

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

AMAZON EU S.À.R.L.,

Claimant,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR Case No. _____

REQUEST BY AMAZON EU S.À.R.L. FOR INDEPENDENT REVIEW

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1. Amazon E.U. S.à.r.l (“Amazon”) submits this Request for Independent Review Process (“IRP”) pursuant to Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”), the International Arbitration Rules of the International Centre for Dispute Resolution (“ICDR Rules”), and ICANN’s Supplementary Procedures for Independent Review Process (“Supplementary Procedures”).¹

2. Amazon has suffered and continues to suffer injury and harm directly as a result of ICANN’s breaches of its Articles of Incorporation² (“Articles”), Bylaws,³ and New gTLD Applicant Guidebook⁴ (“AGB”) in blocking Amazon’s applications to operate the following new generic Top-Level Domains (“gTLDs”): .AMAZON, .亚马逊 (Chinese equivalent), and .アマゾン (Japanese equivalent).⁵ (These three gTLD applications are referred to hereinafter as the “Applications” or the “.AMAZON Applications.”)

A. NATURE OF THE DISPUTE

3. Bowing to political pressure from the governments of Brazil and Peru, ICANN’s Board of Directors (the “Board”) stopped the .AMAZON Applications from proceeding. None of the Board’s justifications for its decision withstands scrutiny.

4. First, the Board implicitly characterized the .AMAZON applied-for gTLDs as geographic names. There is no basis for it to have done so. The AGB lists categories of prohibited and restricted geographic names; those categories do not include either “Amazon” or its Japanese and Chinese equivalents. Thus, the Board departed

¹ **The Applicant Guidebook contains a broad waiver of any applicant’s “rights, remedies, or legal claims against ICANN.” That clause underscores the importance of rigorous review by the Panel; if the clause is enforceable, Amazon may have no access to further review. Nonetheless, in requesting the present review proceeding, Amazon reserves all rights to challenge the waiver as void as against public policy, unconscionable, and otherwise unenforceable.**

² ICANN Articles of Incorporation (hereinafter “Articles”) [Ex. C-001].

³ ICANN Bylaws (amended 30 July 2014) (hereinafter “Bylaws”) [Ex. C-064].

⁴ New gTLD Applicant Guidebook (Version 2012-06-04) (hereinafter “AGB”) [Ex. C-020]. The .AMAZON Applications were made in April 2012 prior to the publication of the Applicant Guidebook in its final version of 4th June 2012 and in reliance on the version of the draft Applicant Guidebook dated 11 Jan. 2012 [Ex. C-015], whose relevant provisions are substantially the same of the final version of the AGB.

⁵ New gTLD Application Submitted to ICANN by: Amazon EU S.à.r.l, Appl. No. 1-1315-58086 (Apr. 2012) (hereinafter “.AMAZON Application”) [Ex. C-017]; New gTLD Application Submitted to ICANN by: Amazon EU S.à.r.l, Appl. No. 1-1318-5591 (Apr. 2012) (hereinafter “.亚马逊 Application”) [Ex. C-018]; New gTLD Application Submitted to ICANN by: Amazon EU S.à.r.l, Appl. No. 1-1318-83995 (Apr. 2012) (hereinafter “.アマゾン Application”) [Ex. C-019]. Amazon also applied for a version of its Chinese name transliterated to English: .YAMAXUN. That Application was approved; a Registry Agreement was entered into on 18 December 2014; and the .YAMAXUN gTLD was delegated in October 2015. *See* Witness Statement of Scott Hayden (29 Feb. 2016), ¶ 29, fn.4 (hereinafter “Hayden Statement”).

without explanation or justification from its carefully defined and ICANN community-agreed application and evaluation procedures.

5. Second, the Board indicated that “exceptional circumstances” justified individual treatment of the .AMAZON Applications in the best interests of the global Internet community. However, the Board failed to identify what “exceptional circumstances” allowed it to treat the .AMAZON Applications differently. Moreover, an independent expert appointed by the International Chamber of Commerce rejected the argument that the .AMAZON gTLDs are not in the best interests of the Internet community. The decision is binding on ICANN, but the Board ignored it.

6. Third, the Board inexplicably cited Amazon’s good faith efforts to address the Brazilian and Peruvian government’s concerns, even though ICANN itself encouraged and facilitated certain of the discussions.⁶ It is axiomatic that settlement discussions cannot be used to a party’s detriment.

7. The true explanation for the Board’s arbitrary and unfair departure from the AGB is that it abdicated its independent decision-making role – required by its Articles and its Bylaws – in favor of unreasoned and unreasonable deference to the views of an advisory committee comprised of government representatives. That committee issued non-binding advice to the Board in the face of pressure from two governments – Peru and Brazil. The committee also had incorrect information before it when it made its decision. The Board thus not only injured and continues to injure Amazon’s business model, initiatives to innovate for its customers worldwide, and strong interests in protecting its world-famous trademark and goodwill⁷, but also acted contrary to the vital interest of the Internet community in ICANN’s transparency, accountability, neutrality, objectivity, and fairness.

8. Based on an independent, objective, and *de novo* inquiry into the Board’s actions,⁸ Amazon now asks this Panel to require the ICANN Board to adhere to its governance documents, the AGB, and international law and allow the

⁶ Hayden Statement, ¶¶ 18-24.

⁷ *See id.*, ¶¶ 7, 11, 43.

⁸ The *Booking.com v. ICANN* IRP panel determined that the standard of review calls for an objective inquiry. *See Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶ 111 (hereinafter “*Booking.com* Declaration”) [Ex. CLA-001]. Consistent with earlier decisions, the panel in *DotConnectAfrica Trust v. ICANN* determined that the standard of review is a “*de novo, objective and independent* one, which does not require any presumption of correctness.” *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Final Declaration (9 July 2015), ¶ 76 (hereinafter “*DotConnectAfrica Trust* Declaration”) [Ex. CLA-002].

.AMAZON Applications to proceed. ICANN has regulatory oversight for a global resource. Its actions must be held to a commensurately high standard. As ICANN's own Bylaws reflect, its "Core Values" require ICANN to "make decisions by applying documented policies neutrally and objectively, with integrity and fairness." ICANN's treatment of the .AMAZON Applications fell grossly short of that standard.

B. THE PARTIES

1. Amazon

9. Amazon E.U. S.à.r.l. is an e-commerce company incorporated under the laws of Luxembourg, where it also has its principal place of business.⁹ In April 2012, Amazon submitted the .AMAZON Applications that are the subject of this IRP to ICANN.

10. Amazon (together with its affiliates) serves hundreds of millions of customers globally through retail websites in the United States, the United Kingdom, France, Canada, Germany, the Netherlands, Italy, Spain, Australia, Brazil, Japan, China, India, and Mexico. "AMAZON" is one of the most recognized and trusted brands in the world. Amazon and its affiliates own more than 1,800 registered trademarks in more than 170 countries that contain or consist of AMAZON in English or other languages and scripts.¹⁰

2. ICANN

11. ICANN is a non-profit corporation organized under the laws of the State of California. It is the global regulator¹¹ of the Internet domain name system and coordinates policy-development and implementation crucial to the secure and stable functioning of the Internet. ICANN's Articles and Bylaws set out the principles and rules by which ICANN is required to operate.

12. ICANN's Articles stipulate that ICANN must "operate for the benefit of the Internet community as a whole"¹² "in recognition of the fact that the Internet is an international network of networks, owned by no single

⁹ See Hayden Statement, ¶¶ 5-7, for more background on the company, its operations, and objectives.

¹⁰ *Id.*, ¶ 7.

¹¹ *ICM Registry LLC v. ICANN*, ICDR Case No. 20 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), ¶¶ 1, 10 (hereinafter "*ICM Declaration*") [Ex. CLA-003]; *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 July 2015), ¶ 125 (hereinafter "*Vistaprint Declaration*") [Ex. CLA-004].

