

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

**ICANN’S SUR-REPLY BRIEF**

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## CONTENTS

Page

ARGUMENT .....	1
I.    Amazon’s Challenges to the Procedures of the Guidebook Come Too Late. ....	1
II.   Actions of the GAC and Its Members (Governments) Are Not Subject to the Independent Review Process. ....	3
III.  The Launch Rationales, Written at the End of the Guidebook’s Development, Provide a Succinct Summary of the Compromises that Were Made. ....	4
IV.  The Panel’s Only Mandatory Power Is to Declare Conformity (or Non- Conformity) of ICANN Board Action with the Articles, Bylaws, and Guidebook. ....	6

As permitted by the Panel’s 21 April 2017 order, ICANN respectfully submits this brief response to Amazon’s 20 April 2017 Prehearing Reply Brief.

## ARGUMENT

### **I. Amazon’s Challenges to the Procedures of the Guidebook Come Too Late.**

In its first point, Amazon argues that it was free to submit its applications under the Guidebook’s generally applicable procedures approved by the Board in 2011/2012 and then, when the NGPC followed those procedures to deny Amazon’s applications in 2014, attack the procedures themselves as inconsistent with the applicable version of the Bylaws. Such delayed attacks to the procedures are contrary to the precedential<sup>1</sup> *Booking.com* and *Vistaprint* IRP final declarations.

There are three Guidebook procedures that Amazon attacks: (a) the provision that “consensus advice” of the GAC would raise a strong presumption in favor of the advice, even without an accompanying explanation of the GAC’s reasons;<sup>2</sup> (b) the provision that the GAC could give advice against strings sensitive for geographic reasons, even if those strings passed the Geographic Names Panel’s review;<sup>3</sup> and (c) the process whereby, if no objection is raised to an application (e.g., .IPIRANGA), the Board would not ordinarily review the application, as compared to applications that raise “exceptional circumstances” such as GAC advice, which the Board might individually consider.<sup>4</sup>

Amazon argues (p. 2) that it “does not contend that the Guidebook is inconsistent with the Bylaws,” and that it is relying on the Bylaws “independent of the Guidebook.” But the

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<sup>1</sup> IRP panel declarations are intended to be precedential. Bylaws Art. IV, § 3.21.

<sup>2</sup> As noted in ICANN’s Prehearing Brief, pp. 32-34, Version 6 of the Guidebook suggested that the GAC should express the public policy basis for its advice, but that provision was removed from the operative version of the Guidebook because it was inconsistent with the Bylaws.

<sup>3</sup> See ICANN’s Prehearing Brief, pp. 25-29.

<sup>4</sup> Guidebook § 5.1, last paragraph.

applicable Bylaws do not have the “independent” requirements Amazon seeks to invoke. For example, the applicable Bylaws do not have any requirement that the GAC state the reasons for its advice. In fact, the Bylaws don’t even mention “consensus” GAC advice; that concept was the GAC’s own historical practice that was incorporated into the Guidebook. Likewise, the Bylaws say nothing about procedures to be used for identifying sensitive geographic strings in conjunction with the New gTLD Program. Indeed, the Bylaws do not provide any detail whatsoever as to the rules that would be in place for such a program. And with respect to the concept of “disparate treatment,” the Bylaws only require that, if it were to occur, it should be “justified by substantial and reasonable cause.” The different results for .IPIRANGA and .AMAZON reflect the Guidebook procedure focusing individual Board consideration on unusual cases, such as *challenged* applications, and thus Amazon’s disparity argument is truly a challenge to the Guidebook’s different options for handling challenged and unchallenged applications, as the Board adopted in 2011.

The Guidebook procedures were developed to make the New gTLD Program workable. Applicants and prospective applicants have heavily relied on the Guidebook’s procedures in submitting applications (and, presumably, decisions not to submit certain applications). Correspondingly, governments and others potentially harmed by applications relied on those procedures when they objected to those applications (and, presumably, refrained from objecting). Amazon should not be permitted to take advantage of the New gTLD Program (by filing 76 applications) without any challenge to the Guidebook’s procedures, and then, after the provisions of the Guidebook lead to an undesired result with respect to just three of those applications, file a multi-years-delayed challenge such as the present one.

Amazon argues that its challenges are timely because it lacked standing to challenge the Guidebook when adopted in 2011/2012. That is incorrect. Under the Bylaws applicable at the

time, IRP proceedings could be filed by “[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws.”<sup>5</sup> When the Guidebook was approved for launch in 2011, Amazon and its attorneys were involved in the process of its development<sup>6</sup> and, as even unaffiliated commentators recognized, any .AMAZON application was going to have to navigate geographic shoals.<sup>7</sup> Obviously, the evaluation procedures now challenged “materially affected” Amazon’s prospects.

The purpose of the thirty-day deadline for filing IRP requests is to avoid exactly what occurred here – a complex program with prescribed procedures was rolled out after an extensive public process, leading to expectations by applicants, governments, and others, which Amazon’s delayed challenge would frustrate. Indeed, were this Panel to permit Amazon’s late challenge, this would be extremely unfair to others that relied on the stated Guidebook procedures.

The reason the Bylaws require that IRPs be filed promptly<sup>8</sup> is to allow reliance on Board decisions so that ICANN and all its constituents to move forward with a complex program without the specter of unanticipated rule changes years later. If permitted, Amazon’s challenges would upset a process on which literally hundreds of other applicants have relied. This Panel should determine that Amazon’s Guidebook challenges are untimely.

