

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

AMAZON EU S.À.R.L.,

Claimant,

v.

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,

Respondent.

ICDR Case No. 01-16-0000-7056

**AMAZON'S PREHEARING REPLY BRIEF**

John Thorne  
Rebecca A. Beynon  
Gregory G. Rapawy  
KELLOGG, HANSEN, TODD, FIGEL  
& FREDERICK, P.L.L.C.  
1615 M Street NW, Suite 400  
Washington, DC 20036  
202-326-7900  
jthorne@kellogghansen.com  
rbeynon@kellogghansen.com  
grapawy@kellogghansen.com

*Counsel for Claimant Amazon*

## TABLE OF CONTENTS

|   |   |
|---|---|
| INTRODUCTION .....  | 1 |
| ARGUMENT .....  | 1 |
| I.    Amazon’s Request for Independent Review is Timely .....   | 1 |
| II.   The Panel Can and Should Review the NGPC’s Failure to Address the<br>GAC’s Violations of the Bylaws .....           | 3 |
| III.  The Newly Cited “Launch Rationales” Do Not Help ICANN .....   | 6 |
| IV.  This Panel Has Remedial Authority Either To Direct or To Recommend<br>That ICANN Grant the .AMAZON Applications..... | 9 |

## INTRODUCTION

ICANN's prehearing brief largely fails to discuss its duties under the Bylaws that formed the heart of Amazon's brief (and should form the heart of this Panel's decision). ICANN does, however, proffer three defenses of its conduct that were not raised in its initial Response to Amazon's Request for Independent Review Process and which Amazon therefore did not address in its prehearing brief. This reply addresses those new arguments and explains why they lack merit. It also further briefly discusses the question of this Panel's remedial authority, as to which ICANN's position has changed substantially since its initial response.

## ARGUMENT

### **I. Amazon's Request for Independent Review Is Timely**

Amazon showed in its prehearing brief that the GAC's failure to give reasons for its advice against the .AMAZON Applications, followed by the NGPC's unquestioning deference to the GAC's advice, resulted in both the GAC and the NGPC violating several of their obligations under the Bylaws. Those obligations included the GAC's and NGPC's duties to balance competing values in a defensible way, Amazon Br. 20-22 (Bylaws, art. I, § 2 (C-064));<sup>1</sup> to justify disparate treatment of similarly situated parties, *id.* at 22-25 (Bylaws, art. II, § 1); and to use procedures designed to ensure fairness, *id.* at 25-27, (Bylaws, art. III, § 1); as well as the NGPC's duties of accountability, due diligence, and independent judgment, *id.* at 27-28 (Bylaws, art. IV, §§ 1, 3). In response, ICANN argues (at 33) that Amazon is "challeng[ing] the Board's decision in 2011 to remove a requirement for stated GAC reasons in the operative Guidebook" and that "it is far too late" for Amazon to do so. That is wrong for two reasons.

---

<sup>1</sup> Citations to "Amazon Br." refer to Amazon's Prehearing Brief filed on March 5, 2017. Citations to "ICANN Br." refer to ICANN's Prehearing Brief filed on April 5, 2017. Other short forms not defined in this reply are the same as those used in Amazon's prehearing brief.

*First*, ICANN mischaracterizes Amazon’s challenge to the NGPC’s actions. Amazon does not contend that the Guidebook is inconsistent with the Bylaws. Instead, Amazon contends that, independent of the Guidebook, the Bylaws require the GAC to give reasons for advice and the NGPC to review and evaluate those reasons. Amazon advances those contentions in seeking a remedy for the NGPC’s improper decision on May 14, 2014, to defer to GAC advice even though the NGPC acknowledged that it “did not have the benefit of the GAC’s rationale” for that advice. C-054, at 10. Because Amazon sought review “within thirty days of the posting of the minutes” of that NGPC’s meeting, Bylaws art. IV, § 3, ¶ 3, Amazon’s request is timely.