¹² Articles, ¶ 4 [Ex. C-001].

nation, individual or organization....”¹³ As such, ICANN must carry out its activities in conformity with relevant principles of international law and applicable international conventions and local law, and “to the extent appropriate and consistent with [its] Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.”¹⁴

13. ICANN must also conduct itself in accordance with the “Core Values” stated in its Bylaws, which include “[i]ntroducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest;”¹⁵ “[e]mploying open and transparent policy development mechanisms;”¹⁶ “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness;”¹⁷ and “[r]emaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”¹⁸ The Bylaws contain an independent directive protecting openness, transparency, and procedural fairness: “ICANN and its constituent bodies” must “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”¹⁹ The Bylaws expressly prohibit ICANN from “apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause....”²⁰ They also give the IRP Panel its power to determine if ICANN conducted itself consistently with the Articles and Bylaws in its treatment of the .AMAZON Applications.²¹

14. ICANN’s Board is responsible for ensuring that the Articles and Bylaws are implemented faithfully, and it is the Board that has ultimate decision-making authority.²² In making its decisions, the Board receives policy

¹³ *Id.*, ¶ 3.

¹⁴ *Id.*, ¶ 4.

¹⁵ Bylaws, Art. 1, § 2, ¶ 6 [Ex. C-064].

¹⁶ *Id.*, Art. I, § 2, ¶ 7.

¹⁷ *Id.*, Art. I, § 2, ¶ 8. *See also* GAC Comments on the new gTLD Program Draft Applicant Guidebook (24 Oct. 2008), p. 6 [Ex C-004]; GAC’s Submission to ICANN Regarding the Introduction of New gTLDs (10 Feb. 2009), p. 1 [Ex. C-006].

¹⁸ Bylaws, Art. I, § 2, ¶ 10 [Ex. C-064].

¹⁹ *Id.*, Art. III, § 1.

²⁰ *Id.*, Art. II, § 3.

²¹ *See id.*, Art. IV, § 3, ¶ 4.

²² *Id.*, Art. II, § 1; Art. IV, § 3.

recommendations from a number of “supporting organizations.”²³ It may also consider advice received from “advisory committees.”²⁴ In blocking the .AMAZON Applications, the Board improperly deferred to politically-driven advice received from one of these committees, the Governmental Advisory Committee (the “GAC”).

15. The GAC – a constituent body²⁵ of ICANN and thus also subject to the principles and rules of the Articles and Bylaws – is comprised of representatives of national governments, distinct economies, and multinational government organizations and treaty organizations (as observers if invited). The GAC has no legal authority to act for ICANN,²⁶ and has no decision-making authority over ICANN’s activities.²⁷ It is an advisory body, as its name states.

16. ICANN’s founding documents intentionally circumscribed the role of national governments.²⁸ This is reflected in various provisions of the Articles and Bylaws, for example, “no official of a national government or multinational entity established by treaty or other agreement between national governments may serve as a Director;”²⁹ ICANN “shall ... pursue the charitable and public purposes of lessening the burdens of government;”³⁰ the “GAC shall operate as a forum for the discussion of government and other public policy interests and concerns;”³¹ and the GAC’s role is to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.”³²

²³ See, e.g., Bylaws, Art. VIII, “Address Supporting Organization”; Art. IX “Country-Code Names Supporting Organization”; Art. X, “Generic Names Supporting Organization”. [Ex. C-064].

²⁴ *Id.*, Art. XI (Advisory Committees), § 1 (“Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.”).

²⁵ *DotConnectAfrica Trust* Declaration, ¶ 101 [Ex. CLA-002].

²⁶ GAC Operating Principles (June 2015), Art. I, Principle 5 [Ex. C-074].

²⁷ *Id.*, Art. I, Principles 2 (“The GAC is not a decision making body”).

²⁸ *ICM Declaration*, ¶ 1 (“However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, *but at the same determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control*, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers.”) (emphasis added) [Ex. CLA-003]. See also Affirmation of Commitments by the United States DOC and the ICANN (30 Sept. 2009) [Ex. C-008].

²⁹ Bylaws, Art. VI, § 4, ¶ 1 [Ex. C-064].

³⁰ Articles, ¶ 3 [Ex. C-001].

³¹ GAC Operating Principles, Art. I, Principle 4 [Ex. C-074].

³² Bylaws, Art. XI, § 2, ¶ 1(a) [Ex. C-064].

17. However, while the GAC’s advice on public policy matters³³ must “be duly taken into account [by ICANN], both in the formulation and adoption of policies,”³⁴ the Board is not required to follow that advice. Article XI of the Bylaws provides, *inter alia*, that if the Board takes an action that is inconsistent with the GAC’s advice, it must inform the GAC and provide reasons why it decided not to follow that advice. The GAC and the Board must then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If a solution cannot be found, the Board must state in its final decision the reasons why the GAC advice was not followed. In short, the ICANN Board retains ultimate decision-making authority.³⁵

C. SUMMARY OF RELEVANT FACTS³⁶

1. The New gTLD Program

18. Practically since its inception, ICANN commenced work to “open up the top level of the Internet’s namespace to foster diversity, encourage competition, and enhance the utility of the [Domain Name System].”³⁷ Consistent with ICANN’s community-driven, bottom-up policy-development framework, ICANN’s Generic Names Supporting Organization (“GNSO”) defined the policies for introducing new gTLDs.³⁸ In October 2007, the GNSO completed its work after years of consultations with civil society, business and intellectual property constituencies, registry operators and registrars, and the technology community on such matters as the benefits and risks of introducing new gTLDs and, very importantly, the selection and evaluation criteria to be applied. Following this “carefully deliberated” process, which included significant GAC input, the Board adopted the

³³ AGB, Module 3.1 [Ex. C-020]. The Preamble to GAC’s 2011 Operating Principles identifies the relevant areas of “public policy,” an otherwise amorphous concept with considerable divergence across national jurisdictions: “ICANN’s decision making should take in to account public policy objectives including, among other things: secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity; the robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, worldwide; transparency and non-discriminatory practices in ICANN’s role in the allocation of Internet names and address[es]; effective competition at all appropriate levels of activity and conditions for fair competition, which bring benefits to all categories of users including, greater choice, lower prices, and better services; fair information practices, including respect for personal privacy and issues of consumer concern; and freedom of expression.”

³⁴ Bylaws, Art. XI § 2, ¶ 1(j) [Ex. C-064].

³⁵ *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, Hearing on the Merits transcript (22–23 May 2015), pp. 384:24-385:15 (“hereinafter “*DotConnectAfrica Trust* Hearing Transcript”) [Ex. CLA-005]. Heather Dryden is the former Chairwoman of the GAC. *Id.*, 9:10-14.

³⁶ **Amazon reserves the right to supplement the facts summarized in this section, including following document production.**

³⁷ AGB, Preamble [Ex. C-020]. Expert Report of Heather Ann Forrest, ¶¶ 4.1-4.3 (hereinafter “Forrest Expert Report”).

³⁸ According to the Bylaws, Art. X, § 1 “responsibil[ity] for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains” lies with the GNSO. Within the GNSO, governments are not recognized as a constituency group. Instead, registry operators, registrars, and business and civil society groups, such as trademark holders, non-commercial users are so recognized.

GNSO's policy recommendations in June 2008.³⁹ In June 2012, the ICANN Board adopted the final version of the AGB that would govern the new gTLD program. By submitting an application, applicants had to accept all of the terms and conditions of the AGB without any room for negotiation. The AGB is also binding on ICANN.⁴⁰

19. ICANN intended the AGB, which one IRP Panel has described as “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs,”⁴¹ to provide clear and predictable guidelines, procedures and rules for applicants to follow.⁴² Professor Heather Forrest describes its structure and its key provisions in an expert report submitted herewith to assist the Panel, including, importantly for present purposes, the restrictions on the delegation of geographic names and the procedures the Board implemented to address objections that may be raised by governments and affected communities; namely, “Community Objections.”

20. AGB Section 2.2.1.4 details the restrictions that apply to geographic names. The GAC had pressed for a broad and flexible definition of geographic names that could not become gTLDs.⁴³ The Board rejected this approach. It instead opted for a “process [that] relies on pre-existing lists of geographic names [*e.g.*, maintained by the International Standards Organization] for determining which strings require the support or non-objection of a government... *in the interest of providing a transparent and predictable process for all parties*”⁴⁴ (emphasis added), or that are prohibited. However, governments and other representatives of communities were given the option to invoke the Community Objection process “to address attempted misappropriation of community labels.”⁴⁵ Governments can also present their views through the GAC.

