OTCA
Organização do Tratado de Cooperação Amazônica
SP - Secretaria Permanente

Organización del Tratado de Cooperación Amazónica
SP - Secretaría Permanente

Amazon Cooperation Treaty Organization
SP - Permanent Secretariat

De Organisatie van de Overeenkomst voor Amazonische Samenwerking
SP - Permanent Secretariaat

PS/ACTO/ 363 /2018

Brasilia, September 5, 2018.

To:

Mr. Göran Marby,
President and CEO of ICANN

Mr. Cherine Chalaby,
Chair of the ICANN Board

Dear Members of the Board,

The Amazonian countries, Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, member states of the Amazon Cooperation Treaty Organization (ACTO), have commissioned the Permanent Secretariat of ACTO, to communicate their position, approved in the Extraordinary Meeting of the Amazon Cooperation Council, held in Brasilia on August 27, 2018, in relation to the request for delegation of the ".amazon" TLD, as follows:

The Amazon countries, Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela, member states of the Amazon Cooperation Treaty Organization (ACTO), reaffirming that the name "Amazon" pertains to a geographical region constituting an integral part of the heritage of its countries, with regard to the delegation process of the ".amazon" TLD, consider it necessary to express the following principles:

- *The delegation of the ".amazon" TLD requires the consent of the Amazon countries;*
- *The Amazon countries have the right to participate in the governance of the ".amazon" TLD, including on matters related to public policy issues of their interest.*

The Amazon countries have reviewed the proposal presented by the company Amazon Inc. regarding the request for delegation of the ".amazon" TLD.

The Amazon countries have concluded that the proposal does not constitute an adequate basis to safeguard their immanent rights relating to the delegation of the ".amazon" TLD.

The Amazon countries, however, express the willingness to engage with the ICANN Board, based on the aforementioned principles, with a view to safeguarding their rights as sovereign states with respect to the delegation of the ".amazon" TLD.

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Likewise, please find herewith enclosed the final report of the working group established at the Meeting of the Ministers of Foreign Affairs of the ACTO Member Countries, held on December 1, 2017.

Sincerely yours,

ORGANIZAÇÃO DO TRATADO DE COOPERAÇÃO AMAZÔNICA
OTCA
BRASÍLIA
BRASIL

Amb. Jacqueline Mendoza
Secretary General SP/OTCA

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ANNEX V

FINAL REPORT OF THE WORKING GROUP ESTABLISHED PURSUANT TO PARAGRAPH 28 OF THE TENA DECLARATION

(Text approved at the Extraordinary Meeting of the Amazon Cooperation Council, held in Brasilia on 27 August 2018)

I. Introduction

1. The Working Group was established pursuant to paragraph 28 of the Tena Declaration, which was adopted by the Ministers of Foreign Affairs and high-level representatives of the governments of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela, at the XIII Meeting of Ministers of Foreign Affairs of ACTO, on December 1, 2017, who:

> ***"[Resolved:]***
>
> ***…***
>
> ***28. To consider the full validity of paragraph 31 of the Declaration of El Coca of the XII Meeting of Foreign Affairs of ACTO on May 13, 2013 in Ecuador and to encourage and instruct technical and operational bodies of the Member countries to carry out a comprehensive and urgent review of the proposal presented in the 60th meeting of ICANN in Abu Dhabi by Amazon Inc. to reach a common position on this subject."***

2. The proposal mentioned in paragraph 28 of the Tena Declaration, cited above, was presented by Amazon Inc. (the company) to the Amazon countries on October 29, 2017, during the 60th meeting of the Internet Corporation for Assigned Names and Numbers (ICANN) (Abu Dhabi, October 28 to November 3, 2017). Entitled *"our practical compromise",* it consisted of the following points:

i. The company would commit to *"block culturally sensitive names at second level"*, so that *"that no one could ever register and use these names"*;

ii. The company would commit to *"consult with relevant governments to identify these terms"*, and there would be both an *"ongoing process to identify other culturally sensitive terms"* and *"regular consultations with relevant governments under defined procedures";* and

iii. The company would commit to provide support for *"applications for .AMAZONAS, .AMAZONIA, .AMAZONICA" "filed or endorsed by OTCA and Member Governments",* which *"could include technical and application preparation support"*.

3. On 7 February 2018, following informal exchanges facilitated by ICANN representatives, the company sent to the ACTO Permanent Secretariat an updated proposal (annex 1). According to its terms, it would outline what would be, in the company's view, *"the basic aspects of a possible settlement agreement that would both recognize and resolve the legitimate concerns of the affected governments regarding the .Amazon matter while allowing ICANN to execute quickly the Registry Agreements for the .Amazon TLDs."* Documents containing further elements of clarification were also received on 6 March 2018 and 14 March 2018 (annexes 2 and 3).

