

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PANEL

ICDR No. 01-16-0000-7056

In the Matter of an Independent Review Process

Between:

**AMAZON EU S.A.R.L.,
Claimant,**

-and-

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent.**

FINAL DECLARATION

IRP Panel:

Hon. Robert C. Bonner, Chair

Robert C. O'Brien, Esq.

Hon. A. Howard Matz (Concurring and partially dissenting)

1. Claimant Amazon EU S. a. r. l. ("Amazon") seeks independent review of the decision of the Board of the Internet Corporation for Assigned Names and Numbers ("ICANN"), acting through ICANN's New gTLD Program Committee ("NGPC"), denying its applications for top-level domain names of .amazon and its IDN equivalents in Chinese and Japanese characters. Amazon contends that in making the decision to deny its applications, the NGPC acted in a manner that was inconsistent with and violated

provisions of ICANN’s Articles of Incorporation, Bylaws and/or Applicant Guidebook for gTLD domain names (collectively, ICANN’s “governance documents”). ICANN contends, to the contrary, that at all times the NGPC acted consistently with ICANN’s governance documents.

2. After conducting a two-day in-person hearing on May 1–2, 2017 and having reviewed and considered the briefs, arguments of counsel and exhibits offered by the parties as well as the live testimony and the written statement of Akram Atallah, the written statement of Scott Hayden, the expert reports of Dr. Heather Forrest, Dr. Jerome Passa, and Dr. Luca Radicati di Bronzoli, the Panel declares that:

- a. The Board, acting through the NGPC, acted in a manner inconsistent with its Articles, Bylaws and Applicant Guidebook because, as more fully explained below, by giving complete deference to the consensus advice of the Government Advisory Committee (“GAC”) regarding whether there was a well-founded public policy reason for its advice, the NGPC failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC’s consensus advice. In sum, we conclude that the NGPC failed to exercise the requisite degree of independent judgment in making its decision as required by Article IV, Section 3.4(iii) of its Bylaws. (*See also* ICANN, Supplementary Procedures, Rule 8(iii) [hereafter “Supplementary Procedures”].)
- b. The effect of the foregoing was to impermissibly convert the strong presumption to be accorded GAC consensus advice under the Applicant

Guidebook into a conclusive presumption that there was a well-founded public policy interest animating the GAC advice.

- c. While the GAC was not required to give a reason or rationale for its consensus advice, the Board, through the NPGC, was. In this regard, the Board, acting through the NGPC, failed in its duty to explain and give adequate reasons for its decision, beyond merely citing to its reliance on the GAC advice and the presumption, albeit a strong presumption, that it was based on valid and legitimate public policy concerns. An explanation of the NGPC's reasons for denying the applications was particularly important in this matter, given the absence of any rationale or reasons provided by the GAC for its advice and the fact that the record before the NGPC failed to substantially support the existence of a well-founded and merits-based public policy reason for denying Amazon's applications.
- d. Notwithstanding the strong presumption, there must be a well-founded public policy interest supporting the decision of the NPGC denying an application based on GAC advice, and such public policy interest must be discernable from the record before the NGPC. We are unable to discern a well-founded public policy reason for the NGPC's decision based upon the documents cited by the NGPC in its resolution denying the applications or in the minutes of the May 2014 meeting at which it decided that the applications should not be allowed to proceed.

- e. In addition, the failure of the GAC to give Amazon, as a materially affected party, an opportunity to submit a written statement of its position to the GAC, despite Amazon's request to the GAC Chair, violated the basic procedural fairness requirements for a constituent body of ICANN. (*See* ICANN, Bylaws, art. III, § 1 (July 30, 2014) [hereinafter Bylaws].) In its decision denying the applications, the NGPC did not consider the potential impact of the failure of the GAC to provide for minimal procedural fairness or its impact on the presumption that would otherwise flow from consensus advice.
- f. In denying Amazon's applications, the NGPC did not violate the Bylaws' prohibition against disparate treatment.
- g. Amazon's objections to changes made to the Applicant Guidebook are untimely.

I. PROCEDURAL HISTORY

The relevant procedural background of this Independent Review Process ("IRP") is:

3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: John Thorne of Kellogg, Hansen, Todd, Figel & Frederick

Respondent: Jeffrey LeVee of Jones Day

4. The authority for the Independent Review Process is found at Article IV, Section 3 of the ICANN Bylaws.

5. The applicable Procedural Rules are ICDR's International Dispute Resolution Procedures, as amended and in effect on June 1, 2014, as augmented by ICANN's Supplementary Procedures, as amended and in effect as of 2011.
6. On May 14, 2014, relying primarily upon the GAC's consensus objection, the NGPC rejected Amazon's applications.
7. Amazon's request for reconsideration was rejected by ICANN's Board Governance Committee on August 22, 2014.
8. Thereafter, Amazon notified ICANN of its intention to seek independent review under Article IV, Section 3 of ICANN's Bylaws, and Amazon and ICANN participated in a Cooperative Engagement Process in an attempt to resolve the issues related to Amazon's applications. No resolution was reached.
9. On March 1, 2016, Amazon filed a Notice of Independent Review with the International Centre for Dispute Resolution, and thereafter, this Independent Review Panel (the "Panel") was selected pursuant to the procedures described therein.
10. After a preliminary telephonic conference on October 4, 2016, the Panel issued Preliminary Conference and Scheduling Order No. 1, *inter alia*, establishing timelines for document exchange and granting Amazon's request for an in-person hearing to be held in Los Angeles, California. Thereafter, on November 17, 2016, in its Order No. 2, the Panel granted Amazon's application to permit live testimony at the hearing of Akram Atallah, the Interim President and Chief Executive Officer of ICANN, and denied its requests for live testimony by Amazon's Vice President and Associate

General Counsel for Intellectual Property Scott Hayden; Dr. Heather Forrest, an Amazon expert witness; and Heather Dryden, former chair of the GAC. After some adjustment, a schedule for pre-hearing briefs was established and the merits hearing dates were set for May 1–2, 2017.

11. On January 3, 2017, the Panel approved a Joint Stipulation Against Unauthorized Disclosure of Confidential Information (“Joint Stipulation”) providing for the good faith designation of proprietary and sensitive internal documents as CONFIDENTIAL or HIGHLY CONFIDENTIAL.
12. An in-person merits hearing was held in Los Angeles on May 1–2, 2017, at which Mr. Atallah’s testimony was taken, exhibits were produced and the matter argued. At the conclusion of the hearing on May 2, the Panel closed the proceedings, subject to receiving a transcript of the hearing and a consolidated exhibit list from counsel, and took the issues presented under submission.
13. Following the merits hearing, on June 7, 2017 the Panel issued its Order No. 3 denying Amazon’s objections to ICANN’s proposed redactions of the hearing transcript that disclosed information contained in several exhibits designated as CONFIDENTIAL or HIGHLY CONFIDENTIAL under the Joint Stipulation.

II. FACTS

The salient facts are:

14. Amazon is a global e-commerce company incorporated under the laws of Luxembourg. Marketing through retail websites worldwide, Amazon, together with its affiliates, is

one of the largest internet marketers of goods in the world, with hundreds of millions of customers globally. (Statement of Scott Hayden, ¶ 5-6 [hereinafter Hayden Statement].)

It has a well-recognized trade name of “Amazon” which is a registered trademark in over 170 nations. (Id., at ¶ 7.) For nearly two decades, Amazon has been granted and used a well-recognized second level domain name of amazon.com. (Id., at ¶ 15.)

15. In April 2012, Amazon applied to ICANN for the delegation of the top-level domain names .amazon and its Chinese and Japanese equivalents, pursuant to ICANN’s Generic Top-Level Domains (“gTLD”) Internet Expansion Program. (Id., at ¶12.)

16. There are significant security and operational benefits to a company having its own top level domain name, including its ability to “create and differentiate” itself and have its own “digital identity online.” (Tr. Akram Atallah Test., 82-83 [hereinafter Atallah Tr.].) Amazon saw the potential of having the .amazon gTLD, or string, as a “significant opportunity to innovate on behalf of its customers” and improve its service to its hundreds of millions of customers worldwide. (Hayden Statement, ¶ 7.) It also saw it as a means to safeguard its globally recognized brand name. (Id.)

17. ICANN is a non-profit, multi-stakeholder organization incorporated in the State of California, established September 30, 1998 and charged with registering and administering internet names, both second and top level, in the best interests of the internet community. (Request for Independent Review, 3.) ICANN operates pursuant to Articles of Incorporation and Bylaws. The Bylaws applicable to this IRP proceeding are those as amended in July 30, 2014. (Id., at 3-4; *see* Bylaws (designated as Ex. C-64).)

18. In 2008 ICANN proposed to expand top level domain names beyond .com, .edu, .org to generic top level domain names. (Request for Independent Review, 6-7.) Through its multi-stakeholder policy development process, over a several-year period ICANN developed and issued an Applicant Guidebook (“Guidebook” or “AGB”) setting forth procedures for applying for and the processing and approval of gTLD names. There have been several iterations of the Guidebook. The version applicable to the Amazon applications at issue was adopted in 2012. (Id.; *see* ICANN, gTLD Applicant Guidebook (June 4, 2012) (designated as Ex. C-20) [hereinafter Guidebook].)
19. The Guidebook sets forth procedures for applying for and objecting to top level domain names. As for geographic names, the Guidebook adopts the ISO geographic names registry that includes prohibited geographic names and restricted geographic names, the latter which cannot be used over the objection of a nation that has an interest in such names. (*See* Guidebook, §§ 2.2.1.4.1, 2.2.1.4.2.) There is an initial review process for all applications for gTLDs. (Id., at § 1.1.2.5.) The objection process includes both an Independent Objector (“IO”) process and the potentiality of an objection by one or more governments that make up ICANN’s Government Advisory Committee (“GAC”). (Id., at §§ 1.1.2.4, 1.1.2.6., 3.2.5.) An IO can lodge an objection which ordinarily results in one or more independent experts being appointed by the International Chamber of Commerce to determine the merits of the objection, against criteria set forth in the Guidebook. (Id., at § 3.2.5.) Short of an objection, a GAC member government is permitted to lodge an “Early Warning Notice” expressing its public policy “concerns” regarding an application for a gTLD or string. (Id., at § 1.1.2.4.) The Guidebook also contemplates situations where the member governments of the GAC

provide “consensus advice” objecting to a string, in which case such “advice” is to be given a strong presumption against allowing an application to proceed. (*See generally* Guidebook, Module 3.)

20. There have been over 1,900 applications for gTLDs. Only a small fraction of them, less than 20, have been the subject of GAC advice. (Atallah Tr., 214.)

21. Amazon’s applications passed ICANN’s initial review process with flying colors, receiving the highest possible score in ICANN’s initial review report (“IER”). (Hayden Statement, ¶¶ 25-30.) Indeed, on July 13, 2013, ICANN issued an IER for the .amazon application that received a maximum score of 41 out of a possible 41 points. (Id.) The IER stated that .amazon did “not fall within the criteria for a geographic name contained in the Applicant Guidebook § 2.2.1.4.” (Id.) In other words, at this early stage, ICANN had determined that .amazon is not a listed geographic name in the AGB. This means that .amazon was not a prohibited nor restricted geographic name requiring governmental support. (Id., at ¶ 31.)

22. Nonetheless, on November 20, 2012, Amazon’s applications were the subject of an Early Warning Notice filed by the governments of Brazil and Peru. (*See* Ex. C-22.) By its own terms, an Early Warning Notice is not an objection; however, it puts an applicant on notice that a government has a public policy concern about the applied for string that could be a subject of GAC advice at some later point in time. (*See* Guidebook, § 1.1.2.4.) The Early Warning Notice process is set forth in ICANN’s Applicant Guidebook. (Id.)