³⁹ AGB, Preamble [Ex. C-020]; Adopted Board Resolutions – Paris (26 June 2008), p. 3. [Ex. C-003].

⁴⁰ *DotConnectAfrica Trust* Declaration, ¶ 72-75 [Ex. CLA-002]; *See also DotConnectAfrica Trust* Hearing Transcript, p. 98:13-17 [Ex. CLA-005]; *Booking.com* Declaration, ¶¶ 108-109 [Ex. CLA-001]. *See also*, ICANN New gTLD Program Pamphlet, p. 3 [Ex. C-005]; AGB, Module 6, Preamble (“Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application”) [Ex. C-020].

⁴¹ *Booking.com* Declaration, ¶ 17 [Ex. CLA-001].

⁴² *See* ICANN New gTLD Program Pamphlet, p. 3 [Ex. C-005].

⁴³ GAC Principles Regarding New gTLDs (28 Mar. 2007), Principle 2.2 [Ex. C-002].

⁴⁴ Email from P. Dengate Thrush to H. Dryden enclosing ICANN Board Notes on the GAC New gTLDs Scorecard (5 Mar. 2011), pp. 30-32 [Ex. C-013]; Letter from P. Dengate Thrush to J. Karklins (22 Sept. 2009), p. 15-17 [Ex. C-007]; Letter from P. Dengate Thrush to H. Dryden (5 Aug. 2010), pp.5- 6 [Ex. C-010]; ICANN's Summary Report and Analysis of Public Comment (Oct. 2009), p. 15-16 [Ex. C-009]. *See also* Forrest Expert Report, ¶ 8.1-8.4.

⁴⁵ Email from P. Dengate Thrush to H. Dryden (5 Mar. 2011), p. 31 [Ex. C-013].

2. The .AMAZON Applications

21. In January 2012, ICANN began accepting applications for new gTLDs. Amazon submitted 76 applications, including the .AMAZON Applications, to provide consumers with easier ways to access Amazon, to provide better products and services, to foster innovation, and to defend and protect its globally recognized intellectual property rights. Amazon plans to create “under the .AMAZON gTLD umbrella, websites that could enhance and strengthen its service to our customers, including consumers, sellers, enterprises, and content creators.”⁴⁶ It is of great importance to Amazon to protect its core trademark and brand name – AMAZON – and to use this gTLD to innovate on behalf of its globally-based customers.⁴⁷

22. Before submitting the Applications, Amazon verified that the AGB did not prohibit or require governmental approval for the .AMAZON string (and its Chinese- and Japanese-character equivalents).⁴⁸ In so doing, Amazon relied on the plain and clear terms of the AGB and the principles of transparency and predictability that the ICANN Board emphasized at every stage of its development.⁴⁹ In short, Amazon had no reason to believe ICANN would deny its applications.

3. Brazil and Peru’s Early Warning Notice

23. Under the AGB, individual GAC members can issue a notice to an applicant, known as an “Early Warning” to indicate that an application “might be problematic, e.g., potentially violate national law or raise sensitivities.”⁵⁰ An Early Warning is not a formal objection and can be issued for any reason.⁵¹ It is issued by an individual country and contains the particular points of view of the issuing country. It is not intended to reflect the GAC’s views.⁵²

24. In November 2012, Peru and Brazil’s GAC representatives issued an Early Warning for only the English-language .AMAZON application. The notice cited three main grounds: (i) granting exclusive rights to the

⁴⁶ Hayden Statement, ¶ 7.

⁴⁷ *Id.*, ¶¶ 7-11.

⁴⁸ *Id.*, ¶ 11.

⁴⁹ *See id.*, ¶¶ 8-10, 42-43.

⁵⁰ *See* AGB, § 1.1.2.4, 1.1.2.4 n.1 [Ex. C-020].

⁵¹ *Id.*, § 1.1.2.4.

⁵² *DotConnectAfrica Trust* Declaration, ¶ 110 (quoting Heather Dryden, “Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that’s not a GAC view.”) [Ex. CLA-002]; *DotConnectAfrica Trust* Hearing Transcript, pp. 306:20-24, 314:1-19 [Ex. CLA-005].

.AMAZON gTLD to “the private company” Amazon “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” and “would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region;”⁵³ (ii) the string .AMAZON matches part of the name, in English, of an international organization comprised of Amazonian countries that is commonly referred to as “OTCA;”⁵⁴ and (iii) the .AMAZON gTLD is for a geographic name and had not received support from “governments of the countries in which the Amazon region is located.”⁵⁵ As discussed in the next two sections, in the course of the application evaluation process, an ICANN expert panel would determine that the .AMAZON gTLDs are not for geographic names, and an ICC independent expert would reject the substance of the complaints motivating the Early Warning.

25. Applicants are advised to take Early Warning notices “seriously,” as they “raise[] the likelihood that the application could be the subject of GAC Advice on New gTLDs ... or of a formal objection” later in the process.⁵⁶ Accordingly, Amazon engaged in extensive good-faith discussions with representatives from Brazil, Peru, and OTCA, and even offered to make binding public interest commitments to these governments to allay their concerns.⁵⁷ Those efforts continued through November 2015 without a successful outcome.⁵⁸ Inexplicably, the Board ultimately cited Amazon’s good faith efforts to find a negotiated solution as a factor supporting rejection of the .AMAZON Applications.

⁵³ GAC Early Warning – Submittal Amazon-BR-PE-58086 (20 Nov. 2012), p. 1 [Ex. C-022].

⁵⁴ *Id.* OTCA maintains a website at www.otca.info. See OTCA (English) home page: <http://otca.info/portal/index.php?p=index>. OTCA is not a GAC member.

⁵⁵ GAC Early Warning – Submittal Amazon-BR-PE-58086 (20 Nov. 2012), p. 1 [Ex. C-022]; Forrest Expert Report, ¶ 6.16.

⁵⁶ AGB, § 1.1.2.4 [Ex. C-020].

⁵⁷ Letter from S. King to H. Dryden (4 July 2013), p. 1 [Ex. C-035]; Letter from S. King to S. Crocker, F. Chehadé and C. Chalaby (4 July 2013), pp. 1-2 [Ex. C-036]. The Public Interest Commitments Specification is a mechanism incorporated by the Board into the gTLD Registry Agreement in response to GAC advice. This mechanism allows applicants to voluntarily submit to heightened public interest commitments and transforms these commitments into binding contractual obligations that are subject to compliance oversight by ICANN. See Hayden Witness Statement, ¶ 22; Letter from S. King to S. Crocker, F. Chehadé and C. Chalaby (4 July 2013) [Ex. C-036] describing the PIC submitted by Amazon to ICANN for the .AMAZON Applications.

⁵⁸ Hayden Statement, ¶¶ 18-24.

4. The Geographic Names Evaluation Panel

26. The AGB contains precisely defined restrictions relating to geographic names as gTLDs.⁵⁹ ICANN's Geographic Names Panel verifies whether an applied-for gTLD falls within one of the restricted categories.⁶⁰ The Panel reviewed every gTLD application.

27. In March, April, and July 2013, ICANN published Geographic Names Panel reports for the .AMAZON Applications.⁶¹ The .AMAZON report stated that: "The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in [AGB] § 2.2.1.4."⁶² The other two reports contained the same conclusion.⁶³ Professor Forrest's expert report explains why these results were correct under the AGB.⁶⁴

5. The Community Objections to the Applications

28. The AGB gives third parties, including governments, the right to lodge formal objections to a string on four possible grounds.⁶⁵ Of the four, only the Community Objection – "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted" – is relevant to the present dispute.⁶⁶ The purpose of the Community Objection is to allow governments or affected communities to object to gTLD applications not covered by the AGB's rules on geographic names,⁶⁷ or that are "highly objectionable,"⁶⁸ or otherwise raise sensitivities.⁶⁹ The Board also granted

⁵⁹ See AGB, § 2.2.1.4 [Ex. C-020].

⁶⁰ Forrest Expert Report, ¶ 6.6.