4. On 8 February 2018, the Working Group held a plenary meeting to start consideration of the 7 February 2018 proposal. The Working Group held other plenary meetings on 22 February 2018, 6 March 2018, 27 March 2018, 17 April 2018, 3 May 2018, 24 May 2018 and 11 June 2018. In addition to holding plenary meetings, the Working Group engaged in permanent consultation both amongst its members and with the respective national authorities and experts in related fields in order to fulfill its mandate with the sense of urgency required by the Tena Ministerial Meeting.

5. The present report reflects the work accomplished by the Working Group. It contains the following sections: 1– Introduction; 2– Overview of the ".amazon" case; 3– State practice and opinion on TLD names with geographical and cultural significance; 4– Other considerations relating to the protection of TLD names with geographical and

cultural significance; and 5– Review of the company's proposal. The 7 February 2018 proposal and the clarifications subsequently provided by the company, as well as a proposal made by the company on 6 October 2015, appear as annexes.

II. Overview of the case of ".amazon"

6. In 2012, the company filed an application to ICANN – which is responsible for the management of the so-called "critical resources" of the Internet, namely names, numbers and technical standards – where it requested the delegation of the ".amazon" top-level domains ("TLD"). Had this request been granted, the company would be in the administration and use of Internet domain names available through addresses like "... xxx.amazon", and not only "... xxx.amazon.com". Numerous companies, institutions and cities around the world have made similar requests, on the assumption that the availability of a specific TLD for their use could strengthen their brands and/or names, as well as give them the advantages associated with the administration and policy development of TLDs.

7. It should be noted that the registration of new TLDs results in the monopolization of the registered name in the Domain Name System (DNS). In the case of ".amazon", for example, any Internet address under the ".amazon" TLD ("www.books.amazon", "otca.amazon", "rio.amazon", "people.amazon", etc.) would be, in principle, administered by the entity to which the right to register the ".amazon" is granted, and they would also be subject to the rules and standards developed by this entity.

8. Brazil and Peru timely objected to the request for registration of ".amazon", on the grounds that there is an inextricable relation between this TLD name and the Amazon region, the Amazon peoples, the Amazon natural heritage and the Amazon culture. It was clear that the ".amazon" TLDs should not be delegated to the company, according to the ICANN standards then prevailing, in a regime of exclusivity. Further, the company would exploit the ".amazon" TLDs for the private ends of the

company only, thereby limiting the possibility of its use by the Amazon countries, including for the achievement of public policies and the promotion of Amazon natural and cultural heritage. The Member States of ACTO subsequently endorsed the objection of Brazil and Peru. They further invoked the El Coca Declaration of May 3, 2013, adopted at the XII Meeting of Ministers of Foreign Affairs of the ACTO Countries, whereby their highest political authorities resolved to:

> ***"31. Expressing its firm rejection to any claim of ownership by others of geographical names of the Countries of ACTO in general and the name ".amazonia" or related, without the consent of the Amazon Countries. Thank the Federative Republic of Brazil and the Republic of Peru by the efforts advanced in the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), in defense of regional interests with respect to the claim to register the domain name amazon and ask to continue with the corresponding actions in that instance, reaffirming the right of the Member Countries of ACTO in defense of their sovereignty and the interests and rights current and future of the Amazonian peoples and their inclusion in the information society"***

9. The countries represented in the Governmental Advisory Committee (GAC) endorsed the position of ACTO, thereby exercising their responsibility to provide input to ICANN where there may be an interaction between ICANN's activities and national or international laws, or where they may affect public policy issues. The GAC, by full consensus, expressed to the ICANN Board of Directors the existing international opposition to the delegation of the ".amazon" TLDs, as recorded in the "GAC Communiqué" adopted on July 18, 2013 in Durban:

> ***""The GAC advises the Board that:***
>
> ***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 applications for .amazon (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591).”***

10. On 14 May 2014, based on the above declaration by the GAC,[1] the ICANN Board, through the New gTLD Program Committee (NGPC), decided not to grant the company’s request in the following terms:

> ***“...the NGPC accepts the GAC advice ... and directs the President and CEO, or his designee, that the applications for .AMAZON … and related IDNs in Japanese … and Chinese … filed by Amazon EU S.à.r.l should not proceed. By adopting the GAC advice, the NGPC notes that the decision is without prejudice to the continuing efforts by Amazon EU S.à.r.l. and members of the GAC to pursue dialogue on the relevant issues.”***

11. It should be noted that, as part of the process culminating in the Board’s decision, representatives from both the Amazon countries and the company held several meetings, including at the ACTO headquarters in Brasília. They discussed and explored possibilities to establish a *“modus vivendi”*, in order to allow the commercial exploitation of the “.amazon” TLDs by the company, while at the same time safeguarding the countries’ right to use the TLDs for the public interest, in line with national strategies and for the benefit of the local peoples. However, neither party could accept the different proposals presented by the other at that time.

