. Amazon designated the immediately prior version of the Bylaws as Ex. C-64. There are no differences between the present and immediately prior versions that are material to this proceeding.

¹⁰ In addition to the gTLDs, the Internet domain-name system includes about 250 top-level domains consisting of two characters, which are known as "country-code top-level domains," or ccTLDs.

¹¹ Statement of Policy on Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (5 Jun. 1998), Ex. R-32.

out a framework under which the U.S. Government would be willing to transition its supervision of Internet technical coordination to a to-be-formed organization, now ICANN, allowing multistakeholder participation. ICANN's premise is that all users of the Internet deserve a say in how it is run, and ICANN seeks to consider all points of view, even though they often conflict.

11. Facilitating input from stakeholders around the globe to reach consensus on important issues requires a complex organization. ICANN has an international Board of Directors and over 350 staff members. In addition to the Board (and its many committees), staff, and Ombudsman,¹² ICANN's community includes a Nominating Committee,¹³ three Supporting Organizations,¹⁴ four Advisory Committees,¹⁵ and technical expert advisors,¹⁶ all in addition to thousands of stakeholders who participate in ICANN's processes.

B. Role of the Governmental Advisory Committee (GAC) in ICANN

12. Historically, global coordination of communications technologies (e.g., radio, telephone) has been accomplished by inter-governmental organizations established by treaty. As noted above, ICANN follows a different model embracing participation by private as well as governmental stakeholders. From ICANN's beginning in 1998, it was apparent that special arrangements within the ICANN structure were appropriate to take into account the views of governments seeking to fulfill their ultimate public-policy responsibilities to their citizens.

13. This led to the formation of the GAC as an Advisory Committee to the ICANN Board. Membership in the GAC is open to all national governments and similar entities.¹⁷ Although the Board interacts with all of its advisory committees, ICANN's Bylaws have special provisions

¹² Bylaws, Art. V, Ex. R-1.

¹³ *Id.*, Art. VII.

¹⁴ *Id.*, Arts. VIII-X.

¹⁵ *Id.*, Art. XI.

¹⁶ *Id.*, Art. XI-A, § 2.

¹⁷ For a full explanation of GAC membership, see *id.*, Art. XI, § 2.1.b.

concerning interaction between the Board and the GAC:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.¹⁸

II. DEVELOPMENT OF ICANN'S NEW GTLD PROGRAM

A. Policy Development 2000-2007

14. In its early years, ICANN focused on increasing the number of companies that could sell domain name registrations within the existing gTLDs. ICANN also focused on expanding, although more slowly, the number of companies that operate gTLDs. In 2000, ICANN approved seven gTLDs to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet and the DNS. In 2004 and 2005, ICANN approved a handful of additional TLDs.

15. The New gTLD Program (“Program”) constitutes ICANN’s most ambitious expansion of the Internet’s naming system, by far. The Program’s goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs. The Program arose from policy recommendations of ICANN’s Generic Names Supporting Organization (“GNSO”) developed during the period 2005-2007.¹⁹ This policy was informed by contributions of other ICANN bodies, notably including the GAC.²⁰ On 26 June 2008, the Board adopted the GNSO’s policy recommendations and directed the ICANN staff to

¹⁸ *Id.*, Art. XI, § 2.1.j.

¹⁹ GNSO Final Report on Introduction of New Generic Top-Level Domains, 8 Aug. 2007, Ex. R-33.

²⁰ GAC Principles Regarding New gTLDs, 28 Mar. 2007, Ex. R-34.

develop an implementation plan for the Program, to be provided to the Board for approval.²¹

B. Design of the Program's Implementation 2008-2012

16. The implementation of the Program was developed with input from the ICANN community over several years. ICANN published a first draft of the “Applicant Guidebook”²² in October 2008 and distributed it for public comment. Revisions were made, and additional comments were sought. The process repeated many times until ultimately ICANN went forward with the Program based on the 4 June 2012 (final) version of the Guidebook. Amazon’s Applications were submitted in April 2012, between release of the 11 January 2012 and 4 June 2012 versions, but as Amazon acknowledges,²³ those two versions are not different in any way that is material to the issues involved here.

17. Some of Amazon’s principal arguments are premised on documents issued early in the Program’s development. In the course of the Guidebook drafting process, however, adjustments were made that make key Amazon statements about the Guidebook incorrect.