⁶¹ See ICANN – New gTLD Program – Initial Evaluation Report (5 Apr. 2013), p. 1 [Ex. C-025]. See also ICANN – New gTLD Program – Initial Evaluation Report (12 July 2013), p. 1 [Ex. C-037]; ICANN – New gTLD Program – Initial Evaluation Report (22 Mar. 2013), p. 1 [Ex. C-024].

⁶² ICANN – New gTLD Program – Initial Evaluation Report (5 Apr. 2013), p. 1 [Ex. C-025].

⁶³ See ICANN – New gTLD Program – Initial Evaluation Report (12 July 2013), p. 1 [Ex. C-037]; ICANN – New gTLD Program – Initial Evaluation Report (22 Mar. 2013), p. 1 [Ex. C-024].

⁶⁴ See Forrest Expert Report, ¶¶ 6.1 – 6.18.

⁶⁵ AGB, § 3.2.1. [Ex. C-020].

⁶⁶ The other grounds for objection are addressed in Professor Forrest's Expert Report ¶¶ 7.1-7.6.12.

⁶⁷ Letter from P. Dengate Thrush to J. Karklins (22 Sept. 2009), p. 17-19 [Ex. C-007]; AGB, § 3.2.2.4 [Ex. C-020]; ICANN Board-GAC Consultation Geographic Names (21 Feb. 2011), p. 3 [Ex. C-012]; Letter from P. Dengate Thrush to H. Dryden (5 Aug. 2010), p. 6 [Ex. C-010].

⁶⁸ AGB, § 3.2.5. [Ex. C-020].

⁶⁹ New Generic Top-Level Domain Names Dispute Resolution Procedure – Objection Form by Prof. Alain Pellet, Independent Objector (12 Mar. 2013), pp. 5-6 [Ex. C-023]. See AGB, § 1.1.2.6. [Ex. C-020].

standing to lodge a Community Objection or a Limited Public Interest Objection⁷⁰ to the ICANN-appointed Independent Objector (“IO”), with the authority to raise objections on behalf of the “public who use the global Internet” to protect their “best interests.”⁷¹ The IO may also file objections to protect the interests of particular communities or constituencies.⁷²

29. On 12 March 2013, Alain Pellet, the IO, lodged Community Objections to the Applications before the International Chamber of Commerce (“ICC”), citing to Brazil and Peru’s Early Warning notice,⁷³ arguing that the IO has a duty to act in respect of strings that “purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a nationality, disability, age, and/or a language or linguistic group (non exhaustive),”⁷⁴ and on the basis of “other relevant rules of international law in connection with” the standards applicable to Community Objections.⁷⁵

30. The IO specifically argued that: (i) “[t]he applied-for gTLD string .Amazon targets, at least implicitly, the community of the Amazon region in South America [], which constitutes a clearly delineated community in the sense of the Guidebook [];” (ii) the opposition against the Application is substantial, as reflected by Brazil and Peru’s Early Warning notice; and (iii) the “Application creates a likelihood of material detriment to the rights and

⁷⁰ A Limited Public Interest Objection may be filed where it is alleged that a proposed gTLD contradicts generally accepted legal norms of morality and public order recognized under principles of international law.

⁷¹ AGB, § 3.2.5. [Ex. C-020].

⁷² New Generic Top-Level Domain Names Dispute Resolution Procedure – Objection Form by Prof. Alain Pellet, Independent Objector (12 Mar. 2013), p. 5-6 [Ex. C-023]; Expert Determination of Prof. Luca G. Radicati di Brozolo (27 Jan. 2014), ¶¶ 39-44 [Ex. C-047].

⁷³ New Generic Top-Level Domain Names Dispute Resolution Procedure – Objection Form by Prof. Alain Pellet, Independent Objector (12 Mar. 2013), p. 5 [Ex. C-023]. Although the IO is not meant to act on behalf of any persons or entities, when he filed the Community Objection, Professor Pellet was counsel to Peru before the International Court of Justice and had also served as counsel to Brazil in similarly important matters, which the ICC eventually determined to be a conflict of interest. *Id.*, p. 6; Expert Determination of Prof. Luca G. Radicati di Brozolo (27 Jan. 2014), ¶¶ 22-29 [Ex. C-047].

⁷⁴ New Generic Top-Level Domain Names Dispute Resolution Procedure – Objection Form by Prof. Alain Pellet, Independent Objector (12 Mar. 2013), p. 5 [Ex. C-023].

⁷⁵ The four tests which need to be met cumulatively for a Community Objection to prevail are: (i) The community invoked by the objector is a clearly delineated community; (ii) community opposition to the application is substantial; (iii) there is a strong association between the community invoked and the applied-for gTLD string; and (iv) 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.” AGB § 3.5.4 [Ex. C-020].

legitimate interests of the Amazon community [],” because of the “risk of exclusive misappropriation” of the .AMAZON gTLD by Amazon, which Brazil and Peru had also expressed in their Early Warning notice.⁷⁶

31. On 27 January 2014, Professor Luca Radicati di Brozolo, the International Chamber of Commerce-appointed independent expert (the “ICC Independent Expert”), rejected the IO’s Community Objections in favor of Amazon.⁷⁷ He concluded that while the IO could properly file an objection on behalf of the “Amazon Community,” there was no proof of substantial opposition from that community to the .AMAZON gTLDs, and there was no evidence that the .AMAZON gTLD would likely create a material detriment to its rights and legitimate interests.⁷⁸ In reaching his decision, the ICC Independent Expert concluded that other strings, such as .AMAZONIA could be used for purposes of protecting, promoting, and raising awareness on issues related to the Amazonia region; Amazon has used AMAZON as a brand, trademark, and domain name for decades and owned AMAZON trademark and domain name registrations in the states said to form the Amazon Community; and there was no evidence of any harm to the community’s interests, including “loss of reputation linked to the name of the region or community or to any other form of damage.”⁷⁹

32. The ICC Independent Expert’s determination is binding on the parties.⁸⁰ It is also binding on ICANN.⁸¹ As discussed below, the Board did not give any weight to – *in fact did not even consider* – the determination in making its decision to block the .AMAZON Applications.⁸²

6. Brazil and Peru’s Campaign for Consensus GAC Advice

33. Peru and Brazil also pursued their campaign against the Applications in the GAC, with matters coming to a head at the ICANN meetings in Durban, South Africa in July 2013.⁸³ Within the new gTLD application

⁷⁶ New Generic Top-Level Domain Names Dispute Resolution Procedure – Objection Form by Prof. Alain Pellet, Independent Objector (12 Mar. 2013), pp. 8-17 [Ex. C-023].

⁷⁷ Expert Determination of Prof. Luca G. Radicati di Brozolo (27 Jan. 2014), ¶ 109 [Ex. C-047].

⁷⁸ *Id.*, ¶¶ 39-44, 89-94, 99-105.

⁷⁹ *Id.*, ¶¶ 102-105.

⁸⁰ AGB, Attachment to Module 3, Art. 1(d), Art. 21(d) [Ex. C-020]; ICC Practice Note (Mar. 2012) Art.8. [Ex. C-016].

⁸¹ *See id.*, § 3.4.6; *Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-000-6505 Declaration, ¶¶ 103-04 [Ex. CLA-004], ICANN’s Response to Claimant Vistaprint’s Limited Request for Independent Review Process (21 July 2014), ¶¶ 36-40 [CLA-006]; *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration of the Independent Review Process Panel (10 Dec. 2015), ¶¶ 46-50 [CLA-008]. *Merck KGaA v. ICANN*, ICANN’s Response to Claimant Merck’s KGaA’s Request for Independent Review Process (29 Aug. 2014), ¶¶ 33-36 [CLA-007].