23. The Early Warning Notice began with the recital that “The Amazon region constitutes an important part of the territory of . . . [eight nations, including six others besides Brazil and Peru] due to the extensive biodiversity and incalculable natural resources.” (Ex. C-22, at 1.) Brazil and Peru then stated three reasons for their concerns about a private company, Amazon, being granted the gTLD “Amazon.” (Id., at 1-2.) The reasons were that:

- (1) It would prevent the use of this domain for purposes of public interest related to the protection, promotion and awareness raising an issue related to the Amazon biome. It would also hinder the possibility of use of this domain name to congregate web pages related to the population inhabiting that geographical region;
- (2) The string “matched” part of the name, in English, of the “Amazon Cooperation Treaty Organization,” an international organization formed under the Amazon Cooperation Treaty signed in 1978; and
- (3) The string had not received support from governments of countries where the geographic Amazon region is located.¹

(See Id.)

24. In a note to the Early Warning Notice, Brazil stated:

The principle of protection of geographic names that refer to regions that encompass peoples, communities, historic heritages and traditional social networks whose public interest could be affected by the assignment, to

¹ As noted elsewhere, under the Guidebook, a non-listed “geographic” name does not require government support.

private entities, of gTLDs that directly refer to those spaces, is hereby registered with reference to the denomination in English of the Amazon region, but should not be limited to it.

(Id., at 3.) Brazil went on to state that its concerns about the .amazon string extended to the English word “amazon” in “other languages, including Amazon’s IDN [internationalized domain name] applications” using Chinese and Japanese characters. (Id.)

25. The parties stipulated that none of the strings applied for by Amazon are listed geographic names as defined in ICANN’s Applicant Guidebook. (Ex. C-102, ¶ 1; Expert Report of Dr. Heater Forrest, 18-28 [hereinafter Forrest Report].)

26. Part of Guidebook procedures provide for an Independent Objector (“IO”) to challenge applications for domain names. (Guidebook, § 3.5.4.) Regarding Amazon’s applications, on March 12, 2013, an IO, Alain Pellet, initiated community objections to Amazon’s applications before the International Centre for Expertise of the International Chamber of Commerce (“Centre”). (Ex. C-102, ¶ 2.) The objections interposed by the IO were virtually identical to the concerns raised by Brazil and Peru in their Early Warning Notice. (Hayden Statement, ¶ 32.) Amazon responded to the IO’s community objections in May 2013. Thereafter, on June 24, 2013, the Centre selected Professor Luca G. Radicati di Brozoli as an independent expert to evaluate the IO’s objections. (Ex. C-47, at 4.) At the request of the IO, the independent expert, Professor Radicati, allowed both sides to file additional written statements. (Id., at 5.) The IO provided an augmented written statement on August 16, 2013, and Amazon replied to it on August 22, 2013. (Id., at 5.) Although, following an extension of time, his draft expert report

was due October 5, 2013, Dr. Radicati did not submit his final expert report until January 27, 2014. (Id., at 5, 25.)

27. On January 27, 2014, Professor Radicati issued a detailed Expert Determination rejecting the IO community objections. (See Ex. C-47.) He methodically considered the four factors laid out in Section 3.5.4 of the Guidebook as to whether the IO's objection on behalf of the community, i.e., the people and area of the Amazon region, had merit. (Id., at 13-14.) Regarding the first factor, he found that there was a strong association between the "community" invoked by the IO and the strings applied for. (Id., at 15.) As to the second factor, i.e., whether there as a "clear delineation of the community" invoked by the IO, Dr. Radicati indicated that: "The record is mixed and doubts could be entertained as to whether the clear delineation criterion is satisfied." (Id., at 16-18.) In light of his conclusion that there was not material detriment to the community being represented by the IO, (*see* discussion *infra*), Dr. Radicati stated that there was no need to reach a "conclusive finding" on the second factor. (Id., at 18.)

28. One of the four factors was "[w]hether the Applications create a likelihood of material detriment to a significant portion of the Amazon community." (Id., at 21). Professor Radicati determined that the applied for string .amazon would not pose a material detriment to the region or the people who inhabit the geographic region proximate to the Amazon River. (Id., at 21-24)

29. Among other things, Professor Radicati found that neither the Amazon community nor any entity purporting to represent that community had applied for the string .amazon. (Id., at 23.) This failure alone, he found, "can be regarded as an indication that the

inability to use the Strings in *not crucial* to the protection of the Amazon Community’s interests.” (Id. (emphasis added).) Regarding his finding of an absence of material harm, Professor Radicati concluded that the fact that an objector is deprived of future use of a specific gTLD is not a material detriment under ICANN’s Guidebook:

[T]he Amazon Community’s inability to use the Strings [.amazon and the two IDNs] is not an indication of detriment, and even less of material detriment. The Objection Procedures are clear in specifying that “[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a filing of material detriment” (Section 3.5.4).

(Id., at 23 (Emphasis in the original).)

30. Further, supporting his finding of no material detriment to the Amazon community and region, Professor Radicati noted that the applicant, Amazon, has used the name “Amazon”

as a brand, trademark and domain name for nearly two decades also in the States [including Brazil and Peru] arguably forming part of the Amazon Community. . . . There is no evidence, or even allegation, that this has caused any harm to the Amazon Community’s interests, or has led to a loss of reputation linked to the name of the region or community or to any other form of damage.

. . . [I]t is unlikely that the loss of the ‘.com’ after ‘Amazon’ will change matters.

(Id., at 23).

31. Regarding the absence of material detriment factor, Professor Radicati concluded:

More generally, there is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community, or that Amazonia and its specificities and importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO. Were a dedicated gTLD considered essential for the interests of the Amazon Community, other equally evocative strings would presumably be available. “.Amazonia” springs to mind.

(Id., at 23.)

32. Another factor considered by independent expert Radicati was: “Whether there is substantial opposition to the Strings within the community.” (Id., at 19.) In rejecting the IO objections, Professor Radicati, while aware of the Early Warning Notice of Brazil and Peru, was evidently unaware that they continued to object to the applied for strings, nor was he aware of the GAC advice. (Id., at 20-21.) Indeed, he stated:

As evidence of substantial opposition to the Applications the IO relies essentially on the position expressed by the Governments of Brazil and Peru in the Early Warning Procedure. The two Governments undoubtedly have significant stature and weight within the Amazon Community. However, as noted by the Applicant, beyond their expressions of opposition in the Early Warning Procedure, the two Governments did not voice disapproval of the initiative in other forms. As a matter of fact, they engaged in discussions with the Applicant.

This is not without significance. Indeed, had the two Governments seriously intended to oppose the Application, they would presumably have done so directly. There is no reason to believe that they could have been deterred from doing so by the fear of negative consequences or by the costs of filing an objection. The Applicant is persuasive in arguing that the Brazilian and Peruvian Governments’ attitude is an indication of their belief that their interests can be protected even if the Objection does not succeed. Indeed, in assessing the substantial nature of the opposition to an objection regard must be had not only to the weight and authority of those expressing it, but also to the forcefulness of their opposition.

(Id.) These considerations led Dr. Radicati to find that the IO has failed to make a showing of substantial opposition to the Applications within the purported Amazon Community. (*See id.*)

33. Professor Radicati was mistaken about the continued lack of opposition to the string, especially from Brazil and Peru. Had he been informed of their opposition and the GAC advice objecting to the strings, it would no doubt have changed his finding regarding

whether there was substantial opposition to the strings. Nevertheless, even though, in addition to factors negating detriment, he considered lack of serious opposition as “indirect confirmation” of lack of detriment, it does not appear that Professor Radicati’s lack of knowledge regarding the GAC advice would have significantly impacted the reasons for his finding that there was no material detriment to the interest of the people and region proximate to the Amazon River by awarding the string to Amazon. (Id., at 23-24.)

34. The NGPC, rejected Amazon’s applications on May 14, 2014. While the NGPC had Professor Radicati’s expert rulings and determinations before it, it did not discuss nor rely upon his expert determinations, *inter alia*, regarding the lack of material detriment, in making its decision to reject Amazon’s applications. (Ex. C-102, ¶ 2.)

35. In order to assist it in carrying out its functions, ICANN has various supporting organizations and advisory committees. One such committee is the GAC which is comprised of representatives of governments from around the world and several multi-lateral governmental organizations. (Atallah Tr., 98-99.)

36. Amazon’s applications were discussed at meetings of the GAC in Beijing in April, 2013² and, later, in Durban, South Africa on July 16, 2013.

37. At its plenary session in Durban on July 16, 2013, the GAC discussed the applications for the .amazon strings. The session was transcribed. (See Ex. C-40.) At this meeting, representatives of various nations spoke. (Id.) Brazil and Peru led the opposition to

² The Beijing GAC meeting was closed and there is no publicly available transcript of what was discussed respecting the application for .amazon and the related IDN strings in Japanese and Chinese characters.

Amazon's strings, and approximately 18 delegates of GAC member nations expressed general support for Brazil and Peru's position opposing the applied for strings. (Id.)

With one or two exceptions of no significance, only the governments of Brazil and Peru expressed any actual reasons for opposing the applications, but if anything, Brazil and Peru's reasons at the GAC meeting were either less specific than the three they gave in their Early Warning Notice or they were not well-founded grounds for objecting to the applied for strings. The representative of Peru, for example, stated that the applications should be rejected because "Amazon" was an ISO "listed" geographic name in the Guidebook; a statement which the parties now agree was erroneous, but not corrected during the Durban meeting.³ (Id., at 14-15.)

38. At the Durban GAC meeting, Brazil essentially pointed out that Brazil and other nations in the Amazon region of South America have a "concern" with the application to register the gTLD .amazon. (Id., at 11-13.) The reason for their concern, much less an articulated public policy concern, is not apparent. (Id.) For example, Brazil asked that the GAC reject the registration of "dot amazon by a private company in the name of the public interest." (Id., at 13.) Brazil does not define what the "public interest" for such a rejection would be. Moreover, how assigning .amazon to the applicant would harm the "public interest" was not explained. Brazil asserted that an undefined "community[.]" quite possibly, the people residing in the Amazon region, will "clearly be impacted[.]" but neither Brazil nor any other nation explained what this "impact"

³ We note that the word "amazon" can be traced back to ancient Greece as meaning large, powerful female warriors. (See *Amazon*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/amazon> (last visited June 12, 2017).) This meaning of the word is found in Virgil's Aeneid. Indeed, it is one of the word's defined meanings in the English language. (Id.)

would be or how it would harm the population living in the Amazon region or be detrimental to its “bio systems.” (Id., at 11-13). Brazil stated that it cannot accept the registration of .amazon to the applicant as “a matter of principle,” but nowhere does it make clear what that “principle” is. (Id., at 13.) A Brazilian vice minister added that dot amazon affected “communities” in eight countries, and it is important to protect “geographical and cultural names.” (Id., at 13-14.) Again, he did not articulate how such “names” would be harmed. (Id.)

39. At the Durban meeting, the representative of Peru set forth three “points that we think are crucial to understanding our request [to reject the applied for strings].” (Id., at 14.) According to the Peruvian representative, they were:

- (1) “[L]egal grounds” found in the ICANN’s Bylaws, in prior GAC advice and in the Guidebook, (Id., at 14.);⁴
- (2) The string is a geographic name listed in the Guidebook and therefore requiring governmental consent (Id., at 14-15.);⁵ and
- (3) The national and local governments of the countries through which the Amazon River flows “have expressed, in writing, their rejection to dot amazon.” (Id., at 14-15, 24.).⁶

⁴ Based on our review, no “legal” grounds for rejecting the applications is apparent in those documents or elsewhere. (See Ex. C-48, at 7, 14.)

⁵ As noted elsewhere, the word “Amazon” is not a listed geographic name in the Guidebook. Therefore, government consent is not required.