18. In particular, early versions of the Guidebook provided for objections made by members of the public, but did not specifically address how governments could raise concerns in view of their public-policy responsibilities. As the Guidebook was developed, the GAC’s role in the evaluation of applications was formalized and elaborated. Comments on early drafts of the Guidebook noted that those drafts failed to reflect the special advisory role of the GAC embodied in the Bylaws. Extensive consultations between the Board and the GAC ensued during February-April 2011.²⁴ As a result, in its 15 April 2011 draft, the Guidebook was revised to include an explicit discussion of the GAC’s role in evaluating applications. This role, the

²¹ Resolutions 2008.06.26.02, 2008.06.26.03, Ex. R-35.

²² Guidebook (24 Oct. 2008 version), Ex. R-4.

²³ IRP Request fn. 4.

²⁴ Collected at <https://newgtlds.icann.org/en/about/historical-documentation/board-gac-consultations>.

Guidebook thereafter made clear, is separate from other aspects of the evaluation process, including the Geographic Names Evaluation and the Community Objection process.

19. Among the new provisions added in the 15 April 2011 draft of the Guidebook was Section 3.1, which describes the GAC's special advisory role of giving public-policy advice:

3.1 GAC Advice on New gTLDs

ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.²⁵

20. Later in the Guidebook's development, language was added making clear that *the GAC* could advise on any grounds and that advice would be *handled separately* from the Objection and Dispute Resolution Process described in Section 3.2:

As described in section 3.1 above, ICANN's Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. **The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.**²⁶

²⁵ Guidebook (15 Apr. 2011 version), § 3.1, Ex. R-9.

²⁶ Guidebook (4 Jun. 2012 version), § 3.2, Ex. C-20 (emphasis supplied).

21. Section 3.1, discussing this broadly applicable GAC-advice mechanism explained that the GAC’s advice is particularly potent when given by consensus:

GAC Advice may take one of the following forms:

I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.²⁷

22. That section then elaborates the procedure by which the Board acts on GAC advice:

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.²⁸

23. Moreover, the Guidebook notes that, where the GAC renders advice concerning particular applications, exceptional circumstances may require individual Board attention:

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.²⁹

C. Creation of the New gTLD Program Committee of the Board

24. As the time for gTLD applications approached, the ICANN Board adopted a resolution on 8 December 2011 to ensure that ICANN’s actions on new gTLD applications would be free of conflicts of interest. Resolution 2011.12.08.19 provided that Board members who were either knowingly or potentially advising on, or involved in any way with submitting, any new gTLD application “Will not vote on that application or any related application; Will not participate in any deliberations about that application or any related application; and Will not

²⁷ *Id.* at § 3.1.

²⁸ *Id.*

²⁹ *Id.* at § 5.1.

receive any information about that application or any related application until such information is made public.”³⁰

25. Soon after the application period opened, it became clear that the conflicts policy would require several members of the Board to recuse themselves from consideration of matters concerning new gTLD applications. To accommodate this, on 10 April 2012, the Board established the NGPC, consisting of the Board members that were free of conflicts related to new gTLDs, and delegated to that committee “all legal and decision making authority of the Board relating to the New gTLD Program.”³¹ Thereafter, the NGPC handled all gTLD-Program matters for the Board until the NGPC was decommissioned in October 2015.³²

III. AMAZON’S APPLICATIONS

A. Filing and Initial Evaluation, Including by the Geographic Names Panel

26. Amazon submitted its Applications in April 2012. During March-July 2013, the Amazon Applications received favorable Initial Evaluation Reports. Those reports stated that the Applications passed six initial evaluation steps and thus were “eligible to proceed to the next step in the Program.”³³

27. One of the six initial screens passed by the Applications was a review by the Geographic Names Panel. As to this screen, the Initial Evaluation Reports stated that 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”³⁴ (which states that gTLD names appearing on various lists were either not available, or were only available with support or non-objection of relevant government(s)). Although Amazon witness Heather

³⁰ Board Resolution 2011.12.08.19 (8 Dec. 2011), Ex. R-38.

³¹ Board Resolutions 2012.04.10.01-2012.04.10.04 (10 Apr. 2012), Ex. R-17.

³² Board Resolution 2015.10.22.15 (22 Oct. 2015), Ex. R-18.

³³ New gTLD Program Initial Evaluation Reports for Amazon Applications, Ex. C-24, C-25 & C-37.

³⁴ *Id.*

Ann Forest makes an extensive presentation arguing that the strings Amazon sought were not within the scope of Section 2.2.1.4, that presentation is irrelevant here. Amazon’s Applications failed because of GAC advice, not because they sought strings that were geographic names within the scope of Section 2.2.1.4.