⁸² *See* Forrest Expert Report, ¶¶ 7.6.9 – 7.6.12.

process, the GAC may “provide public policy advice directly to the ICANN Board ... to address applications that are identified by governments to be problematic, *e.g.*, that potentially violate national law or raise sensitivities.”⁸⁴ GAC consensus advice on a particular application creates “a strong presumption for the ICANN Board that the application should not be approved.”⁸⁵ However, there is nothing to suggest that the ICANN community and ultimately the ICANN Board intended this presumption to displace the neutral and impartial procedure the Board implemented for evaluating formal objections, such as the Community Objection. In fact, the evidence points to the opposite conclusion: “[t]he ICANN Board wishe[d] to have a neutral, expert determination, based upon certain published standards, when deciding whether to accept an application for a new gTLD or if an objection should be upheld.”⁸⁶ Moreover, as previously discussed, the Board is not required to accept the GAC’s advice.⁸⁷

34. On 18 July 2013 (*i.e.*, 6 months before the ICC Independent Expert’s determination) the GAC issued its Durban Communiqué,⁸⁸ stating that the GAC had reached consensus advice objecting to the .AMAZON Applications.⁸⁹ No written justification was provided to support the advice.

35. The transcript of the GAC’s Durban discussions reveals that materially incorrect statements contributed to the GAC consensus advice against the Applications. In opening remarks for the discussion of the .AMAZON Applications, the Peruvian GAC representative informed those present in the GAC plenary that “Amazon” in

⁸³ Hayden Statement, ¶¶ 35-37. Brazil and Peru initially sought GAC consensus advice against the .AMAZON Applications at the GAC meetings in Beijing in April 2013. Their efforts were unsuccessful, primarily because of opposition from the United States government.

⁸⁴ See AGB, §§ 1.1.2.7, 3.1 [Ex. C-020].

⁸⁵ *Id.*, § 1.1.2.7.

⁸⁶ Letter from P. Dengate Thrush to J. Karklins (22 Sept. 2009), p. 21 [Ex. C-007]; Letter from P. Dengate Thrush to H. Dryden (23 Nov. 2010), p. 8 [Ex. C-011].

⁸⁷ ICANN’s Summary Report and Analysis of Public Comment (30 May. 2011), p. 62-63 [Ex.C-014] (“At bottom, the GAC Advice process is nothing different than what is already called for in the ICANN Bylaws. The GAC is entitled to provide the ICANN Board with advice on public policy matters, which the Board is required to consider. There is no automatic veto, although as always, GAC advice will be given the weight and consideration that GAC advice should be given under the circumstances, the strength of the stated advice, and ICANN’s Bylaws requirements.”).

⁸⁸ GAC Communiqué – Durban, South Africa (18 July 2013) [Ex. C-041].

⁸⁹ *Id.*, pp. 3-4. The United States government abstained from the deliberations, stating that: “The United States affirms our support for the free flow of information and freedom of expression and does not view sovereignty as a valid basis for objecting to the use of terms, and we have concerns about the effect of such claims on the integrity of the process. We considered that the GAC was of the same mind when it accepted ICANN’s definition of geographic names in February 2011 and agreed that any potential confusion with a geographic name could be mitigated through agreement between the applicant and the concerned government. In addition, the United States is not aware of an international consensus that recognizes inherent governmental rights in geographic terms....” The U.S. Statement on Geographic Names in Advance of ICANN Durban Meeting (July 2013), p. 1 [Ex. C-034].

English is also a city in Guyana.⁹⁰ There is no such city. Further, Peru also claimed that “Amazon” was on an International Standards Organization (“ISO”) list, specifically ISO 3166-2, and as such could not be delegated without evidence of governmental support or non-objection.⁹¹ “Amazon” is not listed on any ISO 3166 list.⁹² Peru further represented, without citing to any specifics or producing any documents, that “...unanimously, all Amazon countries and all Amazon provinces, departments, and local governments have expressed, in writing, their rejection to dot amazon.”⁹³

36. The ICANN community widely opposed the GAC advice. It was plainly contrary to the new gTLD policies and rules agreed by the ICANN community following a rigorous and transparent process that had included GAC input.⁹⁴

37. Amazon also responded to the Durban Communiqué,⁹⁵ explaining that the GAC’s advice was an arbitrary attempt to treat .AMAZON as a geographic name even though ICANN’s Geographic Names Panel determined that it was not a geographic name.⁹⁶ Amazon argued that the ICANN Board was required to reject the GAC advice because (i) it was inconsistent with international law; (ii) accepting the advice would be non-transparent and discriminatory; and (iii) the advice was contrary to policy recommendations implemented within the AGB, which had been achieved through international consensus over many years.⁹⁷ ICANN has never specifically addressed these arguments.

⁹⁰ Durban - GAC Open Plenary Session 4 (16 July 2013), p. 15 [Ex. C-040].

⁹¹ *Id.*

⁹² Forrest Expert Report, ¶¶ 6.9 – 6.13.

⁹³ Durban - GAC Open Plenary Session 4 (16 July 2013), p. 15 [Ex. C-040].

⁹⁴ *See, e.g.*, ICANN Durban Public Forum Transcript, Comments of Keith Drazek, Chair of the Registries Stakeholder Group (18 July 2013) (“While different stakeholders have different views about particular aspects of the GAC advice, we have a shared concern about the portions of that advice that constitute retroactive changes to the Applicant Guidebook around the issues of sovereign rights, undefined and unexplained geographic sensitivities, sensitive industry strings, regulated strings, et cetera. These changes in essence not only override the rules set forth by this community but also exceed what those same governments could do under their own national laws. GAC advice needs to be consistent with existing national and international law and the GAC should not use ICANN to create new rights or take away existing rights”), pp. 51-52 [Ex. C-042]. Forrest Expert Report, ¶ 3.2.4, ¶¶ 7.6-8.5.

⁹⁵ *See* GAC Advice Response Form for Applicants – Respondent: Amazon EU S.à.r.l. (23 Aug. 2013) [Ex. C-043].

⁹⁶ *See id.*, p. 3 & n.8, 17-19. “For any application where the GNP determines that the applied-for gTLD string is not a geographic name requiring government support (as described in this module), the application will pass the Geographic Names review with no additional steps required.” AGB, § 2.2.1.4.4 [Ex. C-020].

⁹⁷ *See* GAC Advice Response Form for Applicants – Respondent: Amazon EU S.à.r.l. (23 Aug. 2013), p. 2 [Ex. C-043].

7. ICANN Board's Separate Expert Opinion

38. The ICANN Board took no action on the Applications for almost 7 months. But a week after the ICC Independent Expert dismissed the Community Objections against Amazon, the Board decided it needed to consult a different expert. It appointed Professor Jérôme Passa of the Université Panthéon-Assas (the “Board Expert”) to opine on “relevant international and local law on geographical indications, related international treaties, and principles of intellectual property law to address the specific issues of application of law at issue.”⁹⁸ The Board did not ask him to address the arguments Amazon had raised in response to the GAC advice, or the ICC Independent Expert’s determination.

39. Professor Passa accordingly limited his analysis to international and national intellectual property law. He concluded that ICANN was neither “oblige[d] ICANN to reject” nor “oblige[d] ICANN to accept” Amazon’s application.⁹⁹ His analysis confirmed that allowing the .AMAZON Applications to proceed “would not ... be prejudicial to the objecting states who, since they have no reason for linguistic reasons to reserve ‘.amazon’, could always if they so wished reserve a new gTLD such as ‘.amazonia’ or ‘.amazonas’ which would create no risk of confusion with ‘.amazon’.”¹⁰⁰ In short, read impartially and objectively, the Board Expert’s opinion supported a decision favoring Amazon’s position, particularly in light of the fact that the ICC Independent Expert had already ruled in Amazon’s favor.

8. The Board Blocks the .AMAZON Applications

40. Notwithstanding the ICANN Geographic Names Panel’s determinations, the ICC Independent Expert’s findings, and even the Board Expert’s opinion, on 14 May 2014, the Board’s New gTLD Program Committee (“NGPC”) voted to accept the GAC’s advice and stopped the further processing of the .AMAZON Applications.¹⁰¹ The NGPC justified its decision citing the following “significant factors:” (i) the Board Expert’s opinion; (ii) Amazon’s willingness to engage in discussions with the governments of Brazil and Peru and to include

⁹⁸ Approved Resolutions - Meeting of the New gTLD Program Committee (14 May 2014), p. 8 [Ex. C-054].

⁹⁹ Opinion of Jerome Passa (31 Mar. 2014), p. 14 (hereinafter “Passa Opinion”) [Ex. C-048].

¹⁰⁰ *Id.*, p.10.