12. The company continued in its attempt to reach a mutually acceptable solution with the Amazon countries, even after the Board’s decision. On the occasion of the XIX Meeting of the Amazon Cooperation Council of ACTO (Brasilia, 25-26 November 2015), representatives of the Member States took note of a new proposal submitted by the company on 6 October 2015 (Annex 4). The proposal provided for the shared use of the “.amazon” TLDs, both by the company for its private ends, and by the Amazon countries for uses associated with the Amazon region and peoples. The ACTO

[1] The Board also mentioned the expert opinion of an Independent Objector against the delegation of the “.amazon” TLDs without the agreement from the relevant public authorities.

Council considered that the dispute had come to an end following the Board's decision of 2014, and that the Member States were bound to reject the 6 October 2015 proposal, given the absence of a mandate from their Ministries of Foreign Affairs authorizing them to examine the new proposal.

13. In view of the decision by the ICANN Board to reject the ".amazon" application, as well as the failure to reach an agreement with the Amazon countries, the company requested the establishment of an Independent Review Panel (IRP), which issued its Final Declaration on 10 July 2017. The IRP considered that the decision of the Board to deny the company's application would have violated ICANN rules. The opinion of the IRP was that the Board had not adequately motivated its decision of 2014, having relied exclusively on the opinion of the GAC who was opposed to the delegation of the ".amazon" TLDs. Thus, it recommended that the Board should reexamine the company's applications, and that it explains whether it accepts or rejects them based on the Board's own evaluation of the public policy reasons associated with the delegation and the exploitation of the ".amazon" TLDs intended by the company.

14. Regarding the IRP recommendation, however, it should be noted that:

- The IRP **did not** recommend that the ICANN Board should accept the ".amazon" applications by the company;
- The IRP **did not** recommend that the ICANN Board should reject GAC advice contrary to the delegation of the ".amazon" TLDs to the company.
- The IRP **recommended** that "the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded merits-based public policy reasons for denying Amazon's applications".

15. In this context, Brazil and Peru submitted to the GAC a proposal for GAC advice requesting the Board not to follow the IRP recommendation. The rationale for the advice was that, if the Board were to follow the IRP recommendation, it would be completely denying the role of governments in ICANN's multi-stakeholder governance

model, in which it is the responsibility of governments to identify the relevant public policy issues and how they interact with ICANN's activities. The proposal explained that, in case the Board opted to follow the IRP recommendation, it would be accepting that it would be incumbent upon itself, and no longer on governments, the right and responsibility to identify the public policy reasons to decide on the application for the delegation of the "amazon" TLDs. The Brazilian-Peruvian document clarified, on the other hand, that the decision by the governments in this case, additionally, based itself on an evaluation of the **political sensitivity** that the subject raised (which is a basis expressly admitted in the objection procedure allowing governments to oppose, and therefore cause the rejection of, any application for the delegation of top-level domain names). The other ACTO Member States endorsed the position Brazil and Peru expressed in their document.

16. In a meeting held in Montevideo on 23 September 2017, the Board adopted a resolution accepting the fact that the company was declared the prevailing party in the dispute brought against ICANN before the IRP. Consequently, it decided immediately to reimburse the company the sum of US$163,045.51 for the procedural costs incurred with the IRP proceedings. At the same time, the Board refrained from accepting the "Panel's non-binding recommendation" that it re-evaluates the application for the ".amazon" TLDs, and consequently tasked an internal advisory body "to review and consider" that very recommendation and "to provide options for the Board to consider in addressing [it]".

17. During the 60th ICANN meeting, held in Abu Dhabi, from October 28 to November 3, 2017, the GAC was prompted to resume consideration of the subject. In that context, the GAC held a session dedicated to listening to representatives of the company, who submitted a new proposal aimed at persuading the Amazon countries to withdraw their objection to the company's application for the ".amazon" TLDs. As stated above, this proposal led to the subsequent establishment of this Working Group, by decision of the Ministers of Foreign Affairs of ACTO Member States, adopted at the XIII ACTO Ministerial Meeting, on 1 December 2017, in Tena, Ecuador.

18. It should also be noted that the GAC, as per the discussions held among its members on occasion of the 60th ICANN meeting, affirmed in its communiqué to the

Board that the delegation of the ".amazon" TLDs would necessarily require a solution having the acceptance of the countries involved, namely the Member States of the Amazon Cooperation Treaty Organization. Furthermore, the GAC advised the Board to continue facilitating negotiations between the company and ACTO Member States so that they can reach a mutually acceptable solution.