⁶ See discussion *supra*, at 10 n. 1 (Individual governmental consent is not required by the Guidebook).

40. At the conclusion of the plenary session at Durban, after the representative of one nation acknowledged that “there are different viewpoints,”⁷ the GAC Chair, Heather Dryden, asked:

So I am now asking you in the [GAC] committee whether there are any objections to a GAC consensus objection to the applications for dot Amazon, which would include their IDN equivalents? I see none. . . . So it is decided.

(Id., at 30.)

41. In a communique at the conclusion of its Durban meeting, the GAC issued consensus⁸ advice to the Board of ICANN recommending to the Board that it not proceed with Amazon’s applications, stating:

The GAC Advises the ICANN Board that:

- i. The GAC has reached consensus [that the following application should not proceed] on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:
 1. The application for .amazon (application number 1-1315-58056) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5591).

(Ex. R-22, at 3-4 (footnote omitted).)

42. In substance, the GAC “advice” or recommendation was that the Board should reject the applications for all three gTLDs applied for by Amazon. (Id.) No reasons were given by the GAC for its advice, nor did it provide a rationale for the same.⁹ (*See Id.*)

⁷ *See Ex. C-40*, at 29.

⁸ “Consensus” advice means, in essence, no nation objected to the position taken in the advice. It does not mean, however, that there was unanimous approval of the advice.

⁹ The Panel requested that the parties attempt to secure a written statement from Heather Dryden, who was the Chair of the GAC at the time of the Durban meeting, regarding the reasons for the

43. During the course of the GAC’s meetings in Durban, Amazon Vice President and Associate General Counsel Scott Hayden stated that Amazon “asked the GAC to grant us the opportunity to distribute to the GAC background materials about the .AMAZON Applications and the proposals we had made but the GAC Chair rejected our request.” (Hayden Statement, ¶ 37.)
44. At all times pertinent herein, ICANN’s Board delegated its authority to decide all issues relating to new gTLD program that would otherwise require a Board decision, including decisions regarding whether an application for a gTLD should proceed or be rejected, to the NGPC.¹⁰ (Ex. C-54, at 6.)
45. Procedures set forth in the Applicant Guidebook, Module 3.1 provide for an opportunity for an applicant to provide a written response to GAC advice. Amazon submitted a response taking issue with the GAC advice. (*See* Ex. C-43.) Thereafter, regarding one of the issues raised by Amazon, that is, whether Brazil or Peru had a right under international law to the name indicating the geographic region or river called “Amazon,” the NGPC commissioned an independent legal expert, Dr. Jerome Passa, a law professor at the Université Panthéon-Assas in Paris, France, to opine. (*See* Ex. C-48.)
46. In his March 31, 2014 report, Dr. Passa concluded that neither Brazil nor Peru had a legally cognizable right to the geographic name “Amazon” under international law, or for that matter under their own national laws. (Ex. C-48, at 7, 14; *accord* Forrest

GAC advice. (Order No. 2, at 4.) No longer the GAC Chair, Ms. Dryden declined to provide a statement. (Atallah Tr., 95.)

¹⁰ This delegation was made on April 10, 2012.

Report, 5, 9-12). In sum, he concluded that there was no legal principle supporting Brazil and Peru's objections. In other words, the legal objection of Brazil and Peru was without merit and did not provide a basis for the rejection of Amazon's gTLD applications.¹¹ (Ex. C-48, at 14.)

47. Moreover, Dr. Passa found that there was no prejudice to Brazil or Peru if the applied for strings were assigned to Amazon:

Beyond the law of geographical indications [which do not support Brazil and Peru's legal claims], the assignment of '.amazon' to Amazon would not in any event be prejudicial to the objecting states [Brazil and Peru] who, since they have no reason for linguistic reasons to reserve '.amazon', could always if they so wished reserve a new gTLD such as '.amazonia' or '.amazonas' which would create no risk of confusion with '.amazon'.

(Id., at 10; *see also* Ex. C-47, at 23.)

48. Both Amazon and the governments of Brazil and Peru were afforded an opportunity to respond to Dr. Passa's report. All three did so. (Ex. C-54, at 9-10.)

49. The NGPC considered Amazon's applications at several meetings. Following receipt of Dr. Passa's report and several letters responding thereto, the NGPC met on April 29, 2014 to consider the applications for the .amazon string and its Chinese and Japanese IDN equivalents. (*See* Ex. R-31, at 2-4.) The applications were discussed and the GAC advice referenced, but no decision was reached whether to allow the applications to proceed or to deny them. (Id.) Nor was any discussion or speculation by the NPGC

¹¹ Regarding whether Amazon had a legal right to be assigned the strings, Dr. Passa opined "no one can claim a TLD simply because the name it consists of is not included on the ISO list" and that Amazon did not have a legal right to the gTLD .amazon based on its registered trademarks for that name in Brazil, Peru and other nations. (Ex. C-48, at 10.) Amazon makes the point that it was not making a legal claim of right based on its trademarks. (Ex. C-51, at 2.)

regarding the rationale for the GAC advice, or any public policy reasons that supported it, reflected in the minutes of this meeting. (Id.)

50. At its May 14, 2014 meeting, the NGPC adopted a resolution¹² in which it rejected Amazon's applications. Under the heading "GAC Advice on .AMAZON (and related IDNs)," the NGPC resolved that: "[T]he NGPC accepts the GAC advice . . . and directs the [ICANN] President and CEO . . . that the applications . . . filed by Amazon EU S.à.r.l. should not proceed." (Ex. C-54, at 6-7.)

51. The resolution goes on to state:

The action being approved today is to accept the GAC's advice to the ICANN Board contained in the GAC's Durban Communiqué stating that it is the consensus of the GAC that the applications . . . should not proceed. The New gTLD Applicant Guidebook (AGB) provides that if "GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, this will create a strong presumption for the ICANN Board that the application should not be approved." (AGB, § 3.1). To implement this advice, the NGPC is directing the ICANN President and CEO . . . that the applications . . . should not proceed.

(Id., at 7.)

52. After referencing the fact of Amazon's position opposing the GAC advice and stating that it considered the report of Dr. Passa "as part of the NGPC's deliberations in adopting the resolution," the resolution states: "The NGPC considered several significant factors during its deliberations about how to address the GAC advice" (Id., at 8-10.) The resolution noted that the NGPC "had to balance the competing interest of each factor to arrive at a decision." (Id., at 10.) Then, after noting that it

¹² The minutes of the NGPC meeting on May 14, 2014 (Ex. R-83) are substantially the same and recite verbatim the NGPC resolution. (Ex. C-54).

lacked the benefit of any rationale from the GAC for its advice, it listed factors it relied upon, which were:

- (1) The Early Warning Notice submitted by Brazil and Peru that state as reasons for their concern, namely:
 - (a) The granting of the string to Amazon would deprive the string for use by some future party for purposes of protecting the Amazon biome and/or its use related to the populations inhabiting the Amazon region; and
 - (b) Part of the string matches the name in English of the Amazon Cooperation Treaty Organization. (Id., at 10.)¹³
- (2) Curiously, the NGPC considered correspondence reflecting that Amazon sought to amicably resolve Brazil and Peru’s objections. We assume that Amazon’s effort to informally resolve concerns of Brazil and Peru was not a factor that *supported* the NGPC’s decision denying Amazon’s applications. (Id., at 10-11.)¹⁴
- (3) The resolution correctly noted that, as it stood in the position of the ICANN Board, under the Guidebook the NGPC was called upon to “individually

¹³ On its face, it is difficult to see how this partial, one-word match in English to a treaty organization’s name is a valid reason that supports the GAC advice and hence the NGPC’s decision. Indeed, it was undisputed that this organization is commonly referred to as “OTCA,” an acronym for its name in Spanish. (Hayden Statement, ¶ 16; Forrest Report, 27.) There appears to be no reason to believe that internet users would be misled or confused.

¹⁴ If so, this would be unwise policy for the same reason that evidence of settlement discussions is not to be considered against a party attempting to settle a matter. (*See, e.g.*, Fed. R. Ev. 408 (and international legal equivalents).)

consider an application for a new gTLD to determine whether approval would be in the best interests of the Internet community.” (Id., at 11.)¹⁵

(4) The resolution goes on to list eighteen documents, including, for example, the Early Warning Notice, that the NGPC reviewed before deciding to reject Amazon’s applications. (Id., at 11-13.) Aside from referring to the Early Warning Notice, there is no discussion in the resolution how any of these other documents impacted the NGPC’s decision.

53. Thus, the only *reasons* articulated by the NGPC for its decision rejecting Amazon’s applications were the strong presumption arising from the GAC consensus advice and, albeit without explanation, two reasons advanced by Brazil and Peru in their Early Warning Notice. Assuming that those reasons animated the GAC advice—and this is by no means clear¹⁶—there is no explanation by the NGPC in its resolution regarding why the reasons reflect well-founded and credible public policy interests.

54. The only live witness at the hearing was Akram Atallah, ICANN’s Deputy Chief Executive Officer and President of its Global Domains Division. Mr. Atallah has held executive positions at ICANN since he joined in 2010, and, significantly, he attended all seven meetings of the NGPC at which Amazon’s applications were agendaized and discussed, and in particular the last two meetings on April 29 and May 14, 2014. (Atallah Tr., 86:14-24.)

¹⁵ This factor neither supports the grant or the denial of the application, but merely reinforces that NGPC’s duty to make an independent and balanced determination in the best interests of the Internet community.

¹⁶ In her testimony before the *DCA Trust* IRP, GAC Chair Heather Dryden stated that Early Warning Notices, and the rationale of nations that issued them, do not reflect GAC’s rationale for its advice. (Ex. CLA-5, 314:16-19; *see also* Atallah Tr., 306:12-24.)

55. In substance, Mr. Atallah testified that Amazon's applications would have been allowed to proceed, but for the GAC consensus advice opposing them. (Id., at 88-89).
56. Mr. Atallah testified that the NGPC did not consider the .ipiranga string, named for a famed waterway in Brazil, because neither Brazil nor the GAC opposed that string. Nor did Brazil submit an Early Warning Notice with respect to .ipiranga. (Id., at 90).
57. Regarding the impact of GAC consensus advice on the NGPC's decision, Mr. Atallah testified that ICANN is not controlled by governments, but ICANN procedures permit governments, through the GAC, to provide input, both as to ICANN policy matters and individual applications to ICANN. (Id., at 94-95.) The NPGC resolution (Ex. C-54) provides the entire rationale for the Board's (here, the NGPC's) decision to reject Amazon's applications. (Id., 93.) Because it lacks expertise, the NGPC, acting for the Board, did not and "will not substitute its decision" for the GAC's, especially on public interest issues. (Id., at 99-101, 128.)
58. Once the GAC provides the NGPC with consensus advice, Mr. Atallah explained, not only is there a strong presumption that it should be accepted, but it also sets a bar too "high for the Board to ignore." (Id.) Put differently, the bar is "too high for the Board to say no." (Id.) The Board, he said, defers to the consensus GAC advice as a determination that there is, in fact, a well-founded public policy reason supporting it. (Id., at 102). He added: "the board does not substitute its opinion to the opinion of the countries of that region when it comes to the public interest." (Id., at 128:16-18).
59. Mr. Atallah acknowledged that if GAC consensus advice was based upon the GAC's (or governments' advocating for a GAC consensus objection) mistaken view of

international law, it would outweigh the strong presumption and the advice would be rejected by the Board. (Id., at 127:11-128:4.) But the Board would not consider GAC consensus advice based on an anti-U.S. bias or “fear of foreign exploitation,” whether rational or not, as grounds for rejecting such advice. (Id., at 129:21-130:9.)