¹⁰¹ Approved Resolutions - Meeting of the New gTLD Program Committee (14 May 2014), pp. 6-7 [Ex. C-054]; *see* Forrest Expert Report, ¶ 3.2.5.

certain “public interest commitments” in its registry agreements to address their concerns; (iii) various materials submitted by the Brazilian and Peruvian governments and Amazon; (iv) the Board’s inherent right to consider “under exceptional circumstances” an individual application for a new gTLD to determine if approval would be in the “best interest” of the Internet Community; and (v) the Brazil-Peru Early Warning issued 17 months earlier. As discussed in the “Summary of ICANN’s Breaches,” none supports blocking the .AMAZON Applications.

9. The BGC’s Self-serving Reconsideration of the .AMAZON Applications

41. Amazon immediately sought reconsideration of the NGPC’s decision before the ICANN Board Governance Committee (“BGC”).¹⁰² Without any regard for customary conflict of interest rules, the BGC members who considered the reconsideration request had also taken part in the NGPC’s decision to accept the GAC advice.¹⁰³ Therefore, unsurprisingly, the BGC recommended that the decision to block the .AMAZON Applications should stand.¹⁰⁴ Subsequently, the same BGC members -- wearing their NGPC hats -- accepted the recommendation they had made wearing their BGC hats.¹⁰⁵ The NGPC’s and BGC’s conduct was not just “troubl[ing]” as ICANN’s Ombudsman would note, but a patent violation of the Bylaws and customary conflict of interest principles.

D. SUMMARY OF ICANN’S BREACHES¹⁰⁶

1. The Board’s Failure to Apply Documented Policies Neutrally and Objectively and With Integrity and Fairness

42. ICANN’s Core Values require it to make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,”¹⁰⁷ and its Bylaws require that “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures

¹⁰² See Reconsideration Request – 11 April 2013 (29 May 2014) [Ex. C-059].

¹⁰³ See ICANN Ombudsman Blog Creating Dialogue Affirming Fairness, Office of the Ombudsman – Case 14-00333 – Report (28 May 2015) [Ex. C-073]; Letter from K. Rosette to C. LaHatte (25 Feb. 2015) [Ex. C-071]; Letter from K. Rosette to C. LaHatte (21 Apr. 2015) [Ex. C-072]; Hayden Statement, ¶¶ 44-51.

¹⁰⁴ See Recommendation of the Board Governance Committee (BGC) Reconsideration Request 14-27 (22 Aug. 2014), pp. 1, 20 [Ex. C-065].

¹⁰⁵ See Approved Resolutions – Meeting of the New gTLD Program Committee (8 Sept. 2014), pp. 4-12 [Ex. C-068].

¹⁰⁶ **Following document production, Amazon reserves the right to supplement the breaches summarized in this section and the grounds in support of the stated breaches.**

¹⁰⁷ Bylaws, Art. I, § 2, ¶8 [Ex. C-064].

designed to ensure fairness.”¹⁰⁸ These principles of neutrality, objectivity, integrity, transparency and fairness, as developed in international law, apply to regulatory institutions like ICANN,¹⁰⁹ which may not make arbitrary decisions,¹¹⁰ including those “not founded on reason or fact, nor on the law ... but on mere fear reflecting national preference.”¹¹¹ For the reasons set out below, ICANN did not make decisions regarding the .AMAZON Applications by applying documented policies neutrally and objectively, with integrity and fairness.¹¹²

43. First, the NGPC failed to act neutrally and objectively by relying on Brazil and Peru’s politically-motivated Early Warning notice in making its decision. The GAC provided no supporting rationale for its consensus advice against the Applications. The NGPC thus went in search of a rationale and found one in the Early Warning notice.¹¹³ But the Early Warning notice could not provide any support for the NGPC’s ultimate decision in the face of the determinations issued by the Geographic Names Panel and the ICC Independent Expert, both of which were neutral and objective.

44. The Geographic Names Panel applied the criteria set out in the AGB, which the Board had very specifically defined with reference to verifiable, non-controversial lists in order to eliminate subjectivity.

The ICC Independent Expert was appointed by an independent third-party dispute resolution service provider in accordance with the AGB’s rules. He independently reviewed the IO’s arguments against the Applications, which were for all intents and purposes those put forward by Brazil and Peru in the Early Warning. In fact, the IO went even further than Brazil and Peru had, but the ICC Independent Expert rejected his opposition to the

¹⁰⁸ *Id.*, Art. III, § 1.

¹⁰⁹ *The Gibraltar Football Association (GFA)/Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2002/O/410, Award (7 Oct. 2003), ¶ 4 (“Such general principles of law include for example the principle of fairness, which implies inter alia the obligation to respect fair procedures ...”) [Ex. CLA-009]. *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*, Arbitration CAS 98/200, Award (20 Aug. 1999), ¶¶ 61, 158 [CLA-010]; *A. / Fédération Internationale de Lutttes Associées (FILA)*, Arbitration CAS 2001/A/317, Award (9 July 2001), ¶¶ 5-6 [Ex. CLA-011]; Forrest Expert Report, ¶¶ 3.2.5, 8.1- 8.5, 9.1.5.

¹¹⁰ *Federazione Italiana Nuoto (FIN) v. Fédération Internationale de Ntation Amateur (FINA)*, Arbitration CAS No. 1996/A/157, Award (23 Apr. 1997), ¶ 22, in *Digest of CAS Awards 1986-1998*, p. 358, ¶ 22 [Ex. CLA-012].

¹¹¹ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 Sept. 2001), ¶ 232 [Ex. CLA-013].

¹¹² Forrest Expert Report, ¶¶ 8.1-8.5.

¹¹³ Approved Resolutions - Meeting of the New gTLD Programme Committee (14 May 2014), p. 10 [Ex. C-054]. “Although the NGPC does not have the benefit of the rationale relied upon by the GAC in issuing its consensus advice in the Durban Communique on the applications for .AMAZON ... the NGPC considered the reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru....” *Id.*

Applications. ICANN has repeatedly said that it “will accept”¹¹⁴ the determinations of independent experts, such as the ICC Independent Expert in this case. But here it failed to do so. In fact, it appears not to have considered the ICC Independent Expert’s decision at all, and gave no explanation for its decision not to do so. Given (i) that the IO’s Community Objection was inspired by Brazil and Peru’s Early Warning, and (ii) the NGPC rested its acceptance of the GAC’s advice in part on the Early Warning, it was incumbent upon the Board to give due weight to the ICC Independent Expert’s determination. This it failed to do, and as a result failed to apply documented policies neutrally and objectively. The NGPC’s blocking of the .AMAZON Applications based essentially on the views of two GAC members is egregious and contrary to the very principles of limited governmental influence (“the Internet is an international network of networks, owned by no single nation”) on which ICANN was founded.

45. Second, the Board acted without integrity or fairness in commissioning Professor Passa’s opinion. There was no reason for the NGPC to commission “an opinion on the well-foundedness [sic] of various objections raised against reservation of the new gTLD ‘amazon’” just one week after the ICC’s Independent Expert’s decision, which had comprehensively addressed the specific issues underlying the Early Warning notice.¹¹⁵ The NGPC gave no explanation for why the opinion was commissioned or why the subject matter of the opinion was relevant.

46. Professor Passa’s opinion provides no support for the Board’s decision to accept the GAC consensus advice against the Applications. The Board Expert concluded that there were no rules of international, regional or national law in the “field of geographical indications” that obliged the Board to reject the Applications. His additional conclusion that there are no rules of international, regional or national intellectual property law or in the field of fundamental rights requiring the Board to accept the Applications should have had no relevance to the Board’s decision: Amazon’s rights to the .AMAZON gTLDs are based on its strict compliance with the

¹¹⁴ AGB, Art. 3.4.6. *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, ICANN’s Response to Merck’s Request for Independent Review Process (29 Aug. 2014), ¶¶ 33-35 [CLA-007].