19. In compliance with the decision adopted at the XIII Meeting of ACTO Ministers of Foreign Affairs, the Permanent Secretariat of ACTO convened this Working Group to examine the proposal of the company in order to develop a common position. The Working Group comprises experts from each Member Country, including their respective representatives before the Governmental Advisory Committee of ICANN. It held its first plenary meeting on 8 February 2018. The experts met again on February 22 and March 6, ahead of the 61st ICANN meeting (San Juan, 10-15 March 2018).

20. During the 61st ICANN meeting, in San Juan, from 10 to 15 March 2018, the GAC considered the matter again, albeit briefly, and issued the following final statement:

> ***"Application for dot.Amazon and related strings***
>
> ***The GAC received an update from Brazil, supported by Peru and Venezuela, regarding the proposal submitted by Amazon.com at ICANN 60.***
>
> ***Member governments of the Amazon Cooperation Treaty Organization (ACTO) have established a process for analysing the proposal through an urgent and comprehensive review, and this analysis is progressing. The GAC was informed that Amazon.com and Board members have made themselves available to assist if requested. This factual update was also provided to the ICANN Board at the face to face meeting with the GAC."***

21. It must be recalled, additionally, that during the Abu Dhabi ICANN meeting the Board had invited the GAC to provide information about the reasons why governments opposed the company's request in 2013, which led to the Board's rejection

of the company's application for the ".amazon" TLDs. The request was made in order to prepare how the Board will react to the IRP recommendation, which, as recalled, suggested that the Board examine whether there are public policy reasons justifying the rejection of the company's application for the ".amazon" TLDs. The invitation by the Board generated an intense debate within the GAC, where most of the participating countries expressed their objection to responding to it in the requested terms, lest their response be interpreted as an acceptance that the GAC should account to the Board for the public policy reasons that governments are responsible for identifying or deciding. At the 61st ICANN meeting, in Puerto Rico, the GAC met again to discuss how to react to the invitation by the Board. The governments agreed to send it a response that, on the one hand, reported on the progress in the search for a compromise solution by the Amazon countries, through the Working Group established under the auspices of ACTO; on the other hand, it reiterated the terms of the communiqué adopted by the GAC in Abu Dhabi, on 1 November 2017. Hence, the GAC confirmed that it will not again discuss the public policy reasons that justified its objection to the delegation of the ".amazon" TLDs in the past, and it reiterated to the Board the need for a solution having the acceptance of ACTO Member Countries if the requested delegation is to be allowed.

22. Following the San Juan ICANN meeting, the Working Group held 5 additional plenary meetings in order to conclude the present report.

III. State practice and opinion on TLD names with geographical and cultural significance

23. Sovereign States and international organizations have been repeatedly declaring that top-level domain names with geographical and cultural significance shall not be assigned to private companies without the consent of the countries concerned.

24. These declarations are an expression of State practice and opinion, which have the effect of recognising or establishing limits under public international law on the freedom of public and private actors, including ICANN, to delegate or own names with a

geographical and cultural significance as TLD, unless otherwise accepted by the relevant Governments.

25. These declarations are also an expression of States' "[p]olicy authority for Internet-related public policy issues", pursuant to paragraph 35 (a) of the Tunis Agenda for the Information Society. They recognise or reinforce the public policy principle forbidding the delegation and appropriation of names with geographical and cultural significance as TLD, without the consent of the relevant Governments.

26. In the specific context of the case under scrutiny, the following declarations could be mentioned:

- The Early Warning by Brazil and Peru, endorsed by Argentina, Bolivia, Ecuador and Guyana, regarding the ".amazon" application, on 20 November 2012, in which they declared:

  - ***"Granting exclusive rights to this specific gTLD to a private company would prevent the use of this domain for the 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."***

- The aforementioned Declaration of El Coca, adopted by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela, at the XII Meeting of Ministers of Foreign Affairs of the Amazon Cooperation Treaty Organization, on 3 May 2013, in which they declared:

  - ***"…its firm rejection to any claim of ownership by others of geographical names of the Countries of ACTO in general and the name ".amazonia" or related, without the consent of the Amazon Countries […] reaffirming the right of the Member Countries of***

ACTO in defense of their sovereignty and the interests and rights current and future of the Amazonian peoples and their inclusion in the information society."