*Second*, even if Amazon’s argument were a challenge to the Guidebook itself as applied in May 2014, that challenge would still be timely because Amazon could have brought it no earlier. Both when the Guidebook was enacted and when Amazon initiated this IRP, independent review could be sought only by a “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.” *See* Bylaws, art. IV, § 3, ¶ 2.<sup>2</sup> ICANN’s suggestion (at 33) that Amazon should have “challenge[d] the Guidebook provisions regarding GAC advice” in 2011 rather than “proceed[ing] to file its applications in April 2012” cannot be squared with the Bylaws’ standing requirement. Had Amazon filed such a challenge, ICANN would have moved to dismiss because Amazon could not then have shown that it was materially affected by the lack of an express requirement that the GAC give reasons.

ICANN’s position that the thirty-day period blocks challenges to Board action even if the purportedly time-barred party had no standing to bring them earlier would effectively make such

---

<sup>2</sup> That language was later expanded to define the phrase “materially affected” to require that a claimant “suffer injury or harm that is directly and causally connected to the Board’s alleged violation of the Bylaws or the Articles of Incorporation.” Bylaws, art. IV, § 3, ¶ 2.

challenges impossible. That would be inconsistent with the declared purpose of Article IV – to hold “ICANN . . . accountable to the community for operating in a manner that is consistent with these Bylaws,” art. IV, § 1 – and with the general principle that “[t]he statute of limitations usually commences when a cause of action accrues, and it is generally said that an action accrues on the date of injury.” *Bernson v. Browning-Ferris Indus.*, 873 P.2d 613, 615 (Cal. 1994) (en banc) (internal quotation marks omitted); *accord Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 195 (1997) (“A limitations period ordinarily does not begin to run until the plaintiff has a complete and present cause of action.”) (internal quotation marks omitted). Although two previous IRP panels have agreed with ICANN that challenges to the Guidebook were untimely, those decisions rest on the incorrect premise that the claimants could have brought their challenges earlier, without citing art. IV, § 3, ¶ 2 or explaining how such earlier challenges could have satisfied its requirements.<sup>3</sup>

## **II. The Panel Can and Should Review the NGPC’s Failure To Address the GAC’s Violations of the Bylaws**

ICANN also errs in contending (at 4) that, because “[t]he IRP applies only to Board (including NGPC) actions,” this Panel should disregard Amazon’s evidence showing that “actions of the GAC . . . were contrary to ICANN’s Bylaws.” To the contrary, Bylaws and Guidebook violations by the GAC are relevant (indeed, crucial) because they support Amazon’s showing that the NGPC also violated the Bylaws by failing either to investigate the GAC’s violations or to take any corrective action in response.

---

<sup>3</sup> See *Booking.com*, CLA-001, ¶ 130 (“Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook[] at the time”); *Vistaprint*, CLA-004, ¶ 117 (summarizing ICANN’s argument based on the *Booking.com* decision); *id.* ¶ 172 (agreeing with that argument).

It is clear from the Bylaws themselves that they impose obligations on the GAC. At least two relevant provisions of the Bylaws apply directly to the GAC by their terms: the obligation to strike an “appropriate and defensible balance among competing values,” which applies to “[a]ny ICANN body making a recommendation or decision,” art. I, § 2; and the obligation to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness,” which applies to “ICANN and its constituent bodies,” art. III, § 1. ICANN properly conceded in the *DCA Trust* proceeding that the GAC was a “constituent body” of ICANN, *see* CLA-002, ¶¶ 100-101, and its silence on that issue in its prehearing brief suggests that its position has not changed.<sup>4</sup> Further, the Bylaws’ requirements to “justif[y]” any “disparate treatment” applied to “any particular party,” art. II, § 3, and to remain “accountable to the community,” art. IV, § 1, both apply to “ICANN” as a whole. The NGPC’s duty to comply with those provisions includes a duty to ensure that ICANN as a whole is complying; otherwise, Article IV’s mandate that ICANN “operat[e] in a manner that is consistent with these Bylaws,” *id.*, would become a dead letter.