¹¹⁵ Passa Expert Opinion, p. 1 [Ex. C-048]. Professor Passa provides some insight in to what may have motivated the NGPC: “In view of the objections raised by the GAC and various members states, this concern to protect prior third-party rights and interests has led ICANN to consider the legitimacy and opportuneness [sic] of assigning the new gTLD ‘amazon’ to its applicant, namely the Amazon company.” *Id.*, p. 2.

requirements of the AGB.¹¹⁶ Amazon has never maintained that it has a right to the .AMAZON gTLDs based exclusively on its trademarks.¹¹⁷

47. Third, the NGPC failed to explain why it considered Amazon's willingness to discuss in good faith possible solutions with the Brazilian and Peruvian governments to be a negative consideration in deciding to block the Applications.¹¹⁸ This should have led to the opposite conclusion, especially in light of the binding public interest commitments Amazon provided to Brazil, Peru and the Board.

48. Fourth, the NGPC failed to explain what "exceptional circumstances" could possibly justify "individual consideration" of the .AMAZON Applications. The political agendas of governments do not constitute "exceptional circumstances." The Board also did not explain why approving the Applications would not be in the "best interest of the Internet community" especially given that the ICC Independent Expert had reached the opposite conclusion by rejecting the IO's Community Objections against the .AMAZON Applications.

49. In short, despite the overwhelming evidence in favor of the Applications, ICANN accepted the GAC advice simply because it created a "strong presumption" that the Applications should not proceed. The GAC advice was nothing more than an attempt to veto the .AMAZON Applications contrary to the AGB. Thus, the NGPC's decision to accept that advice was an arbitrary expression of prejudice. That approach failed to satisfy the NGPC's responsibilities under the Articles, the Bylaws, and the AGB to exercise

¹¹⁶ Ironically, even the Peruvian government considered Professor Passa's opinion to be irrelevant to the NGPC's deliberations: "That report however is not pertinent to this procedure. Expressly limits its scope to the provisions of applicable international intellectual property agreements. It clearly states that through the analysis, there will be "no reference to the provisions of the various regulations adopted by ICANN and their legal nature", among others, the Applicant Guidebook. Furthermore, the study purposely excludes the contents of the Applicant Guidebook, which is the only reference set up by ICANN to establish the rules for the procedure and the subsequent applicable framework. The opinion of the independent counsel solicited by ICANN to this respect, analyzes the case of ".amazon" in a setting that might be appropriate for an IPRs forum by ICANN. The Guidebook gives no authority to consider IPRs issues as paramount provisions, noting that domain names are not a subject matter ruled by IPRs." Letter from F. Rojas Samanez to S. Crocker (11 Apr. 2014), p. 1 [Ex. C-050].

¹¹⁷ Hayden Statement, ¶ 39.

¹¹⁸ See Approved Resolutions - Meeting of the New gTLD Program Committee (14 May 2014) [Ex. C-054]. "The NGPC also considered correspondence received on the matter, *and takes particular note of correspondence from Amazon* ... wherein Amazon describes its 'attempts to find a mutual resolution with the Governments of Brazil and Peru' concerning the .AMAZON applications, and the public interest commitments that it is willing to include as contractually enforceable provisions in the Registry Agreement." *Id.*, p. 10 (emphasis added).

independent judgment and discretion and to provide reasons for its decisions. It was contrary to ICANN's Core Values and Bylaws and to international law.¹¹⁹

2. The Board's Failure to Operate Transparently and to Respect Amazon's Legitimate Expectations

50. ICANN's Articles require it to "carry[] out its activities ...through open and transparent processes..."¹²⁰ The Bylaws confirm that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."¹²¹ Transparency, a fundamental principle of international law, requires a regulatory body like ICANN to adhere strictly to its publicized rules when making decisions.¹²² The international principle of legitimate expectations, which is based on the bedrock international law principle of good faith (requiring, among other things, neutrality, objectivity, integrity, fairness), similarly requires respect for the reasonable expectations that rules and regulations establish.¹²³ These principles required ICANN to apply strictly the rules set out in the AGB. This ICANN did not do.

51. As set out in Scott Hayden's witness statement, Amazon strictly complied with the rules set out in the AGB.¹²⁴ Based on information provided by ICANN and its own due diligence, Amazon fully understood what the rules required. Amazon legitimately expected that ICANN would apply the AGB in accordance with the policy development process and the plain language of the AGB. Amazon fully relied on ICANN's commitments to implement the AGB as intended by the ICANN community. ICANN failed to do this after it accepted the GAC consensus advice to treat the .AMAZON Applications as applications for geographic names, when an ICANN panel had determined that they are not; by ignoring the decision of the ICC Independent Expert; and by acting on GAC advice advocated for by Brazil and Peru that was clearly inconsistent with the underlying policies and clear rules of the AGB, as well as the principles of limited government intervention on which ICANN was founded.

¹¹⁹ Forrest Expert Report, ¶¶ 3.2.4, 7.6-8.5.

¹²⁰ Articles, ¶ 4 [Ex. C-001].

¹²¹ Bylaws, Art. III, § 1 [Ex. C-064].

¹²² *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB/(AF)/97/1, Award (30 Aug. 2000), ¶ 76 [Ex. CLA-014]. See also *United States Olympic Committee v. International Olympic Committee and International Association of Athletics Federations*, Arbitration CAS 2004/A/725, Award (20 July 2005), ¶ 20 [Ex. CLA-015]; Forrest Expert Report, ¶ 8.5.

¹²³ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), ¶¶ 301-02 [Ex. CLA-0016]; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), ¶¶ 154, 157, 164, 174 [Ex. CLA-017]; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 Sept. 2001), ¶ 611 [Ex. CLA-018].

¹²⁴ Hayden Statement, ¶¶ 8-11, 52.

3. The Board's Failure to Exercise Due Diligence and Care

52. ICANN's Bylaws require an IRP Panel, *inter alia*, to determine whether "the Board exercise[d] due diligence and care in having a reasonable amount of facts in front of" it.¹²⁵ As understood in international law, an organization "satisfies its due diligence obligation when it takes all the reasonable measures ... that a well-administered government would take in a similar situation,"¹²⁶ including by identifying and considering with care all relevant information.¹²⁷

53. First, in the absence of a GAC rationale for its consensus advice, the NGPC decided to rely on Brazil and Peru's Early Warning. In justifying its decision to block the .AMAZON Applications on the basis of the Early Warning, the NGPC implicitly accepted Brazil and Peru's position that the .AMAZON gTLDs would be detrimental to the "public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome" and the "population inhabiting that geographical region."¹²⁸ No evidence was provided or cited to support these assertions. There is no evidence that the NGPC undertook any sort of investigation to evaluate the legitimacy of Brazil and Peru's positions stated in the Early Warning notice.

54. Second, the GAC provided no supporting rationale for its consensus advice against the Applications. The GAC did not identify the objecting countries, the process by which consensus was reached, or the public policy basis for its consensus advice against the Applications. There is no evidence that the Board, for its part, made any effort to obtain any of this information.

55. Third, the NGPC completely ignored the ICC Independent Expert's disposition of the Community Objections against the Applications. It is, in fact, not even mentioned in the nearly 20 items that the NGPC claims to have considered. The ICC Independent Expert's determination found that there was "no evidence" that Amazon's trademark had "caused any harm" to or "led to a[ny] loss of reputation" of the people of the Amazonas

¹²⁵ Bylaws, Art. IV, § 3, ¶ 4(2) [Ex. C-064].

¹²⁶ Jeswald W. Salacuse, *Law of Investment Treaties*, 2nd Ed. (2015), pp. 232-233 [Ex. CLA-019]. See similarly *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), ¶ 77 [Ex. CLA-020].

¹²⁷ ECJ Case C-269/90, Judgment of the Court (21 Nov. 1991), ¶ 14 [Ex. CLA-021]; ECJ Case C-16/90, Judgment of the Court (21 Oct. 1991), ¶¶ 32-35 [Ex. CLA-022]; Draft articles on Prevention of Trans boundary Harm from Hazardous Activities, with comments (2001), Art. 3, cmt. 10 [Ex. CLA-023]; *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (26 June 2009), ¶ 254 [Ex. CLA-024].