- The Declaration of Montevideo, adopted by Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Dominican Republic and Uruguay, at the IV Ministerial Conference on the Information Society in Latin America and the Caribbean, on 4 May 2013, in which they resolved to:

  - ***"Reject any attempt to appropriate, without the consent of the respective countries of Latin America and the Caribbean, the denominations "amazon" and "patagonia" in any language, or any other generic top-level domain (gTLD) names referring to geographical areas or historical, cultural or natural features, which should be preserved as part of the heritage and cultural identity of the countries of the region."***

- The Amazon Cooperation Treaty Organization (ACTO) Statement on the Final Declaration of the Independent Review Panel (IRP) of July 10, 2017, regarding ".AMAZON", of 9 October 2017, which:

  - ***"…reaffirm that the name Amazon, in any language, is part of the cultural heritage and identity of the Amazon countries, and that its use as a first level domain name, unless otherwise agreed by the Amazon countries, shall be reserved for the promotion of the interests and rights of the Amazon peoples and their inclusion in the information society."***

- The aforementioned Declaration of Tena, adopted by Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela, at the XIII Meeting of Ministers of Foreign Affairs of the Amazon Cooperation Treaty Organization, on 1

December 2017, which reaffirmed the full validity of paragraph 31 of the Declaration of El Coca, of 3 May 2013, regarding the ".amazon" domain name;

- The Declaration of Principles Regarding New Generic Top Level Domains, adopted by the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN) on 28 March 2007, in which the member States declared the public policy principle for new TLDs according to which:

  - ***"ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant governments or public authorities."***

- The Abu Dhabi Communiqué of the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN), adopted by the 85 member States attending the 60th meeting of the ICANN, on 1 November 2017, which:

  - ***"…recognizes the need to find a mutually acceptable solution for the countries affected and the Amazon corporation to allow for the use of .amazon as a top level domain name."***

- The Declaration of Cartagena de Indias, adopted during the VI Ministerial Conference on the Information Society in Latin America and the Caribbean, on 20 April 2018, in which the countries of Latin America and the Caribbean resolved to:

  - ***"Reiterate the rejection expressed by the governments of Latin America and the Caribbean in the Montevideo Declaration of 2013, of any attempt to appropriate, without the consent of the respective countries of the region, geographical denominations in***

any language, generic top-level domain (gTLD) names referring to geographical areas, country names or historical, cultural or natural features, two- or three-letter country codes, or denominations of origin, which should be preserved as part of the heritage and cultural identity of the countries of the region, and urge the governments of the region to participate actively in multisectoral forums established for these purposes"

27. Other instances of international practice also corroborate the existence of the public policy and public international law principle forbidding the delegation or appropriation of names with geographical and cultural significance as TLD, unless otherwise accepted by the relevant Governments. They are cases where interested parties acted upon pursuant to this principle, and include:

- The decision by a private company to withdraw its application for delegation and use of ".patagonia" as TLD, in the face of opposition by Argentina and Chile, on 10 July 2013.;
- The decision by the Internet Corporation for Assigned Names and Numbers (ICANN) not to delegate ".amazon" for registration and use by a private company, in the face of opposition by the Amazon countries, on 14 May 2014;
- The decision by a private company to obtain the consent from the Bar Municipality in Montenegro as a requirement for its application to exploit ".bar" as TLD, which was released on 11 June 2014 pursuant to an agreement between the parties, for use under the conditions of this agreement;
- The decision by the African Union Commission to support the establishment of ".africa" as TLD for the purposes selected by the African Union, and the decision by the Internet Corporation for Assigned Names and Numbers (ICANN) not to

delegate ".africa" to a company that did not have the African Union's support, on 3 March 2016.[2]

28. The guidance provided by the Internet Corporation for Assigned Names and Numbers (ICANN) in 2012 to protect names with geographical significance as TLD are currently under debate. They identify protected "geographic names" with those listed, for example, in the ISO 3166 standard, published by the International Organization for Standardization (ISO) to identify country codes and codes for their subdivisions, and in the UNESCO list of regions, published by the United Nations (UN) to identify area codes. Reliance exclusively on these lists, however, has proven to be arbitrary and insufficient:

- The arbitrariness lies in that the guidance provided resulted from a choice by the Internet Corporation for Assigned Names and Numbers (ICANN) to rely on lists used, not for the purpose of defining or identifying names with geographical significance, but to define internationally recognised codes of letters and/or numbers relating to, for example, countries and their subdivisions. That these lists are arbitrary and insufficient to identify names with geographical significance requiring protection is all too apparent. For, under the guidance devised by the Internet Corporation for Assigned Names and Numbers (ICANN) in 2012, names of places like "The Isle of Man", "Guam" and "Bonaire", which appear in the ISO 3166-1 standard, to mention but a few, received a higher level of protection than names like "Scotland" and the Amazon subdivisions of Brazil, Colombia, Peru and Venezuela, which appear in the ISO 3166-2 standard. Other names like "Maghreb", "Mesopotamia" and "Patagonia", for example, which do not appear in neither list, would have received no direct protection at all.[3]

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[2] The decisions regarding ".bar" and ".africa" concerned TLDs qualifying as "geographical names" under the guidance provided by the Internet Corporation for Assigned Names and Numbers (ICANN) in 2012 for the delegation of new generic top-level domains (gTLD Applicant Guidebook v. 2012-06-04). See paragraph 28.