60. Although the NGPC considered the reasons given in the Early Warning Notice, Mr. Atallah made clear that the NGPC made no independent inquiry regarding whether there was a well-founded public policy rationale for the GAC advice, (Id., 102:17-20), nor did the NGPC explain why the reasons given in the Early Warning Notice stated well-founded public policy concerns for rejecting the applications. Moreover, the NGPC in its resolution did not discuss, much less evaluate Brazil and Peru’s reasons for their objection to the strings, (*see* Ex. C-54).

61. On August 22, 2014, ICANN’s Board Governance Committee denied Amazon’s request for reconsideration of the NGPC’s decision. (Ex. C-67.)

62. On March 1, 2016, Amazon filed its Notice and Request for an Independent Review of the NGPC decision denying its applications.

III. PROVISIONS OF THE ICANN’S ARTICLES OF INCORPORATION, BY-LAWS AND APPLICANT GUIDEBOOK

63. The task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Applicant Guidebook.¹⁷ The most

¹⁷ While the Bylaws refer only to the Articles of Incorporation and Bylaws as subjects for the IRP process, the Panel is also permitted to determine whether the procedures of the Guidebook were followed. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration,

salient provisions of these governance documents are listed below.

64. Article IV, Section 3(4) of the Bylaws and Rule 8 of ICANN Supplementary

Procedures for Independent Review Process provide:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [i.e., the internet community as a whole]?

(See Bylaws, Art. IV, § 3(4).) Here, only compliance with requirements (ii) and (iii) is in issue.

65. Art. 4 of the Articles of Incorporation:

“[ICANN] shall operate for the benefit of the Internet community as a whole”

66. Art. I, Sec. 2 of the Bylaws: CORE VALUES¹⁸

In performing its mission, the following core values should guide the decisions and actions of ICANN:

. . .

3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interest of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making. . . .

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

at ¶ 106 (Int’l Centre for Dispute Resolution, March 3, 2015), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>; Resp’t Prehearing Br., 6.)

¹⁸ All references to the Bylaws are to those in effect at the time of the NGPC’s decision, that is, the Bylaws, as amended July 2014. (See Ex. C-64.)

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. . . .

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness [such as the process of independent review].

11. While remaining rooted in the private sector, recognizing that governments . . . are responsible for public policy and duly taking into account governments' . . . recommendations.

. . . Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

67. Art. II, Sec. 3 of the Bylaws: NON-DISCRIMINATORY TREATMENT

“ICANN shall not . . . single out any particular party for disparate treatment unless justified by substantial and reasonable cause”

68. Art. III (TRANSPARENCY), Sec. 1 of the Bylaws: PURPOSE

“ICANN and its constituent bodies shall operate to the maximum extent feasible in a[] . . . transparent manner and consistent with procedures designed to ensure fairness.”

69. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 1 of the Bylaws: PURPOSE

“. . . ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.”

70. Art. IV (ACCOUNTABILITY AND REVIEW), Sec. 3 of the Bylaws:

INDEPENDENT REVIEW OF BOARD ACTIONS

The Board, or in this case, the NGPC final decision is subject to an “independent review” by this independent review panel to determine whether the Board/NGPC made

its decision in a manner consistent with ICANN’s articles of incorporation, applicable Bylaws and the applicant guidebook, i.e., its governance documents.

71. Art. XI (ADVISORY COMMITTEES), Sec. 1 of the Bylaws: GENERAL

“Advisory Committees shall have no legal authority to act for ICANN, but shall report their findings and recommendations to the Board.”

72. Art. XI, Sec. 2(1)(a) of the Bylaws

“The [GAC] should consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly . . . where they may affect public policy issues.”

73. Art. XI, Sec. 2(1)(j) of the Bylaws

“The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies.”

74. Module 2 of the Applicant Guidebook¹⁹

Module 2 of the Guidebook sets forth the evaluation procedures for gTLD strings, including string similarity, string confusion, DNS stability, reserved names and geographic names.

75. Sec. 2.2.1.4 of the Applicant Guidebook

“Applications for gTLD strings must ensure that appropriate consideration is given to the interests of governments . . . in geographic names. The requirements and procedure

¹⁹ The applicable version of the Guidebook for purposes of this IRP is Version 10 published on June 4, 2012. (*See* Ex. C-20; Resp’t Prehearing Br., 10 n. 29.)

ICANN will follow in the evaluation process are described in the following paragraphs.”

76. Sec. 2.2.1.4.2 of the Applicant Guidebook

“The following types of applied-for strings are considered geographic names and [require] . . . non-objection from the relevant governments” This is followed by a list of four specific categories, including, *inter alia*, cities, sub-national place names, etc.

77. Sec. 2.2.1.4.4 of the Applicant Guidebook

“A Geographic Names Panel (GNP) will determine whether each applied-for gTLD string represents a geographic name For any application where the GNP determines that the applied-for 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.”

78. Attachment to Module 2 of the Applicant Guidebook, at A-1

“It is ICANN’s goal to make the criteria and evaluation as objective as possible.”

79. Module 3 of the Applicant Guidebook

Module 3 relates to Objection Procedures.

80. Sec. 3.1, GAC Advice on New gTLDs of the Applicant Guidebook

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities [i.e., may affect public policy issues].

. . .

. . . The GAC [may] advise[] ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN that the application should not be approved.

IV. PARTIES' POSITIONS AND REQUEST FOR RELIEF

81. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties and then provides the reasons for its Declaration.

82. Amazon seeks a declaration that the NGPC, acting for the Board, acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its rejection of the Amazon applications. Distilled to their essence, Amazon makes the following contentions:

- a. The GAC was required to state a reason(s) or rationale for its consensus advice, i.e., reason(s) for recommending that Amazon's applications be denied.
- b. As a constituent body of ICANN, the GAC was required to adhere to the Bylaws' duties of procedural fairness under Article III, Section 1. To comply with this Bylaw, the GAC was either required to permit Amazon, as the potentially adversely affected party in interest, to appear before the GAC or, at a minimum, submit information to the GAC in writing before it issued consensus advice.
- c. To warrant a strong presumption, GAC advice must be based upon a valid and legitimate public policy interest(s).
- d. By failing to make an independent evaluation of whether or not there was a valid public policy rationale for the GAC advice, the NGPC abdicated its independent decision making function to the GAC, converted the strong presumption to be given to GAC consensus advice into a conclusive presumption or veto, and otherwise abandoned its obligation to make a sufficient due diligence

investigation of the facts needed to support its decision and/or failed to make an independent, merits-based decision in the best overall interest of the Internet community.

- e. To comply with ICANN's transparency obligations, the NGPC must give reasons for its decisions. The NGPC's resolution of May 14, 2014 is not a sufficient statement of reasons for its decision rejecting Amazon's applications in that the NGPC failed to state any public policy rationale for its decision and/or balance the interests of Amazon favoring the granting of the applications with public policy interests militating against granting same.
- f. The ICANN Board, acting through the NGPC, violated its obligation not to engage in disparate treatment of the applicant under Article II, Section 3 of the Bylaws by denying its application, whereas under similar circumstances a private Brazilian corporation was granted the gTLD of .ipiranga, a string based on the name of another celebrated waterway in Brazil.²⁰

83. As for relief, in addition to a declaration by this Panel that the NGPC acted inconsistently with ICANN governance documents, Amazon seeks affirmative relief in the form of a direction to ICANN to grant Amazon's applications. Alternatively, Amazon asks the Panel to recommend to the ICANN Board that its applications be granted and to set timelines for implementation of the Panel's recommendation, including a timeline for ICANN's "meet and confer" obligation with the GAC.²¹

²⁰ The Ipiranga is mentioned in the Brazilian national anthem.

²¹ In these circumstances, Amazon urges the Panel to retain jurisdiction until final resolution of this matter by the Board.

84. ICANN disputes each of Amazon’s contentions and asserts that the NPGC did not violate the Articles of Incorporation, the Bylaws or the Guidebook. Fairly synthesized, it argues:

- a. There is nothing in the Articles of Incorporation, applicable Bylaws²² or Guidebook that requires the GAC to state any reason for its consensus advice.
- b. The procedural fairness obligation applicable to the GAC, as a constituent body of ICANN, did not require the Board to assure that a representative of a private company be able to appear before the GAC, nor did it require the Board to allow a potentially adversely affected party to be able to submit written statements to the GAC.²³
- c. Although the GAC advice must be based on legitimate public policy considerations, even in the absence of a rationale for the GAC advice, there was sufficient support in the record before the NGPC for the NGPC to discern a well-founded public policy interest, and it was proper for the NGPC to consider reasons given in the Early Warning Notice as providing a public policy reason supporting the NGPC decision.
- d. Given the strong presumption arising from GAC consensus advice, the NGPC appropriately decided to reject Amazon’s applications.

²² Although not applicable to this IRP, Section 12.3 of the new version of the Bylaws adopted in 2016 requires all advisory committees of ICANN, including the GAC, to include “the rationale for such advice.” (See Ex. R-81; ICANN Bylaws, § 12.3 (eff. Oct. 1, 2016).) The new Bylaws indicate that they are not intended to be retroactive. (See ICANN Bylaws, § 27.4 (eff. Oct. 1, 2016).)

²³ ICANN also noted that Amazon had an opportunity to “lobby” governments in between the GAC meetings at which Amazon’s applications were discussed and it, in fact, did so. ICANN argued that this overcomes any lack of procedural fairness regarding the GAC.

- e. The NGPC gave reasons for its decision, and the reasons given by the NGPC for denying Amazon's applications are sufficient.
- f. The NGPC did not engage in disparate treatment of Amazon. The anti-disparate treatment provision contained in the Article II, Section 3 of the Bylaws should be read, not as applying to ICANN as a whole, but as a limitation on actions of the ICANN Board. As there was no objection to .ipiranga, neither the NGPC nor the Board was ever called on to decide whether .ipiranga should be granted to a private company.²⁴ Accordingly, there could be no disparate treatment by the Board, or the NGPC acting for the Board, regarding the strings at issue in this proceeding.
- g. Amazon's challenge to a 2011 change in the Applicant Guidebook relieving the GAC of any requirement to provide reasons for its advice is untimely.

85. Further, ICANN takes issue with the relief requested by Amazon. It argues that the Panel's powers are limited under the Bylaws to declaring whether or not the Board, or in this case the NGPC, complied with its obligations under ICANN's governance documents. It acknowledges, however, that if the Panel finds that the NGPC acted in a manner inconsistent with the governance documents, the Panel may properly make remedial recommendations to the Board.

V. ANALYSIS OF ISSUES AND REASONS FOR DECISION

86. The majority of the Panel discusses *seriatim* each of the pertinent issues fairly raised by parties as part of the Independent Review Process.

²⁴ ICANN also argued that the Ipiranga, a small waterway running through Sao Paulo, paled by comparison to the Amazon River, both in length and importance.

A. Was the GAC required to state a reason(s) or provide a rationale for its advice?

87. There is little question that a statement of reasons by the GAC, when providing consensus advice regarding an application for an internet name, is desirable. Having a reason or rationale would no doubt be helpful to the ICANN Board in evaluating the GAC's advice and assuring that there is a well-founded public policy interest behind it. Nonetheless, there is no specific requirement that the GAC provide a reason or rationale for its advice, and therefore, we conclude that a rationale or statement of reasons by the GAC was not required at the time of its action in this matter.²⁵
88. Amazon argues the decision in the *DCA Trust* IRP, particularly paragraph 74, is precedent for proposition that the GAC must provide a reason for its advice. In that IRP, the Panel held: "As previously decided by this Panel, such accountability requires an organization to *explain or give reasons* for its activities, accept responsibility for them and to disclose the results in a transparent manner." (See *DotConnectAfrica Trust v. ICANN*, Case No. 50-2013-001083, Final Declaration, at ¶ 74 (Int'l Centre for Dispute Resolution, July 31, 2015), <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (Emphasis added) [hereinafter *DCA Trust*].)
89. While prior IRP decisions are indeed precedential, although not binding on this Panel,²⁶ we believe that read in context, *DCA Trust* stands for the proposition that the Board, to meet its accountability and transparency obligations, must give reasons for its actions. We do not read this language as requiring the GAC to do so.
90. It is true that ICANN changed its Bylaws in 2016 and now the GAC is required to provide a rationale for its advice, but this change is not retroactive, and, contrary to

²⁵ See discussion *supra*, at 32 n. 22 (discussing a change in the Bylaws effective 2016).