Several IRP decisions, none of which ICANN attempts to distinguish or rebut, have reasoned that the NGPC’s responsibility under the Bylaws includes an obligation to ensure that other parts of ICANN, including the GAC, comply with their own responsibilities. *See dot Sport*, CLA-032, ¶¶ 7.71, 7.90 (concluding that the Board’s duty to “uph[o]ld the integrity of the system” required it to consider whether a purportedly independent expert’s determination was tainted by “apparent bias”); *DCA Trust Final*, CLA-002, ¶¶ 100-102 (discussing the GAC’s status as a “constituent body” of ICANN and its resulting duties under Bylaws art. III, § 1); *see*

---

<sup>4</sup> Further, because the GAC is a “constituent body” of ICANN under art. III, § 1, it should follow as a matter of ordinary language that it also fits within the broader phrase “[a]ny ICANN body” under art. I, § 2. Again, ICANN has not argued otherwise.

*also GCC Final*, CLA-031, ¶ 130 (finding it “difficult to accept that ICANN’s core values of transparency and fairness are met” based on defects in the GAC’s procedures). Those decisions are correct, and this Panel should adopt a similar approach.

Indeed, ICANN’s counsel conceded in *DCA Trust* that “it’s fair to look at the GAC’s conduct” where an IRP claimant has alleged that “[t]he Board knew” about the GAC’s allegedly wrongful conduct. *DCA Trust Final*, CLA-002, ¶ 100 (quoting Jeffrey LeVee). That concession is accurate but too narrow: the GAC’s conduct is relevant not only to the extent that the Board “actually knew” that the GAC had violated the Bylaws, *id.*, but also to the extent that the Board should have learned of such a violation by conducting “adequate diligence to ensure that it was applying its procedures fairly,” *id.* ¶ 105. In the context of the .AMAZON Applications, the NGPC either knew or had readily available to it all relevant information about the GAC’s fatally flawed procedures and practices. That is because the NGPC had and took advantage of the opportunity to discuss the GAC with its Chair, Heather Dryden, *see* ICANN Br. 38; R-31, at 3, who participated in six of the seven NGPC meetings where the .AMAZON Applications were discussed, R-26; R-27; R-28; R-29; R-31; C-055. Ms. Dryden is of course the same witness whose testimony led the *DCA Trust* panel to conclude that the GAC and the NGPC had failed to live up to their obligations of fairness and transparency. *See* Amazon Br. 29-31.

Conduct and statements by Brazil and Peru are relevant to establish Bylaws and Guidebook violations by the GAC and the NGPC because the NGPC expressly relied on the “reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru.” C-054, at 10 (citation omitted). To be clear, Amazon’s primary position is that the NGPC could not properly treat the contentions of Brazil and Peru as the policy advice of the GAC, because the GAC as a body never adopted those contentions (or any other reasoning)

as the basis for its advice. *See* Amazon Br. 19-34. But even if the NGPC could properly deem Brazil and Peru to be speaking for the GAC, it could not defer to them without considering evidence that (1) at least Brazil, if not other GAC members as well, engaged in inequitable treatment of Amazon by applying a different standard to it because of its perceived status as a U.S.-based company, *see id.* at 24-25; and (2) Peru was simply mistaken about whether the .AMAZON Applications sought to use a name that constituted a geographical name within the meaning of the Guidebook, *see id.* at 34-35.

### **III. The Newly Cited “Launch Rationales” Do Not Help ICANN**

ICANN’s brief relies extensively (at 27-28, 42-43) on a document it describes as the “Launch Rationales” for the Guidebook. ICANN did not cite or quote those rationales in its initial response to Amazon’s request for independent review. Its witness Akram Atallah does not refer to them in the part of his statement (at 4) that purports to summarize the “evolution of the Guidebook’s provisions governing the GAC’s role.” (Capitalization and emphasis omitted.) Yet now ICANN relies on them heavily, focusing on a statement in the rationales that “GAC Advice” is a “process [that] could be used, for example, for governments to object to an application for a string considered by a government to be a geographic name.” R-76, at 45. That statement does not help ICANN for four reasons.

*First*, ICANN can point to no part of the Guidebook that incorporates or mentions the rationales.<sup>5</sup> Accordingly, the rationales should be treated as extrinsic evidence and should not be given weight comparable to the Guidebook’s intrinsic text and structure. *See* Amazon Br. 36-37 (discussing the Guidebook’s mandatory language and declared purpose of providing clear, objective criteria). Further, the Guidebook tells readers where to look for its history:

---

<sup>5</sup> The Board amended the Guidebook after the date of the rationales, *see* ICANN Br. 10 & n.29, giving it ample opportunity to incorporate them if it had meant to do so.