[3] N.B. The origin of the practice by the Internet Corporation for Assigned Names and Numbers (ICANN) to rely on ISO standards dates back to 1984 (RFC 920), but was done, not to identify

- Regarding the current discussions within ICANN on the protection of names with geographical significance as TLD, GAC members, in their San Juan Communiqué, adopted at the 61th meeting of the ICANN, on 15 March 2018, declared that:

    - "…discussions [regarding Geographic Names at the Top Level within ICANN] should take into account any material available or being produced outside the ICANN context relating to names with geographical significance".

- The State practice and opinion identified above are to be included among the material available or being produced relating to names with geographical significance.

- In addition, several other States have expressed, in the context of discussions at the World Intellectual Property Organization (WIPO), from as early as 2001 (SCT/S2/8), their understanding that names with a geographical significance shall be protected against appropriation not only as TLD, but in the Domain Name System (DNS) as a whole.[4] As recorded by WIPO's General Assembly in 2002, *all* but three member States supported conclusions to the effect that names with geographical significance shall be protected in the DNS (WO/GA/28/7, para. 80). Discussions on the definition of such names are still ongoing under the auspices of WIPO, and a largely shared understanding among member States has been that these names shall include, but are not limited to, names listed in the standard ISO 3166-2, which includes the Amazon political entities of Brazil, Colombia, Peru and Venezuela. Besides, it should be noted that a proposal entitled "Proposal

names with geographical significance, but for the limited purpose of assigning country codes top level domains "[without] deciding what is and what is not a country" (RFC 1591).

[4] "The Chair concluded that most delegations favoured some form of protection for country names against registration or use by persons unconnected with the constitutional authorities of the country in question." (para. 210)

Concerning the Protection of Country Names and Geographical Names of National Significance" has been put forward by the delegations of Georgia, Iceland, Indonesia, Italy, Jamaica, Malaysia, Mexico, Monaco, Peru, Switzerland and the United Arab Emirates for initial discussion at the 39th session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, held from 23 to 26 April 2018.

- Finally, the guidance and practice developed by the Internet Corporation for Assigned Names and Numbers (ICANN) for the delegation of new generic top-level domains established a mechanism whereby international opposition against the delegation of names raising sensitivities among Governments, expressed through GAC advice, could justify ICANN's refusal to delegate any new top-level domain name to private parties. The mechanism was relied upon in the ".amazon" case and ensured that the seemingly existing lacunae under ICANN's guidance regarding the protection of names with a geographical and cultural significance would not be acted upon as if there were lacunae or permissive rules more generally – that is, lacunae or permissive rules at the international level. In fact, the existing public policy and public international law principle regarding the protection of names like ".amazon" as TLD, as evidenced by the constant and uniform opposition of the most directly affected States, is that they shall not be delegated to private parties, unless otherwise accepted by the relevant Governments, regardless of whether ICANN's existing guidance protects them expressly.

IV. Other considerations relating to the protection of TLD names with geographical and cultural significance

29. The international practice and opinion identified above support the existence of public policy reasons and principle prohibiting the appropriation of names with geographical, cultural or national significance as TLDs, unless otherwise agreed by

the relevant States. They also reveal the acceptance of this principle as law by the most directly affected countries.

30. In this context, claims by governments over these TLDs need not be subsumed under any specific or context-limited regime of trademark protection or, more generally, intellectual property law. They are grounded, independently and self-sufficiently, on both public policy and general international law principles, which States may identify and develop specifically regarding TLD names as culturally and politically sensitive as ".amazon".

31. With respect to the ".amazon" applications, it was GAC consensus advice the instrument that led to the necessary rejection by ICANN of a delegation that would have resulted in the appropriation of a TLD with geographic, cultural and national significance.

32. Under the objection procedure based on GAC consensus advice, the GAC could have opposed *any* application for a TLD that 'is seen as potentially sensitive or problematic by one or more governments'.[5] Hence, GAC advice producing identical effects as in the ".amazon" case could have been issued *'on any application'* for a new TLD, not necessarily a TLD with geographical significance. It could also have been issued based, not on international law, but only on public policy reasons or principle that only Governments were entitled to identify or develop.