B. The GAC Issues an Early Warning on Amazon’s Application

28. Pursuant to the Guidebook, all applications for new gTLDs are subject to public comment at the outset of the application’s life cycle.³⁵ During the public comment period, the GAC may issue “Early Warning” notices concerning particular applications.³⁶ Under this process, the GAC issued a GAC Early Warning notice concerning the .AMAZON Application in November 2012. The warning, which was issued on behalf of the governments of Brazil and Peru, endorsed by Bolivia, Ecuador and Guyana, summarized its rationale as follows:

Granting exclusive rights to this specific gTLD to a private company would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome. It would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.³⁷

29. An Early Warning notice is not an official GAC statement against an application but indicates to the applicant that one or more governments view the application as potentially problematic.³⁸ As elaborated in the Guidebook:

The GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application. However, **a GAC Early Warning should be taken seriously as it raises the likelihood that the application could be the subject of GAC Advice on New gTLDs (see subsection 1.1.2.7) or of a formal objection (see subsection 1.1.2.6) at a later stage in the process.**³⁹

³⁵ Guidebook (4 Jun. 2012 version), § 1.1.2.3, Ex C-20.

³⁶ *Id.* at § 1.1.2.4.

³⁷ GAC Early Warning – Submittal Amazon-BR-PE-58086, at 1 (20 Nov. 2012), Ex C-22.

³⁸ *Id.*

³⁹ Guidebook (4 Jun. 2012 version), § 1.1.2.4, Ex C-20 (emphasis added).

30. Thus, Amazon was aware soon after submitting its Applications (if not before) that they raised concerns among governments responsible for the Amazon region.

C. Objection and Dispute Resolution Process

31. Under the Program, after Initial Evaluation and the Early Warning notices, applications go through the procedures set forth in Module 3 of the Guidebook. There are two procedures: (a) GAC Advice on New gTLDs (Section 3.1) and (b) Objection and Dispute Resolution Process (Sections 3.2-3.5.4). The Amazon Applications were subject to both. The Objection and Dispute Resolution Process for the Amazon Applications is discussed here first because it began before the GAC issued its advice.

32. Although there are four different types of objections that can be made under the Objection and Dispute Resolution Process,⁴⁰ only one type – Community Objections – were made against Amazon’s Applications. Community Objections are decided by expert panelists appointed by the International Centre for Expertise of the International Chamber of Commerce (“ICC”). Community Objections may be filed by members of the public having standing, as well as by the Independent Objector (“IO”).⁴¹ Professor Alain Pellet, who had been appointed the IO for the Program, submitted Community Objections to Amazon’s Applications as well as 10 other applications.⁴² Under Section 3.2.5 of the Guidebook⁴³, the IO “does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet.” The IO modeled his objections to the Amazon Applications on the grounds stated in the GAC Early Warning notice about the .AMAZON application.

⁴⁰ *Id.* at § 3.2.

⁴¹ *Id.* at § 3.2.5.

⁴² Objection of the Independent Objector to .AMAZON, EXP/396/ICANN/13 (12 Mar. 2013), Ex. R-36. Essentially identical objections were filed to the other Amazon Applications in EXP/397/ICANN/14, EXP/398/ICANN/15.

⁴³ Guidebook (4 Jun. 2012 version), § 3.2.5, Ex C-20.

33. On 27 January 2014, the expert appointed by the ICC dismissed the objections, finding that the IO had failed to prove two of the four required elements⁴⁴ required for a Community Objection. First, the expert found that the IO had not shown that “there is a substantial opposition to the Strings within the community.” As stated in paragraphs 90 and 91 of the Expert Determination for the IO’s Community Objections against the Applications⁴⁵:

90. 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.** The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, **as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms.** As a matter of fact, they engaged in discussions with the Applicant.

91. This is not without significance. Indeed, **had the two Governments seriously intended to oppose the Application, they would presumably 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 [Amazon] 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.** Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

(Emphasis supplied.)

34. The expert also found that the IO had failed to meet his burden of proof to show that “the Applications create a likelihood of material detriment to a significant portion of the Amazon community.” More specifically, the Expert Determination stated in paragraph 100 that:

in and of itself, the failure of the Amazon Community, or of anybody sharing its interests, to apply for the Strings 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.

And again in paragraph 104:

in this case very significant potential consequences are alleged and there are many entities that could have expressed opposition had their interests been threatened. The fact

⁴⁴ The burden of proof and required elements are defined by Guidebook (4 Jun. 2012 version), § 3.5.4.