For the complete set of the supporting documentation and more about the origins, history and details of the policy development background to the New gTLD Program, please see <http://gnso.icann.org/issues/new-gtlds/>.

Guidebook, C-020, at 1-2. “[T]he complete set of the supporting documentation” for the Guidebook available at that link includes the Final Report of the ICANN Generic Names Supporting Organization (“GNSO Final Report”).<sup>6</sup> As explained by Amazon’s expert Dr. Forrest (¶ 8.5) and quoted in Amazon’s prehearing brief (at 37), the GNSO Final Report (at 4) urges the use of “transparent and predictable criteria, fully available to the applicants prior to the initiation of the process.” But that “complete set of . . . documentation” does *not* include the rationale on which ICANN newly relies; and the rationales were never subject to the public notice and comment process used for the Guidebook drafts.<sup>7</sup> That weighs against ICANN’s attempt to depict the rationales as granting the GAC authority to define new geographic names found nowhere in the Guidebook itself.

*Second*, even if the rationale’s statement that GAC advice can be used “to object to an application for a string considered by a government to be a geographic name,” R-76, at 45, were

---

<sup>6</sup> See ICANN Generic Names Supporting Organisation, *Final Report on the Introduction of New Generic Top-Level Domains* (Aug. 8, 2007), at <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm>, cited in Amazon Br. 37 (as “Forrest-015”), and in Forrest Report ¶ 8.5. There is a link to the GNSO Final Report at <http://gnso.icann.org/en/issues/new-gtlds/>. The link is dated September 6, 2007, the date on which that report was approved by the GNSO Council, but the report itself is the August 8 version quoted by Dr. Forrest.

<sup>7</sup> See Witness Statement of Akram Atallah ¶¶ 9, 17, 20 (describing the notice-and-comment process for Guidebook drafts). The newly cited rationales provide a link to archived public comments at <http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>. R-76, at 43. The archive shows that the last comments solicited on the Guidebook before the Board published its rationales concerned the April 2011 draft of the Guidebook, on which comments closed on May 15, 2011. The omission of public comment on the rationales is important because the Bylaws require public comment on “policies . . . that substantially affect the operation of the Internet or third parties.” Bylaws, art. III, § 6, ¶ 1. Thus, if the rationales were intended to affect the substantial rights of applicants – which giving the GAC broad authority to define new geographic names would certainly do – they should have been put out for comment; and the lack of comment is evidence that they were not meant to have any such effect.

entitled to weight, that statement could still be harmonized with the text, structure, and purposes of the Guidebook to use transparent, predictable criteria. As one example, the GAC might object to an application seeking to use a name that *was* a geographic name under the Guidebook criteria, but that ICANN’s Geographic Names Panel had erroneously missed under its review – as Peru (mistakenly) believed had happened here. *See* Amazon Br. 34-35.<sup>8</sup> Indeed, Peru’s repeated, vehement insistence that its position was supported by an ISO list cited in the Guidebook, *see* C-091, at 2, is hard to explain if (as ICANN now contends) the Guidebook definition of geographic names was not binding on governments such as Peru.

*Third*, ICANN’s characterization (at 27) of the newly cited rationales as a “resolution of the geographic names issues that the Board and GAC had achieved” permitting the GAC’s actions here cannot be squared with other evidence, including the candid reaction of Peter Dengate Thrush, who was the Chair of ICANN’s Board when the rationales issued. As Amazon explained in its prehearing brief (at 39), Mr. Dengate Thrush described the GAC’s actions here both as a “breach of the legitimate expectations of TLD applicants” and as violating “the hard wrought principles developed between board and GAC” on the subject of “rights in geographic names.” C-092, at 1; *see* Amazon Br. 39 & n.22 (collecting similar views from other contemporaneous observers). ICANN ignores Mr. Dengate Thrush’s statements entirely and insists that the Board really did agree to give the GAC unrestricted discretion to assert rights over