33. As declared in Paragraph 35 (a) of the Tunis Agenda for the Information Society, 'Policy authority for Internet-related public policy issues is the sovereign right of States'. Accordingly, under ICANN Bylaws, '[t]he Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements ***or where they may affect public policy issues***.'

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[5] Applications raising sensitivities include strings which '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 national minority, disability, age, and/or a language or linguistic group (non-exhaustive)'.

34. The wider focus of the objection procedure based on GAC consensus advice on *any new TLD*, as opposed to *TLDs with geographical significance*, can be understood in light of the peculiarities of TLDs as a constitutive part of the DNS, and the need for public policy guidance in their respect.

35. The hierarchy that exists in the DNS is not without reason. The DNS functions not only like a postal address, where the order or place in which a name appears conveys different types of information about the delivery address, which in turn will help others looking for a known address to find it, or to connect to it. It also functions like a signpost, which gives information about what sort of activity is actually supposed to happen in or under that delivery address. It therefore also allows people who do not know any particular address to try to find and connect to addresses that they expect would offer whatever it is that they are looking for: providers of a certain type of wine; producers of a certain region of the world; touristic information about certain places; educational material about certain communities, etc.

36. Traditionally, the DNS sends a clear a message about what sort of business one should expect to find under the existing TLDs. The ".com" domain names generally lead to commercial addresses. The ".edu" domain names connects people to educational activities. The ".gov" supposes governmental use. And so forth. Country codes, in turn, have been the TLDs generally used for helping people find all sorts of activities and material having some connection, physical or otherwise, with the country or populations concerned. They have been placed, as a result, under the authority of States.[6]

37. Changes relating to the DNS brought about by the expansion of TLDs have not substantially altered the functions of a DNS hierarchically organised. TLDs, even in the context of their multiplication post 2011, continue to fulfil a very different role in the hierarchical structure of the DNS, and this role cannot be equated with the one domain names perform at lower levels.

38. Specifically, with regard to TLDs having a geographical and cultural significance, in addition to the international practice and opinion identified previously,

[6] The administration and use of these country codes TLD is a matter left to each country, and in some cases their use has been allowed for other purposes as a result of a sovereign decision by the country concerned.

the objection by States to their delegation for use by another party is further justifiable in the broader context where the objected delegation has the potential of subverting the structure of the DNS.

39. Thus, for example, public policy would justify that no party should appropriate, to the exclusion of others, names publicly available for use worldwide, as a TLD with geographical, cultural or national significance, unless otherwise agreed by the relevant States. The appropriation of a unique name in the DNS as a TLD having such peculiar significances, without the agreement of the relevant States, would amount to the recognition of a space in the Internet associated to countries and populations, but where these countries or populations or public representatives can neither participate in, nor benefit from, the TLD freely.

40. Furthermore, the entitlement of States to oppose the delegation of TLD names by which they, their regions, or their peoples are known may be understood in light of the peculiarities of the DNS more generally. Any delegation by ICANN of any TLD would necessarily produce effects within the jurisdiction of all States, including the monopolisation of the name as a TLD, with all its functional and operational peculiarities in the DNS, within physical territories subject to national jurisdictions. This monopolisation, imposed from abroad, unless otherwise agreed by the relevant States, would collide with their authority to decide which regime to accord to their names within their borders.

41. Finally, in view of the visibility TLDs with such significance may continue to acquire in the hierarchically structured DNS, their dissemination may override the DNS space reserved for State-administered or State-delegated country codes, with which they would compete *without being subject to the appropriate public policy authorities responsible for and who represent the regions and populations that these unique TLDs refer to.*

V. **The Amazon Inc. proposal**

42. The main points of the 7 February 2018 proposal are as follows:

i. The company would commit to *"establish[] **a second-level domain name**, mutually agreed upon by the parties for use by the OTCA countries to provide visibility into the Amazonia region and to support the Amazonian people's cultural heritage."*; in connection with this commitment, the company *"would bear the cost of hosting the website associated with [that second-level domain] as well as bear the costs associated with digitizing the content for that website, up to an amount of US $1,000,000"*, for the duration of *"4 years from the date of the agreement"*.

ii. The company would *"agree[] to permanently reserve (block from all use) a substantial number of second level domain names"*; *"[t]he number of second level domain names and the specific names would be agreed upon by Amazon.com and the OTCA governments"*.

iii. The company would *ex gratia* ("as an indication of goodwill and support for the people and governments of the Amazonian Region") *"make available to the OTCA governments credits for the use of AWS services, Kindles pre-loaded with mutually agreed upon content, and similar Amazon.com services and products in an amount not to exceed $5,000,000"*.

iv. The company would *ex gratia* ("as a further indication of Amazon.com's goodwill") *"be willing to help the OTCA governments create a substantive informational program to publicize the benefits of this agreement for the people of the Amazonian region and others"*.