⁴⁵ Expert Determination of Prof. Luca G Radicati di Brozolo (27 Jan. 2014), Ex. C-47.

that none of them was prompted to raise any objection, whether formally or at least informally, can be taken as a significant indication of lack of likelihood of detriment. It further corroborates the position that the use by the Applicant of the Strings for closed gTLDs cannot impair the interests of the Amazon Community[.]

35. Based on these two failures to meet the burden of proof, the expert dismissed the IO's Community Objections.⁴⁶

D. GAC Consensus Advice on the Amazon Applications

36. As noted above, the Guidebook creates a process for consideration of GAC advice separate from the Objection and Dispute Resolution process. And, as also previously noted, section 3.1 of the Guidebook as finally adopted stated that consensus GAC advice "will create a strong presumption for the ICANN Board that the application should not be approved."⁴⁷

37. Following this process, the GAC extensively considered the concerns of some governments regarding the Amazon Applications. It discussed the concerns at its Beijing meeting in April 2013, but was unable to complete its consideration. At the conclusion of that meeting, the GAC indicated that additional discussions would occur at its July 2013 meeting in Durban, and requested that ICANN not proceed with those Applications beyond initial evaluation until the GAC could complete its work.⁴⁸ In May 2013, Amazon submitted a response to the ICANN Board opposing that GAC advice and objecting to the delay.⁴⁹

38. Shortly before the Durban meeting, Argentina, Brazil, Chile, Peru, and Uruguay submitted a statement for the meeting urging the GAC to advise ICANN that the Amazon Applications be rejected. The United States – while stating concern over sovereignty-based objections to gTLD names – issued a statement that it was "willing in Durban to abstain and

⁴⁶ The Expert Determination also expressed concern about whether the IO had a conflict of interest because he had done legal work in an unrelated matter for Peru. Despite that concern, however, the expert reached the merits as discussed above.

⁴⁷ Guidebook (4 Jun. 2012 version), § 3.1, Ex C-20.

⁴⁸ GAC Beijing Communiqué, at 3, Ex. R-19.

⁴⁹ GAC Advice Response Form for Applicants submitted by Amazon EU S.à r.l, Ex. C-30.

remain neutral onamazon (and IDNs in Japanese and Chinese) . . . , thereby allowing the GAC to present consensus objections on these strings to the Board, if no other government objects.”⁵⁰

39. On 16 July 2013 in Durban, the GAC held a plenary session, open to the public. The concerns raised about the Amazon Applications were discussed at that plenary session. Numerous countries presented comments supporting issuance of advice that the Amazon Applications not proceed, and none dissented from that advice. At the conclusion of the session, the GAC Chair ruled that a consensus had been reached according to GAC operating principles.⁵¹ On 18 July 2013, the GAC presented its communiqué to the ICANN Board, which stated:

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591)”⁵²

40. Two days later, ICANN held a public forum in Durban. During that forum, Stacey King of Amazon, its now-witness Heather Forrest, and other Amazon supporters spoke in opposition to the GAC advice concerning the Amazon Applications.⁵³

IV. NGPC’S CONSIDERATION OF THE GAC ADVICE

A. Gathering Information and Initial Action

41. Amazon was afforded the opportunity to comment in writing on the GAC advice that its Applications not proceed and, on 23 August 2013, Amazon submitted lengthy comments. In addition to opposing the GAC advice, Amazon requested that ICANN “obtain, before it

⁵⁰ U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting (Jul. 2013), Ex. C-34.

⁵¹ Transcript of the GAC Open Plenary session, Durban, South Africa (16 Jul. 2013), Ex. C-40.

⁵² GAC Durban Communiqué, at 3-4 (18 Jul. 2013), Ex. R-22.

⁵³ Transcript of ICANN Public Forum, Durban, South Africa (18 Jul. 2013), Ex. C- 42.

considers the GAC Advice against the AMAZON Applications, independent expert advice on the protection of geographic names in international law generally and the violations of relevant principles of international law and applicable conventions and local law represented by the GAC Advice.”⁵⁴

42. As Amazon had requested, the NGPC commissioned Professor Jérôme Passa to provide independent expert advice on whether principles of international law obligated ICANN to either reject or accept Amazon’s Applications. Professor Passa advised that there were no such principles.⁵⁵ The NGPC afforded Amazon an opportunity to comment on the Passa report, and it did so, agreeing with Passa’s core conclusions but stressing that international trademark law supported its use of “Amazon” and arguing that acceding to the GAC advice would create a “dangerous precedent.”⁵⁶