---

<sup>8</sup> As another example, the GAC might object to an application seeking to use a regional name in a way that would conflict with the law of geographical indications. *See* Forrest Report ¶ 5.4 (describing certain international law governing “geographical indications, indications of source, and appellations of origin”). Thus, if an applicant sought to set up a .CHAMPAGNE gTLD that would be open to all makers of sparkling wine worldwide, the government of France might object that the proposed gTLD would be inherently misleading. Although the better view is that the mere use of a geographical name as a gTLD cannot even potentially violate international law, *see id.* ¶ 5.4.1, the Board’s rationale could be interpreted to leave that legal issue unresolved and open for further debate.

any geographic names. That reinterpretation of the Guidebook lacks, as Mr. Dengate Thrush said of the GAC's advice, even "a shred of credibility." C-092, at 1.

*Fourth*, Mr. Dengate Thrush's unsuccessful call for his successors on "[t]he board . . . to defend ICANN principles against this kind of abuse," *id.*, points to another reason why the newly cited rationales should not be read as ICANN suggests. ICANN's Articles of Incorporation embody a strong preference for "open and transparent processes," C-001, ¶ 4, and the Core Values declared by its Bylaws include the use of "open and transparent policy development mechanisms" and "documented policies," art. I, § 2, ¶¶ 7, 8. Even if the rationales standing alone could reasonably be interpreted to override the GNSO preference for "transparent and predictable criteria" that are "fully available to applicants," GNSO Final Report at 20, and to permit the GAC to define new geographic names at will, any such interpretation should be rejected as contrary to ICANN's core values. That is the conclusion the NGPC should have reached in the first instance, rather than caving in to the political pressure exerted by Brazil and Peru. Its surrender leaves the final defense of ICANN's values in the hands of this Panel.

#### **IV. This Panel Has Remedial Authority Either To Direct or To Recommend That ICANN Grant the .AMAZON Applications**

Finally, a word is in order concerning this Panel's remedial authority, as to which ICANN has revised its position substantially. In its original Response to Amazon's IRP, ICANN argued (at 25) that the Panel's authority "is limited to 'declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws' and recommending that the Board stay any further action until it reviews the opinion of the IRP panel." In its prehearing brief, ICANN now argues (at 47) that "Panels are limited to declaring conformity (or not) with the Bylaws and recommending Board action." In a footnote, ICANN draws a distinction between "'affirmative' relief," which may include "recommend[ing] a course of

action for the Board to follow,” and “mandatory ordered relief.” ICANN Br. 49 & n.186 (quoting *GCC Final*, CLA-031, ¶ 146). Thus, ICANN appears to concede that this Panel has authority at least to recommend the grant of the .AMAZON Applications, although ICANN denies that such a recommendation would be binding on the Board.

For the reasons set forth in Amazon’s prehearing brief, Amazon continues to believe that Article 30 of the ICDR’s International Dispute Resolution Procedures gives this Panel full authority to direct ICANN to grant the .AMAZON Applications. If the Panel disagrees, however (or if it chooses as a discretionary matter not to exercise its full authority) it has now-undisputed authority at least to recommend that the .AMAZON Applications be granted, and to declare that the NGPC’s sole basis for not granting them earlier – its deference to the GAC’s procedurally improper, substantively flawed, and thoroughly politicized advice – was inconsistent with the Articles, Bylaws, and Guidebook.

\* \* \*

ICANN’s new defenses thus fail on their own terms; and even if they did not they are largely distractions. None of them rebuts Amazon’s thorough showing that the denial of the .AMAZON Applications on the basis of the GAC’s unreasoned political veto violated ICANN’s duties to defend its core values, justify disparate treatment of similarly situated parties, apply fair and transparent procedures, and remain accountable to the Internet community. Amazon looks forward to answering at the upcoming hearing any questions that the Panel may have.

Respectfully submitted,

/s/ John Thorne

---

John Thorne

Rebecca A. Beynon

Gregory G. Rapawy

KELLOGG, HANSEN, TODD, FIGEL

& FREDERICK, P.L.L.C.

1615 M Street NW, Suite 400

Washington, DC 20036

202-326-7900

jthorne@kellogghansen.com

rbeynon@kellogghansen.com

grapawy@kellogghansen.com

*Counsel for Claimant Amazon*

April 20, 2017