43. Upon request by the Working Group, the company provided clarifications regarding the 7 February 2018 proposal, in particular *"on the commitments the company would be ready to make in return for ACTO member States' agreeing to a mutually acceptable solution, as is required to allow the use of ".amazon" as TLDs"*.

44. The following are the clarifications provided by the company:

v. Asked whether its commitment to "*establish[] a second-level domain name … for use by the OTCA countries*" was limited to one single domain name, the company confirmed such understanding, and clarified that the use by ACTO Member States of additional second-level domains would need to be reviewed by a Steering Committee.

vi. Asked whether it considered one single second-level domain sufficient to accommodate the rights and interests of eight diverse countries, as well as ACTO's (for example, to promote their cultural and natural heritage and preserve the rights of the Amazon peoples in the four official languages of ACTO Member States), the company replied affirmatively.

vii. Asked about the timing and the process for the selection of second-level domains for use by *the company* and *the Amazon countries*, the company replied that a Steering Committee would be *"the best mechanism to decide when the proper second-level domain may be added* ***for use by the OTCA countries****, immediately after the TLD is delegated"* (our emphasis). The company explained that it would work with the Amazon countries to establish the Steering Committee "as soon as agreement is reached".

viii. Asked whether and why its offer to cover the costs associated with the establishment and maintenance of second-level domains for use by the Amazon countries was limited to a period of four years, the company replied that this is the "start-up" period requiring the largest amount of resources, after which maintenance costs would become very low. The company added that it is willing to discuss whether a longer period would be appropriate.

ix. Asked whether it wished to subject the content created by the Amazon countries for their use as second-level domains to approval requirements, the company replied that it "must abide by its internal security measures … such as technical reviews, and any legal reviews required by law."

x. Asked whether its commitment to "*permanently reserve (block from all use) a substantial number of second level domain names*" meant that the Amazon countries themselves would be prevented from using the reserved domain names, the company replied affirmatively, explaining that this protection would be automatic and intended to prevent human error. It indicated, however, that the Steering Committee could address the question of modifying the list of reserved names.

xi. Asked whether the reserved names would be limited to terms in English, Portuguese and Spanish, thereby excluding translations to Dutch (one of the four ACTO official languages) and indigenous languages, the company explained that it is willing to include Dutch translations, as well as translations of the principal indigenous languages, under the guidance of the Amazon Cooperation Treaty Organization.

xii. Asked whether and how its offer to give the Amazon countries credits for buying its products and services would contribute to the development of the Amazon region, the company replied it would be primarily the responsibility of ACTO Member States to ensure that the use of the credits offered contribute to the development of the region.

xiii. Asked about its offer to "help" Amazon countries "publicize the benefits" of an agreement allowing the use of the ".amazon" TLDs, the company indicated that the "help" would be to "communicate the value of the arrangement to their people and governments", if the Amazon countries so wish and under their guidance. The company also indicated that the "help would be in the form of assistance to OTCA as it sees fit to support cultural and environmental causes and vulnerable populations".

xiv. Asked about its offer to make its employees and executives available for in-person participation in the Amazon countries, the company exemplified that they could participate in interviews and ceremonies to publicise the benefits of

a possible agreement. The company explained that their participation in these activities, if any, would be determined under the guidance of the Amazon countries. The company later added that it would *"also make other relevant professionals available to the OTCA countries for support"*.

xv. Asked whether its commitments would be framed so as to expressly recognise the Amazon countries' original right over the ".amazon" TLDs, the company replied that it *"looks to the OTCA for its guidance on what form of memorialization would be the best avenue for its countries to* ***ensure Amazon's commitment*** *to this mutually acceptable agreement"* (our emphasis). The company explained that it considers *"it is best for the OTCA to frame and communicate the value of the arrangement to its people and governments"*, and that *"this could be a public written document"*, and that the company *"will respect [ACTO's] wishes and act accordingly"*.

45. Some of the requested clarifications sought by the Working Group remained answered. They are as follows:

xvi. The company did not respond to the question of whether the Amazon countries would participate in the selection of second-level domain names for use by the company.

xvii. The company did not respond to the question of whether it would consider being subject to approval requirements stipulated by the Amazon countries for use of second-level domains.

xviii. The company did not respond to the question of whether it believed that a successful agreement with the Amazon countries would enhance the company's image internationally, by associating with it, for example, initiatives in support of cultural and environmental causes and of vulnerable populations.

VI. Annexes

Annex 1 – Proposal of 7 February 2018

Annex 2 – Clarifications of 5 March 2018

Annex 3 – Supplemental clarifications of 14 March 2018

Annex 4 – Proposal of 6 October 2015