²⁶ See Bylaws, Article IV, Section 3(21).

Amazon's argument, cannot be viewed as merely codifying the holding in *DCA Trust*.
(See discussion *supra*, at 32 n. 22.)

B. Was Article III, Section 1's procedural fairness requirement violated?

91. This issue is evidently one of first impression. We have been unable to find any prior IRP matter that has considered this issue with respect to the GAC, and none was cited to us by the parties.
92. Article III, Section 1 of the Bylaws provides: "ICANN *and its constituent bodies* shall operate . . . with procedures designed to ensure fairness." (Emphasis added.)
93. The GAC is a constituent body of ICANN within the meaning of this Article. Indeed, ICANN does not argue otherwise. Nor is there any doubt, under the facts presented, that Amazon attempted to offer a written statement or materials regarding why the GAC should not adopt consensus advice opposing Amazon's applications. (Hayden Statement, ¶ 37.) It was not permitted to do so. (*Id.*) Nor is there any doubt that, as the applicant, Amazon stood to be materially adversely affected if the GAC issued consensus advice against its application, if for no other reason than there would be a strong presumption that, if the GAC did so, Amazon's application should be rejected by the ICANN Board.
94. Basic principles of procedural fairness entitle an applicant who request to have the opportunity to be heard in some manner before the GAC, as a constituent body of the ICANN. There is, however, a question of how much procedural fairness is required to satisfy Article III, Section 1. We need not decide whether such procedural fairness necessarily rises to the level normally required by administrative and quasi-judicial bodies. (See, e.g., *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313

(1950).) However, in matters relating to individual applications being considered by the ICANN Board itself, it is noteworthy that while individual applicants are not permitted to appear in person and make a presentation to the Board, ICANN's procedures permit an applicant, whose interests may be adversely affected by a decision of the Board regarding its application, to submit a written statement to the Board as to why its application should be permitted to proceed. The Panel is of the view that the same type of procedural fairness afforded by the Board required the GAC, as a constituent body of ICANN, to provide a comparable opportunity. Thus, under the facts of this IRP, the procedural fairness obligation applicable to the GAC, at a minimum, required that the GAC allow a written statement or comment from a potentially adversely affected party, before it decided whether to issue consensus advice objecting to an application. The Board's obligation was to see that the GAC, as a constituent body of ICANN, had such a procedure and that it followed it.

95. In this case, Amazon attempted to distribute written materials explaining its position to the GAC, but the GAC Chair denied its request. (Hayden Statement, ¶ 37.) Allowing a written submission would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that "Amazon" was a *listed* geographic name under the Guidebook. Amazon might have been able to submit information that neither Brazil nor Peru had a legal or sovereign right to the name "Amazon" under international or domestic law and that Amazon had registered the trademark or trade name of "Amazon" in many nations of the world, including Brazil and Peru. In any event, the failure to provide Amazon with an opportunity to submit a written statement - - despite its request that it be allowed to do

so - - to the very body of ICANN that was considering recommending against its application violated Article III, Section 1.

96. In the view of the majority of the Panel, while the GAC had the ability to establish its own method of proceeding, its failure to afford Amazon the opportunity to submit a written statement to the GAC governments at their meeting in Durban undermines the strength of the presumption that would otherwise be accorded GAC consensus advice. While our holding is limited to the facts presented in this matter, it draws support from the principle that a party has the right to present its views where a judicial or arbitral body is deciding its case. Indeed, this fundamental principle of procedural fairness is widely recognized in international law. Moreover, international law also supports the view that the failure to afford a party the opportunity to be present its position affects the value of the decision-making body's proclamations. For example, in the realm of international arbitration, the awards of arbitrators are given substantial, nearly irrefutable, deference. (*See generally* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. III, V, July 6, 1988, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention").) However, the New York Convention allows a court to refuse to enforce an arbitration award—that is, refuse to show the arbitrators deference—if "[t]he party against whom the award is invoked was not given proper notice . . . or was otherwise unable to present his case." (*Id.*, at art. V(1)(b).) Identical provisions allowing a party to either set aside an arbitration award or resist its enforcement appear in the Model Law on International Commercial Arbitration published by United Nations Commission on International Trade Law. (*See* United Nations Commission on International Trade Law, UNCITRAL Model Law on

International Commercial Arbitration 1985, with Amendments as Adopted in 2008, arts. 34(2)(a)(ii), 36(1)(a)(ii) (Vienna: United Nations, 2008).)

97. We find that this principle, enshrined in international arbitration law by convention, is instructive here. While the GAC is indisputably a political body - - not a judicial or arbitral body - - its consideration of specific gTLD applications takes place within the framework of the ICANN Board's application review process where the GAC's consensus advice is given a strong presumption by the Board, which itself is functioning as a quasi-judicial body. Thus, under the facts before us, the GAC's decision not to provide a affected party with the opportunity to be present a written statement of its position, notwithstanding its specific request to do so, not only constitutes a violation of procedural fairness obligations under Article III, Section 1 of the ICANN Bylaws, it diminishes the strength of the strong presumption that would otherwise be warranted based upon GAC consensus advice.
98. It is true, as ICANN established at the hearing, that because Amazon's applications were considered at two GAC meetings, Amazon had an opportunity between those meetings to lobby one or more governments to object to consensus advice, and it attempted to do so. Whatever this opportunity was, however, it was not a procedure that the GAC made available when requested by an applicant. Moreover, attempting to influence governments, who have their own political agendas and trade-offs that could be extraneous to the merits of an application for an internet name, is not the same as procedural fairness provided by the GAC itself. That duty is independently mandated under the Bylaws and is not supplanted by an opportunity to lobby governments apart from or in-between GAC meetings.

99. Our decision regarding minimum procedural fairness required by Article III, Section 1 of the Bylaws finds support in the *DCA Trust* IRP. In that matter, the Panel noted that DCA Trust was not given “an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice[.]” (*See DCA Trust*, at ¶ 109.) The *DCA Trust* Panel went on to hold that this lack of procedural opportunity was “not [a] procedure[] designed to insure the fairness required by Article III, sec. 1.” (*Id.*)

C. Must GAC advice be based upon public policy considerations?

100. The reasons for GAC Advice, even if not expressed, as is the case before us, must nonetheless be grounded in public policy. This proposition is fairly gleaned from several provisions of ICANN’s governance documents. Thus, the Bylaws recognize that the GAC’s purpose is to advise the Board regarding its activities “where they may affect public policy issues.” (Bylaws, art. XI, § 2(1)(a).) So, not only does the GAC have an important role in providing recommendations and advice regarding policy development by ICANN, but it also can intervene regarding a specific application to ICANN provided that the application raises legitimate public policy concerns. The GAC Operating Principles reinforce the need for a nexus between GAC advice and legitimate public policy concerns. (*See ICANN Governmental Advisory Comm. Operating Principles*, art. I, principles 2, 4.) Although not a decision-making body, as reflected in its Operating Principles, the GAC views itself as providing advice and recommendations to the ICANN Board and operating as a forum to discuss “government and other public policy issues and concerns.” (*Id.*) The Applicant

Guidebook indicates that the GAC may object when an application “violates national laws or raises sensitivities.”²⁷ (Guidebook, module 3.1.)

101. Moreover, the public policy concerns underlying GAC advice must be well-founded.

Mr. Atallah acknowledged that if GAC consensus advice was based upon a mistaken view of international law, the Board would reject such advice. (Atallah Tr., 127:14-128:4.) Thus, we conclude that if, for example, in the unlikely event that GAC consensus advice was animated by purely private interests, or corruptly procured, the ICANN Board would properly reject it. Put differently, such advice, even if consensus advice, would not be well-founded and would not warrant a strong presumption, or any presumption at all. Similarly, if the only reason for the GAC advice was that the applied for string is a listed geographic name under the Guidebook, whereas in truth and in fact it is not a listed geographic name, that reason, although based on public policy concerns, would be not be well-founded and, therefore, would be rejected by the Board. Put differently, the objection based on such grounds would not warrant a presumption that it should be sustained. Similarly, if the reason for objecting to the string is that assigning it would violate international or national laws, consensus advice might warrant a presumption if well-founded, but that presumption would be overcome by expert reports that make clear that neither international law, nor national law of the

²⁷ As noted, based on the record before us, the granting of Amazon’s application would violate no country’s national laws. As for sensitivities, it is noteworthy that nowhere in the record is there a claim, much less any support for same, that the people who inhabit the Amazon region would find the use by the applicant of the English-language string, .amazon, derogatory or offensive. Brazil’s statement of concerns regarding the “risks” of granting the applications that relates to “a very important cultural, traditional, regional and geographical name related to the Brazilian culture” falls short of identifying what those “risks” are. (*See* Ex. C-40, at 11-13.) Nor did the delegates from Brazil or Peru articulate why the use of the string would be offensive to the sensibilities of people inhabiting the Amazon River basin. (*See id.*) There was no evidence in the record to support such an assertion, even had it been made.

objecting countries, prohibit the assignment of the string to the applicant. This is especially true where, as here, an independent expert report commissioned by the NGPC made clear that the legal objection of Brazil and Peru lacked merit. If the only reason for the consensus advice is that another entity, presumably a non-governmental organization (NGO), in the future would be denied the string, at a minimum the NGPC, acting for the Board, would need to explain why the Guidebook rule that deprivation of future use of a string, standing alone, is not a basis to deny a string is inapplicable. Further, if the public policy concern supporting the GAC advice is implausible or irrational, presumably the Board would find it not well-founded and would not be compelled to follow it, notwithstanding the strong presumption. (*Cf.* Atallah Tr., 128:24-129:20.)

102. The foregoing illustrates why it is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board. In this matter, the only arguably valid reason for the GAC advice is the assertion by Brazil and Peru that sometime in the future a NGO or other entity may wish to use the applied for English gTLD and equivalents in Chinese and Japanese characters to promote the environment and/or the culture of indigenous people of the Amazon region. This is no doubt a public policy concern. However, the evidence before the NGPC, in the form of expert reports of Dr. Passa and Dr. Radicati, indicates quite clearly that there is no prejudice or material harm to potential future users of the applied for strings. Ordinarily, the Board defers to expert reports, especially expert reports, such as Dr. Passa's, commissioned by the Board, or in this instance, by the NGPC functioning as the Board.

103. We conclude that GAC consensus advice, although no reasons or rationale need be given, nonetheless must be based on a well-founded public interest concern and this public interest basis must be ascertained or ascertainable from the entirety of the record before the NGPC. In other words, the reason(s) supporting the GAC consensus advice, and hence the NGPC decision, must be tethered to valid and legitimate public policy considerations. If the record fails to contain such reasons, or the reason given is not supported by the record, the Board, in this case acting through the NGPC, should not accept the advice.²⁸

104. As we explain more fully below, the Board cannot simply accept GAC consensus advice as conclusive. The GAC has not been granted a veto under ICANN's governance documents. If the NGPC's *only* basis for rejecting the applications was the strong presumption flowing from GAC consensus advice, this would have the effect of converting the consensus advice into a conclusive presumption and, in reality, impermissibly shifting the Board's duty to make an independent and objective decision on the applications to the GAC.