43. On 14 May 2014, after repeatedly analyzing and deliberating the issues at many meetings, the NGPC adopted Resolution 2014.05.14.NG03 accepting the GAC advice, so that the Amazon Applications would not proceed.⁵⁷

B. Amazon’s Reconsideration Request

44. On 29 May 2014, Amazon requested reconsideration of the NGPC’s 14 May 2014 acceptance of the GAC advice.⁵⁸ Reconsideration is a process set out in ICANN’s Bylaws that permits, among other things, any adversely affected person to seek reconsideration of:

actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's

⁵⁴ Amazon’s GAC Advice Response Form for Applicants, at 12 (23 Aug. 2013), Ex. R-23.

⁵⁵ Independent Report of Jerome Passa (31 Mar. 2014), Ex. C-48.

⁵⁶ Letter from Scott Hayden to Steve Croker, etc., at 1, 2 & 3 (14 Apr. 2014) , Ex. C-51.

⁵⁷ NGPC Resolution 2014.05.14.NG03 (14 May 2014), Ex. C-54. The resolution was without prejudice to continuing dialog between Amazon and GAC members.

⁵⁸ Amazon Reconsideration Request (29 May 2014), Ex. C-59.

consideration at the time of action or refusal to act [or] that are taken as a result of the Board's reliance on false or inaccurate material information.⁵⁹

45. The Board Governance Committee (“BGC”) is charged with evaluating requests that Board actions and inactions be reconsidered and making recommendations to the Board on them.⁶⁰

46. On 22 August 2014, the BGC (one conflicted member abstaining) met, considered a 20-page analysis of Amazon’s reconsideration request, the Passa report, and many other materials, and recommended denial of Amazon’s request.⁶¹

47. On 8 September 2014, the NGPC met to consider the BGC’s recommendation and, after discussion, decided to adopt the BGC’s recommendation to deny Amazon’s reconsideration request.⁶² That decision was accompanied by a detailed rationale⁶³ analyzing each issue raised by Amazon, including most of those it now raises in this IRP. Thereafter, Amazon initiated the current IRP.

STANDARD OF REVIEW

48. The IRP is a unique, non-binding process available under ICANN’s Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN’s Articles or Bylaws.⁶⁴ The IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN’s Articles or Bylaws.⁶⁵ ICANN’s Bylaws specifically define the standard of review applicable to this IRP Panel, focusing on:

⁵⁹ Bylaws, Art. IV, § 2, Ex. C-64.

⁶⁰ *Id.* at § 2.3. The BGC also handles reconsideration requests seeking review of ICANN staff actions.

⁶¹ BGC Recommendation on Reconsideration Request 14-27 (22 Aug. 2014), Ex. C-65.

⁶² NGPC Minutes (8 Sep. 2014), Ex. R-37.

⁶³ *Id.* at 7-19.

⁶⁴ Bylaws, Art. IV, §§ 3.1, 3.2, Ex. C-64.

⁶⁵ *Id.* Art. IV, § 3.4.

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁶⁶

The IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.⁶⁷

49. ICANN has appointed the International Centre for Dispute Resolution (“ICDR”) as ICANN’s IRP Provider. ICANN’s Bylaws and the Supplementary Procedures that the ICDR has adopted specifically for ICANN IRP proceedings apply here.⁶⁸

50. Consistent with ICANN’s Bylaws, the IRP Panel is to issue a written “declaration” designating, among other things, the prevailing party.⁶⁹ The Board will then give serious consideration to the IRP Panel’s declaration and do so, where feasible, at the Board’s next meeting.⁷⁰ To date, the Board has adopted and implemented every IRP panel recommendation.

ARGUMENT

51. Amazon argues that independent review is warranted because, in accepting the GAC advice, the Board: (a) did not act transparently and in accord with Amazon’s expectations; (b) did not apply documented policies neutrally and objectively, and with integrity, fairness and due diligence; (c) discriminated in its treatment of the Applications; and (d) acted with a conflict of interest. None of these arguments is consistent with the actual facts.

⁶⁶ *Id.*

⁶⁷ *Id.*, Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“Booking.com Final Declaration”) ¶ 115 (3 Mar. 2015), Ex. CLA-1.

⁶⁸ Absent a governing provision in ICANN’s Bylaws or the ICDR’s Supplemental Procedures, the ICDR Rules apply. In the event of any inconsistency between the Supplementary Procedures and the ICDR’s Rules, the Supplementary Procedures shall govern. Bylaws, Art. IV, § 3.8, Ex. C-64; *see also* ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process (“Supplementary Procedures”), § 2.