¹²⁸ Approved Resolutions - Meeting of the New gTLD Programme Committee (14 May 2014), p. 10 [Ex. C-054].

region.¹²⁹ It was not reasonable for the NGPC to ignore the ICC Independent Expert’s determination on precisely those issues that the AGB intended such experts to resolve. The NGPC’s rejection of his conclusions required factual inquiry and evidence that was not before the NGPC when it denied the .AMAZON Applications.¹³⁰

56. Fourth, while the NGPC commissioned its own expert report, it narrowly limited the Board Expert’s mandate to “strictly legal grounds in the field of intellectual property law.”¹³¹ It ignored other relevant principles of international law, the principles contained in ICANN’s Articles and Bylaws, and the various arguments that Amazon advanced in opposition to the GAC advice.¹³² Whether an expert opinion was needed in light of the ICC Independent Expert’s determination is highly questionable. However, once the NGPC decided to commission its own expert opinion, it was under an obligation to give the expert a remit relevant to the evaluation of the specific gTLD applications before it.

4. The Board’s Failure to Ensure That its Decision was Non-discriminatory

57. ICANN’s Bylaws establish that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”¹³³ This Bylaw reflects the international law prohibition on discrimination where “(i) similar cases are (ii) treated differently (iii) and without reasonable justification.”¹³⁴

58. First, the Board approved the application for the gTLD .IPIRANGA, submitted by Brazil’s largest privately-held fuel distribution company, Ipiranga, S.A. The Ipiranga is a river of São Paulo state in south-eastern Brazil, historically known as the place where Dom Pedro I declared the independence of Brazil from the United Kingdom of Portugal, Brazil, and the Algarves. The river shares its name with a district in the city of São Paulo, as well as other cities and municipalities in Brazil. Its importance is reflected by the fact that the river’s name is mentioned in the Brazilian national anthem. Brazil opposed the delegation of the .AMAZON gTLD to Amazon, “a private company,” because of the cultural sensitivity of the name “Amazon.” This rationale applies equally to

¹²⁹ Expert Determination of Prof. Luca G. Radicati di Brozolo (27 Jan. 2014), ¶ 102 [Ex. C-047].

¹³⁰ Approved Resolutions - Meeting of the New gTLD Programme Committee (14 May 2014), pp. 8-13 [Ex. C-054].

¹³¹ Passa Expert Opinion, p. 2 [Ex. C-048].

¹³² See *id.*

¹³³ Bylaws, Art. II, § 3 [Ex. C-064].

¹³⁴ *Saluka Investments B.V. v. The Czech Republic*, Partial Award (17 Mar. 2006), ¶ 313 [Ex. CLA-016]. See also *ADC Affiliate Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), ¶ 442 [Ex. CLA-025].

Ipiranga’s application for .IPIRANGA. But Brazil did not press for GAC consensus advice against that application and the Board approved Ipiranga’s application.¹³⁵ In order to treat the .AMAZON Applications in the same way as it treated the .IPIRANGA application, the Board should have determined not to follow the GAC’s advice, which it is explicitly authorized to do.

59. Second, the capriciousness of ICANN’s process is also shown by its treatment of the .YAMAXUN application – which sought a gTLD that was simply another version of Amazon’s name in Chinese. ICANN’s own process produced the correct result for the .YAMAXUN application. There was no reason to treat the .AMAZON string composed of Chinese characters (亚马逊) or the other .AMAZON gTLDs differently except for the political intervention of Brazil and Peru.

60. The .AMAZON Applications received different treatment from other similarly situated applications without reasonable justification. The NGPC discriminated against them in violation of the ICANN Bylaws and international law.

5. The Board’s Failure to Act Without Conflict of Interest in Deciding to Block the .AMAZON Applications

61. In its decision-making the ICANN Board is required to act without conflict of interest.¹³⁶ Customary principles of procedural fairness prohibit anyone from rendering a decision in his or her own case, due to inherent bias and conflict of interest. The BGC egregiously violated the Bylaws and this fundamental principle when making its recommendation on the .AMAZON Reconsideration Request.

62. All four BGC members who considered the Reconsideration Request – Cherine Chalaby, Olga Madruga-Forti, Chris Disspain, and Mike Silber – had also voted for the original NGPC decision blocking the .AMAZON Applications.¹³⁷ The fifth BGC member, Bruce Tonkin, abstained from the vote.¹³⁸ The applicable standard for evaluating a reconsideration request is, *inter alia*, whether the NGPC “contradict[ed] established

¹³⁵ See *Vistaprint* Declaration, ¶¶ 190-191 (ICANN’s “Board would risk violating its Bylaws, including its core values” by failing to consider and explain why apparently similar applications had been treated differently) [Ex. CLA-004].

¹³⁶ Bylaws, Art. IV, § 3, ¶ 4(1) [Ex. C-064].

¹³⁷ Letter from K. Rosette to C. LaHatte (25 Feb. 2015), p. 4 [Ex. C-071]; Minutes of the Regular Meeting of the New gTLD Program Committee (14 May 2014), p. 6 [Ex. C-055]; Minutes of the Board Governance Committee (BGC) Meeting, pp. 1-2 (22 Aug. 2014) [Ex. C-066].

¹³⁸ Minutes of the Board Governance Committee (BGC) Meeting (22 Aug. 2014), p. 2 [Ex. C-066].

ICANN policy,” failed to consider “material information,” or considered “false or inaccurate material information.”¹³⁹ That is, the BGC members were called upon to decide whether they themselves had made serious errors when they, as NGPC members, decided to block the .AMAZON Applications. It is impossible that the BGC members who evaluated the .AMAZON Reconsideration Request could have done so objectively. Ultimately, they simply recommended to themselves that their previous decision was justified. The NGPC then proceeded to accept that recommendation, again without any sort of independent analysis.

63. In substance, the BGC’s recommendation on the Reconsideration Request was incorrect on several counts. For example, the BGC determined that the NGPC had not relied on the Peruvian Government’s incorrect statements regarding the appearance of “Amazon” on an ISO list, specifically list 3166-2. But the materials the NGPC indicates it specifically considered and found significant include a letter from Peru stating that “Amazon” appears on the ISO 3166-2 list. The BGC also concluded that “the briefing materials of the NGPC’s 29 April 2014 and 14 May 2014 meetings reflect that the [ICC] Expert Determination was considered by the NGPC during its deliberations on the Amazon Applications.”¹⁴⁰ The briefing materials contain, in a chronology of events relating to the processing of the .AMAZON Applications, a brief reference to the ICC Independent Expert determination. But this provides no evidence that the determination was actually considered. The fact of the matter is that the determination is mentioned nowhere in the materials that the NGPC considered significant in reaching its decision, namely, those that it listed in its .AMAZON resolution. In this context, the BGC’s reference to the briefing materials is actually evidence of the BGC members’ *ex post facto* efforts to justify their earlier critical omission when they sat as the NGPC.¹⁴¹ If the BGC had performed due diligence, it would have concluded that the NGPC decision was contrary to ICANN’s policy in the AGB, relied on incorrect information from Peru, and failed to consider material facts such as the ICC Expert determination.

¹³⁹ Bylaws, Art. IV, § 2, ¶2 [Ex. C-064]. While ICANN’s Bylaws require that “[t]he Board shall issue its decision on the recommendation of the Board Governance Committee,” it was the NGPC itself, and not the full ICANN Board, that ultimately considered and accepted the BGC’s affirmation of its resolution. *Id.*, Art. IV, § 2, ¶ 17.

¹⁴⁰ Recommendation of the Board Governance Committee (BGC) Reconsideration Request 14-27 (22 Aug. 2014), p. 17 [Ex. C-065].

¹⁴¹ *See* NGPC Meeting - Briefing Materials (29 Apr. 2014) [Ex. C-052]; NGPC Meeting - Briefing Materials (14 May 2014) [Ex. C-056].

64. These serious affronts to Amazon's procedural fairness rights under the Bylaws and international law nullify both the BGC recommendation against Amazon's Reconsideration Request and the NGPC's acceptance of it.

E. RELIEF REQUESTED

65. Amazon respectfully requests the Panel, in a binding Declaration, (i) to declare that ICANN acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB that it made to Amazon, and violated international law; (ii) to direct ICANN to approve the Applications and to conclude registry agreements in connection therewith; (iii) to declare Amazon the prevailing party in this IRP and award it the costs of these proceedings; and (iv) to grant such other relief as the Panel may consider appropriate in the circumstances.

Respectfully submitted,



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