105. In this matter, the NGPC relied upon the reasons set out in the Early Warning Notice of Brazil and Peru as providing a rationale supporting the GAC advice. Although there is no clear evidence that the rationale for objecting to the use of the applied-for strings advanced by Brazil and Peru in the Early Warning Notice formed the rationale for the

²⁸ Under ICANN procedures, the Board would then engage the GAC in further discussions and give GAC a reason why it is doing so. (Atallah Tr., 121-128.) In this case, the reason might well be that there is no discernable valid and legitimate public policy reason for the GAC's recommendation. To the extent that reasons were given in the Early Warning Notice, the mere deprivation of the future use of the string does not appear to be a material reason, especially where there is no showing of harm or prejudice to the environment or inhabitants of the Amazon region.

GAC advice,²⁹ we believe it was appropriate for the NGPC to consider the reasons given by Brazil and Peru as support for the NGPC's decision, along with the presumption of valid public policy concerns arising from the consensus advice, as a basis for denying Amazon's application. Needless to say, however, the Early Warning Notice itself is not entitled to any presumption that it contains valid public policy reasons.

106. That said, as noted above, the reasons given by Brazil and Peru in their Early Warning Notice do not appear to be based on well-founded public policy concerns that justify the denial of the applications. Further, Brazil and Peru's objection to the applications based on deprivation of future use of the strings is not supported by the record, including the expert reports that are part of that record. In these circumstances, we are constrained to conclude that there is nothing to support the NGPC's decision other than the presumption arising from GAC consensus advice. There must be something more than just the presumption if the NGPC is to be said to have exercised its duty to make an independent decision regarding the applications, especially where, as in this matter, the GAC did not provide the ICANN Board with a rationale or reasons for its advice.

D. Were the Early Warning Notice reasons relied on by the NGPC well-founded public policy reasons?

107. Because the NGPC did not set forth its own reasons or analysis regarding the existence of a well-founded public policy concern justifying its rejection of the applications, the Panel must undertake to review the record before the NGPC. Having done so, we are

²⁹ Indeed, the testimony of Heather Dryden, the former Chair of the GAC, in the *DCA Trust* IRP, part of the record in this IRP, indicates that there is no consensus GAC rationale for its advice. (Ex. CLA-5, 322:24-324:21.)

unable to discern from the record before the NGPC a well-founded public policy rationale for rejecting the applications.

108. Four reasons were asserted by Brazil and Peru in their Early Warning Notice and the discussion at the meeting of the GAC in Durban on July 16, 2013:

- a. Peru asserted that applications should be rejected because “Amazon” is a listed geographic name. ICANN, however, concedes that Peru’s assertion, made at GAC’s Durban meeting to rally support for GAC advice opposing Amazon’s application, was erroneous. “Amazon” is not a listed geographic name. (*See* Ex. C-40, at 14-15, 24; Ex. C-102, ¶ 1.)
- b. Brazil and Peru asserted legal rights to the name “.amazon” under international law, causing the NGPC to ask for an expert opinion on this issue. (Atallah Tr., 216:4-13.) Peru specifically claimed it had legal grounds to the name “Amazon,” as it denotes a river and a region in both Brazil and Peru, (*see, e.g.*, Ex. C-40, at 14), and it invoked the “rights of countries to intervene in claims that include words that represent a geographical location of their own,” (Ex. C-95, at 2). The legal claim of Brazil and Peru is without merit. Dr. Passa’s report, part of the record before the NGPC, makes plain that neither nation has a legal or sovereign right under international law, or even their own national laws, to the name. (Ex. C-48.) There appear to be no inherent governmental rights to geographic terms. (*See* Ex. C-34; Forrest Report, ¶ 5.2.1.)
- c. Brazil and Peru asserted in their Early Warning Notice that unidentified governmental or non-governmental organizations, who in the future may be interested in using the string to protect the environment (“biome”) of the Amazon

region or promote the culture of the people that live in this region, will be deprived of future use of the .amazon top level domain name if the applications are granted. (Ex. C-40, at 11-12.) We discuss this assertion below.

- d. Brazil and Peru also asserted that they objected to the applied-for string .amazon because it matched one of the words, in English, used by the Amazon Cooperation Treaty Organization. (*See* Ex. C-22, at 1.) A one word match is not likely to be misleading and is not a plausible public policy reason for an objection. (*See* discussion *supra*, at 22 n. 13.)
109. Only the third reason possibly presents a plausible public policy reason that could be considered to be well-founded. As discussed earlier, the record before the NGPC, however, undermines even this assertion as a well-founded reason for the GAC advice and, therefore, does not support the NGPC's decision denying the applications. First, it is noteworthy that under ICANN's own rules the mere fact that an entity will be deprived of the future use of a string is not a material reason for denying a domain name to an applicant. Indeed, the Guidebook prohibits ICANN from a finding of harm based solely on "[a]n allegation of detriment that consists only of the applicant being delegated the string instead of the objector." (Guidebook, § 3.5.4.) Thus, even had a non-governmental organization filed an application for the .amazon gTLD in order to promote the environment of the Amazon River basin or its inhabitants and objected to that string be awarded to the applicant, this would not alone justify denial of Amazon's applications. While not dispositive, it does lead us to conclude that there must be some evidence of detriment to the public interest in order to justify the rejection of the applications for the strings.

110. Even if, *arguendo*, deprivation of future use could be considered a public policy reason, the uncontroverted record before the NGPC, found in two expert reports, the report of ICC independent expert Professor Radicati di Brozolo and the expert report by Dr. Passa commissioned by the NGPC, was that the use of the string by Amazon was not prejudicial and would not harm such potential future interest in the name, because (1) no entity other than Amazon has applied for the string, (2) Amazon has used this tradename and domain name for decades without any indication it has harmed the geographic region of the Amazon River or the people who live there, and (3) equally evocative strings exist, such as “Amazonia” and “Amazonas”³⁰ that could be used in the future to further the interests to which Brazil and Peru alluded in their Early Warning Notices. (See Ex. C-47, at 13-14, 21-23; Ex. C-48, at 10.) Although Professor Radicati was not informed of the GAC advice³¹, that alone does not undermine his determination that there was no material detriment to the interests of the people inhabiting the Amazon region by awarding the applicant the .amazon string. Moreover, his findings regarding the absence of prejudice or detriment are consistent with and are supported by those of Dr. Passa, the NGPC’s independent expert, who was well aware of the GAC objection to the string.

111. The NGPC did not analyze Professor Radicati’s or Dr. Passa’s reports in its resolution denying the applications. In absence of any statement of the reasons by the NGPC for denying the applications, beyond deference to the GAC advice, we conclude that the NGPC failed to act in a manner consistent with its obligation under the ICANN

³⁰ It is noteworthy that Amazon agreed not to object to .amazonas and .amazonia, if they were to be applied for. (Hayden Statement, ¶ 21.)

³¹ The Panel is surprised and troubled that neither the IO nor Amazon informed Professor Radicati of the GAC advice objecting to the strings before he made his determinations.

governance documents to make an independent, objective decision on the applications at issue. (See Bylaws, art. IV, § 3(4); Supplementary Procedures, Rule 8(iii).)

Moreover, without such an explication of a reason indicating a well-founded public policy interest, the Panel is unable to discharge meaningfully its independent review function to determine whether the NGPC made an independent, objective and merits-based decision in this matter.

E. Was the NGPC required to state its reasons for its decision denying the applications?

112. Although the GAC was not required to state reasons for its action (*see* discussion *supra* at 34-35), under the circumstances presented in this matter we hold that, in order to comply with its governance documents, the Board, in this case the NGPC, *was* required to state reasons for its decision in order to satisfy the community that it rendered an independent and objective decision in this matter. “[A]ccountability requires an organization to *explain or give reasons* for its activities.” (*See DCA Trust*, at ¶ 74; *accord Vistaprint Ltd. v. ICANN*, Case No. 01-14-0000-6505, Final Declaration, at ¶ 190 (Int’l Centre for Dispute Resolution, Oct. 9, 2015), <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> [hereinafter *Vistaprint*] (stating that the Board’s decisions should be “supported by a reasoned analysis.”) (quoting *Gulf Cooperation Council v. ICANN*, Case No. 01-14-0002-1065, Interim Declaration on Emergency Request, at ¶ 76 (Int’l Centre for Dispute Resolution, Feb. 12, 2015) <https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf>)). Similar to *GCC* Final, para. 142, the NGPC resolution in this matter does not discuss the factors or reasons that led to its decision denying the applications, beyond the presumption flowing from

GAC consensus advice. Suffice it to say, the minutes of the NGPC's May 14, 2014 meeting and its resolution adopted that date are bereft of a reasoned analysis.

113. To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC Advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by well-founded public interests. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws as there would be scant possibility of holding it accountable for its decision. (See Bylaws, art. I, § 2(8), art. III, § 1.) Here, the limited explanation of the NGPC is deficient. Certainly, there is no way that an independent review process would be able to assess whether an independent and objective decision was made, beyond reliance on the presumption, in denying the applications. The NGPC failed to articulate a well-founded public policy reason supporting its decision. In the event the NGPC was unable to ascertain and state a valid public policy interest for its decision, it had a due diligence duty to further investigate before rejecting Amazon's applications.

(Supplementary Procedures, Rule 8(ii); see also *DCA Trust*, at ¶ 74.)

F. Absent a well-founded public policy reason, did the NGPC impermissibly give the GAC consensus advice a conclusive presumption?

114. Implicit in the NGPC resolution is that the GAC advice was based on concerns stated by Brazil and Peru in their Early Warning Notice and that the reasons given in the Early Warning Notice by Brazil and Peru for objecting were based on valid, legitimate and credible public policy concerns. An Early Warning Notice, in and of itself, is not reason for rejecting an application. At a minimum, it would require that the Board independently find that the reason(s) for the objections stated therein reflect a well-

founded public policy interest. As there is no explanation in the NGPC resolution why any of the reasons given by Brazil and Peru supported its decision to reject the applications, we have concluded above that there was not a sufficient statement of the reasons by the NGPC to satisfy the requirement of the Bylaws that the Board give reasons for its decisions.

115. In his testimony, Mr. Atallah acknowledged that ICANN is not controlled by governments, even when governments, through the GAC, provide consensus advice. (Atallah Tr., 94-95.) Consensus advice from the GAC is entitled to a strong presumption that it is based on valid public policy interests, but not a conclusive presumption. In its governance documents, ICANN could have given consensus GAC advice a conclusive presumption or a veto, but it chose not to do so.

116. Yet in this matter, Mr. Atallah candidly admitted that when the GAC issued consensus advice against Amazon's applications, the bar was too high for the Board (NGPC) to say "no." (Atallah Tr., 100-101, 128.) Clearly, the NGPC deferred to the consensus GAC advice regarding the existence of a valid public policy concern and by so doing, it abandoned its obligation under ICANN governance documents to make an independent, merits-based and objective decision whether or not to allow the applications to proceed. By failing to independently evaluate and articulate the existence of a well-founded public policy reason for the GAC advice, the NGPC, in effect, created a conclusive or irrebuttable presumption for the GAC consensus advice. In essence, it conferred on the GAC a veto over the applications; something that went beyond and was inconsistent with ICANN's own rules.

117. Moreover, as observed above, we are unable to discern from the Early Warning Notice a well-founded public policy reason for the NGPC's action. There being none evident, and none stated by the NGPC, much less the GAC, the only rationale supporting the NGPC's decision appears to be the strong presumption of a public policy interest to be accorded to GAC consensus advice. But as that is the only basis in the record supporting the NGPC's decision, to let the NGPC decision stand would be tantamount to converting the strong presumption into a conclusive one and, in effect, give the GAC a veto over the gTLD applications. This would impermissibly change the rules developed and adopted in the Guidebook. And it would also run afoul of two important governance principles of ICANN:

- That the Board state reasons for its decisions; and
- That the Board make independent and objective decisions on the merits.