⁶⁹ Bylaws, Art. IV, § 3.18, Ex. C-64.

⁷⁰ *Id.* at § 3.21.

I. ICANN FOLLOWED THE PROCESS SPECIFIED BY THE APPLICANT GUIDEBOOK.

52. Amazon alleges that ICANN did not act “through open and transparent processes” in handling Amazon’s Applications, thereby failing to “respect . . . the reasonable expectations that rules and regulations establish.”⁷¹ Amazon’s Associate General Counsel for Intellectual Property, Scott Hayden, states that it was Amazon’s understanding that “if we complied with the AGB’s requirements and processes, subject to the results of a formal objection or string contention, we would be awarded the right to operate registries for our applied-for gTLDs”⁷² This, Amazon claims, did not occur.

53. But Amazon’s Applications were processed in full accord with the Guidebook. Amazon was given a GAC Early Warning notice about the governmental concerns. The concerns matured into consensus GAC advice against Amazon’s Applications. Rather than addressing these concerns, Amazon told the Board that “GAC Advice should not be used to override years of multistakeholder-created consensus policy that the Guidebook represents.”⁷³

54. Amazon’s narrow view of the GAC’s role, however, is refuted by what the Guidebook actually says. The Guidebook – developed through intense multistakeholder efforts over many years – clearly provided that public-policy concerns raised by governments would be taken into account. It also provided that if those concerns resulted in a GAC consensus that an application should not proceed – even though the application met other requirements such as those involving reviews for geographic names and community objections – the consensus advice would create a “strong presumption” against approval.⁷⁴ Amazon’s argument is simply without merit.

⁷¹ IRP Request ¶¶ 12, 30.

⁷² Scott Hayden Statement ¶ 10.

⁷³ Letter from Scott Hayden to Steve Croker, etc. (14 Apr. 2014) , Ex. C-51.

⁷⁴ Guidebook (4 Jun. 2012 version), § 3.1, Ex. C-20.

II. THE BOARD ACTED CAREFULLY, THOROUGHLY, NEUTRALLY, AND OBJECTIVELY IN EVALUATING AMAZON’S APPLICATIONS AND ULTIMATELY IN ACCEPTING THE GAC’S CONSENSUS ADVICE.

55. In part D(1) of the IRP Request, Amazon alleges that the ICANN Board (acting through the NGPC) did not, in accepting the GAC consensus advice, act neutrally, objectively, and with objectivity and fairness toward Amazon. Part D(3) asserts that the NGPC did not act with due diligence and care. These overlapping attacks on the substance of NGPC’s conduct, as set forth in its stated rationale, should be rejected for multiple reasons.

56. First, Amazon challenges the NGPC’s reference to the Early Warning notice in considering whether to accept or reject the GAC advice. It claims that reliance on such a “politically-motivated” notice shows that the NGPC was biased.⁷⁵ As the NGPC’s detailed written rationale for its initial decision makes clear, however, the Early Warning notice was only one of many documents – including hundreds of pages of submissions, four supplementary letters from Amazon, and Professor Passa’s report – that the NGPC considered in evaluating the concerns raised about the consensus GAC advice. The Early Warning notice was referenced only to illuminate the concerns, as reiterated in the GAC’s public debate at its Durban plenary session, that motivated the consensus that was reached.⁷⁶ Understanding the basis of concerns raised by GAC members does not demonstrate a lack of impartiality toward those concerns.

57. In a related argument, Amazon challenges the NGPC’s lack of any “sort of investigation to evaluate the legitimacy of Brazil and Peru’s positions.”⁷⁷ The available evidence, however, included not only the Early Warning notice, but also statements supported by those and other national governments in letters and in public meetings, as well as the Passa report and

⁷⁵ IRP Request ¶ 43.

⁷⁶ In this regard, Amazon’s complaint that “the GAC provided no supporting rationale for its consensus advice,” IRP Request ¶ 54, is misplaced. The rationale was apparent from the extensive papers and the governmental commentary at the plenary sessions leading to the GAC advice.

⁷⁷ IRP Request ¶ 53.

Amazon’s submissions. The GAC discussed and considered the underlying concerns at their Beijing and Durban meetings, and ultimately reached the consensus to advise that the Applications not proceed. In this way, the GAC fulfilled its institutional role – recognized in ICANN’s Bylaws⁷⁸ and the Guidebook⁷⁹ – as a key advisor to the Board on public policy matters. The NGPC obviously was entitled to consider and give credit to the opinion of many of the world’s governments, achieved by consensus in the GAC, that allowance of the Applications would impair the public interest, especially since Amazon’s showing focused on matters, such as its own trademark rights, that did not speak to the concerns underlying the GAC advice.