## **II. Actions of the GAC and Its Members (Governments) Are Not Subject to the Independent Review Process.**

At pages 3-6, Amazon’s Reply Brief argues that this IRP proceeding should address whether the GAC (and, ultimately, Brazil) violated the Bylaws and Guidebook. As noted in ICANN’s Prehearing Brief (pp. 4-5), however, the IRP is limited to addressing *Board* actions.

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<sup>5</sup> Bylaws, Art. IV, § 3.2 (11 June 2011), Ex. R-80 (18 March 2011; this section was in effect throughout 2011/2012).

<sup>6</sup> See, e.g., ICANN’s Prehearing Brief n. 58.

<sup>7</sup> Comment of Paul Tattersfield (15 Jan 2011) (“What about organizations whose names conflict with geographic areas? .amazon?”), available at <https://forum.icann.org/lists/5gtld-guide/msg00134.html>.

<sup>8</sup> In particular, within thirty days after the posting of the minutes of the meeting at which the Board made the challenged decision. See Bylaws, Art. IV, § 3.3.

Indeed, Section 3 of Article IV of the Bylaws is entitled “INDEPENDENT REVIEW OF BOARD ACTIONS.”

Of course, complaints about constituent bodies can be presented to the Board in connection with recommendations or advice it is considering. Ultimately, however, the constituent bodies only recommend or advise. When complaints affect whether the Board should adopt the recommendation or advice, the Board can and does take them into account. (When Amazon contended that the GAC advice contravened international law, for example, the NGPC commissioned the Passa report, which clarified that international law does not prohibit either approval or denial of the Amazon applications.) But only the Board’s (here, the NGPC’s) actions are ultimately the subject of the Independent Review Process.

**III. The Launch Rationale, Written at the End of the Guidebook’s Development, Provides a Succinct Summary of the Compromises that Were Made.**

Amazon seeks to minimize the explication that the Board gave in its detailed Launch Rationale for the various implementation issues that were ironed out in the process of the Guidebook’s development. Over a three-year period after the Board adopted the GNSO policy recommendations in 2008, ICANN followed a very public community-based process to develop implementable evaluation procedures, which were ultimately embodied in the operative Guidebook (following numerous drafts of that Guidebook).

The GNSO’s 2008 implementation suggestions were a starting point, but a complex process was needed to develop truly implementable evaluation procedures. There were thousands of comments by participants in the process, involving hundreds of meetings and leading to tens of thousands of web pages with proposed procedures and comments on them. As a result, when the Board approved the launch of the New gTLD Program in June 2011, the implementation procedures had significantly evolved. As recognized by ICANN’s formal

commitments to the Internet community,<sup>9</sup> the Board memorialized its reasons for approving the Guidebook's evaluation procedures discussing what proposals were considered as well as which proposals were ultimately adopted and why. It did this in the 20 June 2011 Launch Rationale.

To be sure, the Guidebook itself states the procedures; the Launch Rationale is the Board's contemporaneous explanation of why those procedures were adopted and how they are intended to operate (similar to legislative history). The GAC authority to advise on unlisted geographic names is embodied in Guidebook Section 1.1.2.7, stating that the "GAC may provide public policy advice directly to the ICANN Board on any application." As explained in Guidebook Section 3.1, "[t]he 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." On their face, these provisions allow GAC advice on strings that governments consider geographic, even if they are not prohibited by the ISO 3166-2 list-based geographic names evaluation. The Launch Rationale confirms this plain meaning, summarizing the extensive public discussions that led to this result.

Notably, the Launch Rationale was contemporaneous with the Guidebook's approval, unimpaired by the vagaries of memory. Amazon, in contrast, relies on an email by ICANN's former Chairman, Peter Dengate Thrush, written in 2013 after the GAC gave its advice against .AMAZON in the Durban Communiqué. Mr. Dengate Thrush left ICANN just days after the Board approved the New gTLD Program launch on 20 June 2011, and thus he was not speaking on behalf of ICANN or the Board in his email two years later.

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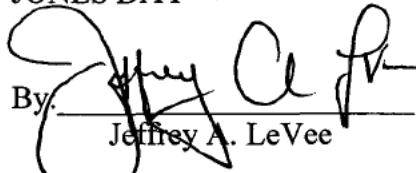
<sup>9</sup> Under ICANN's then operative "Affirmation of Commitments" with the United States government, the Board was required to set out the rationale for its decisions, as it does with every resolution it passes. The Launch Rationale was that rationale.

**IV. The Panel's Only Mandatory Power Is to Declare Conformity (or Non-Conformity) of ICANN Board Action with the Articles, Bylaws, and Guidebook.**

In its fourth point, Amazon's Reply Brief again argues that the Board can grant mandatory relief. As both of ICANN's prior briefs explained,<sup>10</sup> the *Vistaprint* IRP declaration and other IRP precedents make clear that the Panel may make binding declarations regarding the Board's conformity with the Articles, Bylaws or Guidebook, but can make only non-binding recommendations to the Board regarding any remedy.<sup>11</sup> This distinction is especially important here, where any remedial action would need to recognize that the underlying dispute involves parties that are not represented here. Thus, Amazon's argument that Article 30 of the ICDR International Arbitration Rules allows relief beyond the Bylaws should be rejected under the precedents discussed on pages 48-49 of ICANN's Prehearing Brief.

Respectfully submitted,

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Dated: April 27, 2017

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<sup>10</sup> ICANN's Response to Amazon EU S.À R.L.'s Request for Independent Review Process ¶ 71; ICANN's Prehearing Brief pp. 46-49.

<sup>11</sup> Bylaws Article IV, §§ 3.11 & 3.21.