118. It is noteworthy that, while the NGPC's resolution listed many documents that it considered, the NGPC did not explain how those documents may or may not have affected its own reasons or rationale for denying Amazon's applications, other than its reference to the GAC consensus advice and its presumption. Moreover, nowhere does the NGPC explain why rejecting Amazon's application is in the best interest of the Internet community, especially where a well-founded public policy interest for the GAC advice is not evident.

119. Under these circumstances, the NGPC's decision rejecting the Amazon application is inconsistent with its governance documents and, therefore, cannot stand.

G. Did the NGPC violate ICANN’s prohibition against disparate treatment when it denied the applications?

120. Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

121. It is accurate that ICANN’s Bylaws prohibit discriminatory treatment by the Board in applying its policies and practices regarding a particular party “unless justified by substantial and reasonable cause.” (Bylaws, art. II, § 3.) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing. Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

H. Was Amazon’s objection to changes to the applicant guidebook untimely?

122. In essence, Amazon argued that the GAC was required to state reasons for its advice under earlier iterations of the Guidebook. To the extent that earlier versions of the Guidebook supported Amazon’s contention, the Guidebook was changed in 2012 and earlier requirements that the GAC state reasons for its advice or provide specific

information were deleted. ICANN's launch documents, ICANN argued, are even more explicit regarding this change.

123. We agree with ICANN that to the extent that Amazon is challenging Guidebook changes made in 2011 in this proceeding, its attempt to do so is untimely. (*See Booking.com B.V. v. ICANN*, Case No. 50-20-1400-0247, Final Declaration, at ¶ 106 (Int'l Centre for Dispute Resolution, March 3, 2015), <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>; *Vistaprint*, at ¶ 172.) Any disagreement with proposed changes to the Guidebook must be made within 30 days of the notice of proposed amendments to the Guidebook. (*See* Bylaws, Art. IV, § 3.3.)

CONCLUSION

124. Based upon the foregoing, we declare that Amazon has established that ICANN's Board, acting through the NGPC, acted in a manner inconsistent with ICANN's Bylaws, as more fully described above. Further, the GAC, as a constituent body of ICANN, failed to allow the applicant to submit any information to the GAC and thus deprived the applicant of the minimal degree of procedural fairness before issuance of its advice, as required by the Bylaws. The failure by the GAC to accord procedural fairness diminishes the presumption that would otherwise attach to its consensus advice.

125. The Panel recommends that the Board of ICANN promptly re-evaluate Amazon's applications in light of the Panel's declarations above. In its re-evaluation of the applications, 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. Further, if the Board determines that the applications should

not proceed, the Board should explain its reasons supporting that decision. The GAC consensus advice, standing alone, cannot supplant the Board's independent and objective decision with a reasoned analysis. If the Board determines that the applications should proceed, we understand that ICANN's Bylaws, in effect, require the Board to "meet and confer" with the GAC. (*See* Bylaws, Article XI, § 2.1(j).) In light of our declaration, we recommend that ICANN do so within sixty (60) days of the issuance of this Final Declaration. As the Board is required to state reasons why it is not following the GAC consensus advice, we recommend the Board cite this Final Declaration and the reasons set forth herein.

126. We conclude that Amazon is the prevailing party in this matter. Accordingly, pursuant to Article IV, Section 3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 31 of the ICDR Rules, ICANN shall bear the costs of this IRP as well as the cost of the IRP provider. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$5,750 shall be borne by ICANN and the compensation and expenses of the Panelists totaling US\$314,590.96 shall be borne by ICANN. Therefore, ICANN shall reimburse Amazon the sum of US\$163,045.51, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Amazon.

127. Each side will bear its own expenses and attorneys' fees.

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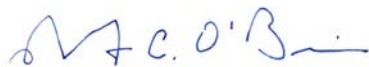
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Our learned co-panelist, Judge A. Howard Matz, concurs in the result. Attached hereto is Judge Matz's separate concurring and partially dissenting opinion.

SO ORDERED this 10th day of July, 2017



Robert C. Bonner
Chair



Robert C. O'Brien

CONCURRING AND PARTIALLY DISSENTING OPINION
OF A. HOWARD MATZ

128. I greatly admire my colleagues on this Panel and respect their diligent and thoughtful work in providing the foregoing Declaration. Moreover, for the reasons I will summarize at the end of this opinion, I concur in the outcome that they reach. But I do not believe that our authority, or that of any IRP Panel, permits us to invalidate a decision of ICANN based in substantial part on a finding that the GAC violated “basic principles of procedural fairness. . . widely recognized in international law. . .” To the extent that the Majority Declaration overturns ICANN’s decision because the NGPC failed to remedy that supposed GAC violation, it extends the scope of an IRP beyond its permissible bounds. And in any event I also reject the factual basis for the Majority’s conclusions about due process and fundamental fairness.

AUTHORITY OF AN IRP PANEL

129. The majority correctly states that “the task of this Panel is to determine whether the NGPC acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Applicant guidebook.” Majority Declaration, ¶ 63. The majority goes on to cite Article IV, § 3(4) of the Bylaws as follows:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision?; b. did the ICANN Board exercise due diligence and care in having sufficient facts in front of them?; and c. Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interest of the company [*i.e.*, the internet community as a whole]?

Id. ¶ 64.

130. What is troublesome about the Majority Declaration is that it does not comply with the clearly limited scope of review that we are duty-bound to follow. Article IV, § 3(4) specifically mandates that the IRP Panel “shall be charged with comparing contested actions of the *Board* to the Articles of Incorporation and Bylaws, and with declaring whether the *Board* has acted consistently with [those] provisions. . . .” (Emphasis added.) Instead of focusing on whether the *Board* acted consistently with its own responsibilities, the Majority Declaration devotes a considerable portion of the ruling to criticizing the *GAC*. Indeed, it does not merely criticize the *GAC*, but also finds that because the *GAC* supposedly violated a “fundamental principle of procedural fairness [that is] widely recognized in international law” [Majority Declaration ¶ 96] it thereby violated Art. III, § 1 of ICANN’s Bylaws. *See, e.g.*, Majority Declaration, ¶¶ 2(e); 94-99; 124. Nowhere does the majority provide support for the proposition that this IRP Panel is entitled to opine on whether general principles of international law require that “fundamental notions of due process” be imported onto *GAC* proceedings, especially when the parties did not even meaningfully brief those “general principles.”
131. As stated in the Final Declaration in *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247 (Mar. 3, 2015),

The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. ¶ 108. . . . Nor . . . does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. ¶ 110 . . . [I]t is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with the applicable rules found in the Articles, Bylaws, and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and

procedures themselves), but merely to apply them to the facts. ¶
115.

132. The majority finds that the Board (NGPC) violated Article IV, § 3(4) of the Bylaws because it effectively and improperly granted the GAC advice a conclusive presumption, despite that advice having been undermined by the GAC's supposed unfairness. (See below.) In this respect and to this extent, then, although the holding in the Majority Declaration is explicitly based on the conduct of the Board (Majority Declaration ¶ 113), the result must be seen as a reflection of the majority's view about what the GAC did (or failed to do). If the conclusion that "the NGPC failed to exercise the requisite degree of independent judgment" (Majority Declaration, ¶ 2(a)) is dubious, as I think it is, then the Majority Declaration may have exceeded its proper scope.

WAS THERE REALLY A "DUE PROCESS" VIOLATION?

133. The claimed violation by the GAC of due process is based on the written testimony of Mr. Scott Hayden, who is Amazon's Associate General Counsel for Intellectual Property. He wrote, "We had asked the GAC to grant us the opportunity to distribute to the GAC background materials about the Amazon Applications and the proposals we had made but the GAC Chair rejected our request." Hayden Statement, ¶ 37.

134. It is noteworthy that Mr. Hayden did not disclose just who at Amazon asked just which GAC representative for leave to submit just which written disclosure, or when such request was made (although it was evidently before the Durban meeting). Even more noteworthy is the indisputable fact that *the GAC already knew* about those Amazon applications and proposals. Indeed, governments objecting to those applications could not have issued an Early Warning until and unless at least the Amazon application had

come to their attention, and Brazil and Peru did not in fact issue the Early Warning until after they received Amazon's application.

135. Notwithstanding my view that it is not appropriate for this Panel to rest its decision, at least in large part, on whether the GAC was fair, I recognize that it is tempting to invoke Bylaws Article III, § 1 ("ICANN and its constituent bodies shall . . . ensure fairness") as the basis for doing so. "Fair is fair," after all, and it is not uncommon in an IRP for the disputing parties to challenge the fairness of their opponent's conduct. But even assuming the GAC was legally obligated to allow Amazon to make a direct written presentation in Durban, what was the impact of its failure to do so? The record shows that there was no impact at all; the claimed violation or error was utterly harmless.

136. The only supposed harm mentioned by the majority is that "allowing a written submission by Amazon would have given Amazon an opportunity, among other things, to correct the erroneous assertion by representatives of the Peruvian government that '.Amazon' was a *listed* geographic name under the Guidebook." *Id.* at ¶ 95. (Emphasis in original.) In fact, however, Mr. Atallah testified that if .Amazon had been on the list, the GAC would not even have been considering the issue in the first place. Tr., p. 208.

As he put it,

So the only reason it's accepted as an application is because it was not on the list and everybody knew that. Otherwise, it wouldn't be an issue that required GAC Advice in the first place.

Id. at 209. This testimony was not rebutted.

137. Which leads to another concern that I have with the majority view: it is at odds with reality. It simply defies common sense to depict Amazon as having been effectively shut out of the process leading up to the GAC Advice or as the victim of one-sided,

heavy-handed maneuvering by Brazil, Peru, and the many other governments that joined in the Durban communique. Indeed, the facts show otherwise. At the hearing before this Panel, Amazon’s counsel himself conceded that people other than government representatives *were* allowed to attend the GAC meeting in Durban: “I now understand that observers were permitted in Durban. So the transparency issue . . . there were observers there. . . .” Tr., p. 270. Their attendance, counsel further acknowledged, was a form of “participation.” *Id.* at 269. In his written testimony, Mr. Atallah affirmed that at the Durban meeting on July 18, 2013 ICANN conducted a “Public Forum,” at which several speakers commented on the GAC’s advice regarding .Amazon. Amazon’s representative, Stacy King, actually stated, “We disagree with these recommendations and object” *Id.* at ¶ 36. Moreover, ICANN introduced ample and unrefuted evidence that in the spring and summer of 2013 – before the GAC Advice was issued – Amazon communicated its response to the Brazil/Peru opposition to several countries, including Germany (Ex. R-67), Australia (Ex. R-69), the United Kingdom (Ex. R-66) and Luxembourg (Ex. R-68). Nor is it surprising that a company as large and influential as Amazon directly waged such a sustained lobbying campaign with numerous members of the GAC. Amazon, of all possible gTLD applicants, was probably the best equipped to communicate its position to everyone involved in the determination of whether ICANN should grant it a new gTLD. Just as it may be understandable to take into account the notion that “fair is fair” in assessing the GAC’s conduct, so too should we recognize the reality that “Amazon is Amazon.”

138. For these reasons, then, in my respectful opinion there is little merit in the majority’s decision to “piggyback” the claimed due process violation by the GAC into a basis for

“undermin[ing] the strength of the presumption that would otherwise be accorded GAC consensus advice.” Majority Declaration, ¶ 96.