58. Amazon also relies on rejection of the IO’s complaint in the Community Objection process, and chastises the NGPC for not giving “due weight” to that rejection.⁸⁰ But the Guidebook establishes the Community Objection process and GAC advice as separate evaluations, and it clearly contemplated that the GAC could advise against applications *on any ground, i.e.*, even if a particular application prevailed in a Community Objection. This was well understood: the Expert Determination rejecting the IO’s objection was based in large part on the fact that the governments of Brazil and Peru had not chosen to oppose *within the Community Objection process*, reflecting the governments’ “belief that their interests can be protected even if the Objection does not succeed.”⁸¹ As the Guidebook provides, the other mechanism for seeking that protection was through the GAC.⁸²

59. Second, Amazon challenges⁸³ the NGPC’s commissioning Professor Passa to give his expert opinion. This attack should be rejected because: (a) in its comments to the NGPC on the

⁷⁸ Bylaws, Art. XI, § 2(1)(a, j), Ex. C-64.

⁷⁹ Guidebook (4 Jun. 2012 version), § 3.1, Ex. C-20.

⁸⁰ IRP Request ¶¶ 44, 55.

⁸¹ Expert Determination of Prof. Luca G. Radicati di Brozolo ¶ 91 (27 Jan. 2014), Ex. C-47.

⁸² Amazon’s argument that the IO’s loss prevented acceptance of GAC advice also ignores that (a) the IO’s role was to act independently, not on behalf of Brazil and Peru, and (b) the advice was the consensus of the GAC’s members, not just Brazil and Peru.

⁸³ IRP Request ¶¶ 45-46; *see also id.* ¶ 56.

GAC advice Amazon *specifically asked* the NGPC to obtain “independent expert advice on the protection of geographic names in international law,”⁸⁴ and (b) Amazon later agreed with Professor Passa’s core conclusions.⁸⁵

60. Further, there is no basis for Amazon’s position that the NGPC, once it sought advice from Professor Passa, was “under an obligation” to have him opine on other matters – including the “principles contained in ICANN’s Articles and Bylaws” and “the various arguments that Amazon advanced in opposition to the GAC advice.”⁸⁶ The Bylaws give the Board/NGPC, not Amazon (or Professor Passa), the responsibility for deciding whether to accept GAC advice, and the Guidebook contemplates that the NGPC will determine what expert advice to obtain that will help in its decision. The NGPC was entitled to ask for the expert advice it needed, and was not obliged to ask for Professor Passa’s advice on other issues not needed for the NGPC to make an independent and informed decision about the GAC advice related to the Amazon Applications.

61. Third, Amazon complains⁸⁷ that the NGPC considered Amazon’s willingness to discuss solutions with Brazil and Peru to be a “negative consideration in deciding to block the Applications.” But the part of the NGPC resolution cited by Amazon shows no “negative consideration” – the NGPC merely noted that Amazon had shown that it had sought to resolve the issue by agreement, as the Guidebook encouraged.

62. Fourth, Amazon alleges that the NGPC “failed to explain what ‘exceptional circumstances’ could possibly justify ‘individual consideration’ of the .AMAZON Applications.”⁸⁸ Notably, however, Section 5.1 of the Guidebook gives “GAC Advice” as the

⁸⁴ GAC Advice Response Form for Applicants submitted by Amazon EU S.à r.l, at 12 (23 Aug. 2013), Ex. R-23.

⁸⁵ Letter from Scott Hayden to Steve Crocker, at 1 (14 Apr. 2014), Ex. C-51; *see also id.* at 2 (stating Amazon never argued “that ICANN is obligated to award us .AMAZON based on intellectual property rights alone.”).

⁸⁶ IRP Request ¶ 56.

⁸⁷ IRP Request ¶ 47.

⁸⁸ IRP Request ¶ 48.

first example of “exceptional circumstances” leading to individual consideration. And, despite Amazon’s complaints about a lack of explanation, the NGPC’s decisions, originally and on reconsideration, described at length the matters considered in reaching the decisions.

III. THE BOARD DID NOT DISCRIMINATE AGAINST AMAZON.

63. Amazon argues that the Board/NGPC discriminated against it because the three TLDs at issue here did not proceed while two others – .YAMAXUN and .IPIRANGA – were allowed.⁸⁹ Amazon argues that this violated the Bylaws’ prohibition of disparate treatment without reasonable cause.