139. In addition to the foregoing factors, another reason why it is unfortunate that the Majority Declaration has declared that the GAC has a duty to adhere to international law-based principles of due process is that such declaration might well cause considerable confusion within ICANN. Article III, § 1 of the Bylaws, cited in ¶ 92 of the Majority Declaration, does indeed provide that both ICANN “and its constituent bodies shall operate. . . with procedures designed to ensure fairness.” But just what are those bodies? How do they participate within ICANN? Do they all function in the same manner? Do they rely on committees? Are they entitled to representation on Board committees? On the Board’s Executive Committee? If constituent bodies must permit direct presentations, would the Board and all its Committees also have to permit third parties to appear before them directly? These are legitimate questions to ask here, notwithstanding that the Majority Declaration states that it is limited to the facts of this case (¶ 113), because this IRP Declaration is entitled to be treated as precedent. (Bylaws Article IV, § 3(21).) But the questions are not even considered, much less answered.

140. Finally, given that it is the ICANN Board whose specific conduct we are reviewing, it must be stressed here that there is absolutely no evidence that it or the NGPC were unaware of both the GAC’s thinking and Amazon’s position. While I will return to the question of what the NGPC knew and what it did *infra*, at this point it is sufficient to note that as to the GAC’s thinking, Mr. Atallah swore under oath that for those NGPC and Board members who attended the seven meetings dealing with Amazon’s

application, it would not have been a benefit if GAC had provided a rationale with its advice. As he put it, “as an insider, you know exactly what is going on” Tr., p. 109. He went on to explain: “ICANN has three meetings a year, every year, where everybody gets together to actually develop policies and do the ICANN business. In every meeting the board actually meets with the GAC. And the issues that the GAC is facing are actually . . . told to the board, and so the board is aware of the issues that . . . the GAC members are bringing up . . . It’s open meetings. And in several of those meetings, the South American countries had voiced their issues with the Amazon applications.” Tr., p. 113. Mr. Atallah also testified that “when the GAC Advice came about, the board provided notice to Amazon to actually provide it with information, present their view, their side of the topic and they presented a large document to the NGPC which they reviewed and did their due diligence.” Tr., p. 184.

DID THE NGPC INDEPENDENTLY INVESTIGATE THE APPROPRIATE FACTS AND FACTORS RELATING TO AMAZON’S APPLICATION?

141. The majority has concluded that “The Board, acting through the NGPC . . . failed in its duty to independently evaluate and determine whether valid and merits-based public policy interests existed supporting the GAC’s consensus advice . . . [and thus] failed to exercise the requisite degree of independent judgment” Majority Declaration, ¶ 2(a). In my respectful opinion, the Majority Declaration either conflates or misapprehends the important difference between what ICANN initially *did* in looking into the GAC Advice re .Amazon and what it concluded after doing so.

142. The Majority Declaration acknowledges that under the then-applicable Bylaws, the GAC was not required to give reasons for its actions. Majority Declaration, ¶¶ 87-90. The Majority Declaration notes that even the decision in the *Dot Connect Africa Trust v. ICANN IRP* (ICDR Case No. 50-2013-001083) does not require the GAC to provide such reasons.³² But then the Majority Declaration essentially goes on to hold the Board responsible for GAC’s supposed failure “to explain or give reasons for its activities. Majority Declaration, ¶ 112 (emphasis in original). It does so by construing the Board to have relied solely on the “strong presumption” that the GAC’s advice is entitled to be implemented as if that presumption was conclusive. Majority Declaration, ¶¶ 104, 114. If that is what the Board did, such action would indeed fail to constitute “independence.” But I do not agree that that is what the Board did.

143. Brazil and Peru, as GAC members, issued their Early Warning on November 20, 2012 and the GAC issued its Advice on July 18, 2013. Thereafter, ICANN notified Amazon, and the NGPC proceeded to solicit and receive from Amazon and others numerous documents and submissions, which were read and considered over the course of seven different NGPC meetings. (Exs. R-26 through R-31.) Also reviewed were Professor Radicati’s Jan. 27, 2014 analysis (Ex. C-47); Dr. Passa’s March 31, 2014 “expert”

³² Regrettably, however, the Majority Declaration does not sufficiently make clear that before the Applicant Guidebook was completed, quite a saga had unfolded over how applications for top level domains in names containing geographic meaning would be treated. Various grounds for objection were considered. The GAC is comprised of sovereign governments that by their very nature function through a political lens, but the GAC is vital to the very essence of the internet and ICANN. There could be no worldwide web without the support and cooperation of governments around the globe. The GAC pushed for the right to raise concerns and objections separate and apart from the otherwise generally available grounds. Recognizing this, the full ICANN community granted GAC the very powers that have been challenged here. The outcome was that the entire ICANN community agreed to allow the GAC to use the Early Warning and GAC Advice (without accompanying rationales) procedures. The written testimony of Mr. Atallah explained this in great detail. (¶¶ 11-23.)

opinion (Ex. C-48); the Early Warning (C-22); several letters from Peru (C-45; C-50; C-51); at least four letters from Amazon (C-35; C-36; C-44; C-46) and other items.

(See Ex. R-83.) Mr. Atallah testified at length about what the NGPC did. He summarized it this way:

But the information that the NGPC went through was comprehensive. They looked at every opinion that the counterparties have [sic] and everything that was available to them, and they made their decision based on the process and as well as the issues at hand . . . and actually reviewed so much information, so much data, that the thing took ten month[s] . . .”

Tr., pp. 184-185.

144. I thus conclude that the NGPC did not in fact accept the GAC advice as conclusive. It displayed both due diligence and independent initiative in its effort to carry out its responsibilities.³³ However, whether it actually succeeded in discharging its responsibilities requires us to ascertain whether that independent inquiry led to a conclusion consistent with what the mission or core values of ICANN require. To that analysis I now turn.

145. Paragraph 113 of the Majority Declaration states very clearly,

To be clear, our limited holding is that under the facts of this IRP, where the NGPC is relying on GAC advice and the GAC has provided no rationale or reason for its advice, the NGPC must state reasons why the GAC advice is supported by *well-founded* public interest [sic] concerns. Otherwise, the NGPC is not acting in a transparent manner consistent with its Bylaws, Article I, § 2(8), Article III, § 1.

³³ In reaching this conclusion, I choose not to apply literally and indiscriminately Mr. Atallah’s testimony to the effect that the NGPC made no independent inquiry as to whether there was a valid public interest rationale for the GAC advice. (Tr., p. 238.) For Amazon to rely so heavily on that off-the cuff statement, made at the very end of a full day’s testimony and in response to a question from the Panel chair, is to take it out of fair context. Indeed Mr. Atallah followed that response with “But there was no reasons for us to believe that the public interests of the Brazilian people is [sic] misrepresented by their governments.” *Id.*

(Emphasis added.)

146. I agree, at least as to Article III, § 1. For me, the key requirement is that there be a “well-founded” basis for the NGPC’s conclusion, regardless of how procedurally adequate its inquiry otherwise was under the Bylaws. Amazon having at least rebutted the strong presumption supporting advice of the GAC, the burden of making that showing became ICANN’s to bear. It failed to do so.

147. The GAC had every right to assert “cultural sensitivities” as the primary basis for its opposition to Amazon’s application. See Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs: “New gTLDs should respect . . . the sensitivities regarding terms with national, cultural, geographic and religious significance.” But Brazil and Peru needed to do more than raise those concerns in the conclusory manner that they did. Professor Radicati had sound reason to conclude that awarding the string “.Amazon” to Amazon would not in fact create a material detriment to the people who inhabit the wide region in South America that is part of the Amazon River and rain forest. As he put it, “. . . [T]here were many other parties defending interests potentially affected by the Applications (environmental groups, representatives of the indigenous populations and so on) that could have voiced some form of opposition to the Applications, had they been seriously concerned about the consequences. Particularly given the standing of at least some of those organizations, it is implausible that none of them would have been aware of the Applications.” Ex. C-47, ¶ 93. Radicati went on to add, “[T]here is no evidence either that internet users will be incapable of appreciating the difference between the Amazon group and its activities and the Amazon River and the Amazon Community and its specificities [sic] and

importance for the world will be removed from the public consciousness, with the dire consequences emphasized by the IO.” Ex. C-47, ¶ 103. (Emphasis added.)

148. What the objectors, the GAC and the NGPC failed to demonstrate here stands in contrast with what the applicants for the “.persiangulf” gTLD pointed to in the “Partial Final Declaration” in the IRP in *Gulf Cooperation Council (GCC) v. ICANN* (ICDR Case No. 01-14-0002-1065). There, in fact, *both* the applicant (Asia Green) and its opponents presented greater support for their respective positions. For example, Asia Green noted,

There are in excess of a hundred billion of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .persiangulf gTLD will help change this. (¶ 14)

For its part, the GCC established that “the relevant community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.” (¶ 38)

149. So what, then, could Brazil and Peru have presented to the GAC that the NGPC should have looked for or relied on in order to reach a conclusion consistent with Art. 1, § 2 of the Bylaws, including such ICANN core values as “seeking . . . broad, informed participation reflecting . . . geographic and cultural diversity” (Core Value 4), “open and transparent policy development mechanisms” (Core Value 7) and “recognizing that governments. . . are responsible for public policy” (Core Value 11)? They could have presented: public opinion surveys; expressions of concern by existing native communities; resolutions by existing NGOs; and submissions by historians and

scientists in the Amazon region about the importance of cultural patrimony and ecological preservation. Had Brazil and Peru made at least some such information available to the GAC and had the GAC at least acknowledged that it had received such material, the NGPC's decision to uphold the GAC advice even in the absence of an explicit GAC rationale would have been sufficient, in my opinion.

150. In addition to the foregoing reasons for concurring in the result, there are other considerations that persuade me to join in the outcome of the majority's ruling. For example, as already indicated, I agree with several observations that are central to the majority's conclusion, including the following.

- a. GAC advice must be based upon public policy considerations, even if not incorporated into a written "rationale." Majority Declaration ¶ 100.
- b. The public policy considerations must be "well-founded," *Id.*, ¶ 101, and "ascertainable from the entirety of the record before the NGPC." *Id.*, ¶ 103.
- c. It "is highly desirable for the GAC to provide reasons or a rationale for its consensus advice to the Board." *Id.*, ¶ 102.³⁴
- d. The Board "cannot accept GAC consensus advice as conclusive." *Id.*, ¶ 104. (Put another way, a "strong" presumption is not the same as an "irrebutable" presumption.)

151. Also, for the most part, Amazon's conduct in pursuing its application was commendably reasonable. For example, it explicitly agreed not to apply for gTLDs with the names (or words) "Amazonas," "Amazonia" and close variants thereof. Such a concrete effort at compromise should not be ignored or taken for granted.

³⁴ So basic and compelling is this "desirable" factor that it now has become required in the 2016 Bylaws.

152. Moreover, given that the 2016 changes in the Bylaws now impose requirements on the GAC to provide reasons for GAC advice, to the extent that because the GAC did not explicitly do so in this case ICANN's decision has been found to be deficient, the outcome of this IRP will cause little or no detriment to ICANN going forward.

153. In the *Booking* Final Declaration, *supra*, the Panel recognized the value of an IRP “contribut[ing] to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here.” ¶ 4. Here, too, there is a demonstrable benefit to the ICANN community that can result from further guidance about the minimum requirements that ICANN must meet in order to have its decisions about GAC advice upheld in the face of challenge. That benefit is especially applicable where, as here, the practical effect of the Panel's ruling is that the dispute is remanded for further proceedings. In other words, Brazil, Peru, the GAC and ICANN, as well as Amazon, may now supplement and strengthen their positions. The Applicant Guidebook states that the objective for ICANN is to “determine whether approval would be in the best interest of the internet community.” § 5.1. Here, all the interested parties, including Brazil, Peru and the GAC, are members of that community. *See* Bylaws, Art. I, § 2(11). They all share a common objective and potentially a common benefit in promoting their respective interests anew in light of this Declaration.

Dated: July 10, 2017


A. Howard Matz