64. There was no disparate treatment. Notably, no objection to the two allowed gTLDs was ever raised. As a result, the applications for those gTLDs were allowed without any Board/NGPC consideration of objections to those applications, which is how the Guidebook states applications without issues generally will be treated.⁹⁰ One can speculate as to the result if such an objection had been made, but the lack of objection is plainly reasonable cause to treat the Amazon Applications differently from .YAMAXUN and .IPIRANGA.

IV. THE BGC AND NGPC ACTED PROPERLY DURING RECONSIDERATION.

65. Amazon also contends that the BGC acted improperly in recommending against reconsideration of the NGPC’s acceptance of the GAC advice because many BGC members were also members of the NGPC. Amazon claims this was a conflict of interest because “principles of procedural fairness prohibit anyone from rendering a decision in his or her own case.”⁹¹

⁸⁹ *Id.* at ¶¶ 57-60.

⁹⁰ Guidebook (4 Jun. 2012 version), § 5.1, Ex. C-20.

⁹¹ IRP Request ¶ 61.

66. But, of course, accepting the GAC advice did not turn Amazon’s challenge to that acceptance into the Board members’ “own case.”⁹² On its face, the reconsideration section of ICANN’s Bylaws makes actions of the Board subject to “reconsideration . . . by the Board.”⁹³ The very nature of that procedure is that a past decision of the Board will be considered for a second time by the Board.

67. As established in the Bylaws, the BGC operates as a Committee of the Board tasked with investigating in detail reconsideration requests and, when appropriate, making recommendations to the Board.⁹⁴ In so investigating Amazon’s reconsideration request, the Board members on the BGC were not acting on their own case, but on Amazon’s case.

68. In 2012, the Board established the NGPC, populated it with all Board members not conflicted with respect to the Program, and delegated it full decision making authority concerning the Program. That authority included reviewing and acting on the BGC’s recommendations regarding whether to reconsider prior NGPC decisions.

69. Amazon argues that BGC members did not act impartially because they were motivated to justify their prior decisions on the NGPC.⁹⁵ But a decision maker’s prior involvement in a proceeding does not require recusal from subsequent involvement. For example, as noted by the United States Supreme Court in *Liteky v. United States*, 510 U.S. 540, 555 (1994), “opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” Although the NGPC’s original decision was not to Amazon’s liking,

⁹² As Amazon asserts in IRP Request ¶ 61.

⁹³ Bylaws, Art. IV, § 2(1) (emphasis added), Ex. C-64.

⁹⁴ *Id.* at Art. IV, § 2(3)(1-5 & 7).

⁹⁵ IRP Request ¶ 63.

it certainly did not evince “deep-seated favoritism or antagonism” that would show bias.

70. Finally, it should be noted that Amazon’s position, taken to its logical conclusion, would make reconsideration impossible. Absent preexisting conflicts of interest, Board members are duty-bound to participate in the Board’s work. Reconsideration by the Board inherently involves Board members passing on whether they should change prior decisions they have made. According to Amazon, every reconsideration request would be inherently conflicted.

V. THE REQUESTED RELIEF IS NOT AVAILABLE UNDER AN IRP.

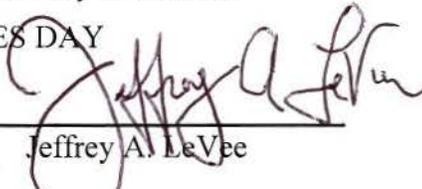
71. Amazon asks that this IRP Panel issue a “binding Declaration” ordering ICANN to “direct ICANN to approve the Applications and to conclude registry agreements in connection therewith.”⁹⁶ Yet, an IRP panel is limited to “declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending that the Board stay any further action until it reviews the opinion of the IRP panel.⁹⁷ As stated in *Vistaprint Limited v. ICANN*, an IRP panel “does not have authority to render affirmative relief requiring ICANN’s Board to take . . . any action or decision.”⁹⁸

CONCLUSION

72. The ICANN Board’s conduct was consistent with ICANN’s Articles and Bylaws. Accordingly and with respect, Amazon’s IRP Request should be denied.

Respectfully submitted,

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Dated: April 13, 2016

⁹⁶ IRP Request ¶ 65.

⁹⁷ Bylaws, Art. IV, § 3.11.

⁹⁸ *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505 (“Vistaprint Final Declaration”) 149 (9 Jul. 2015), Ex. CLA-4.