

GAC Advice Response Form for Applicants



The Governmental Advisory Committee (GAC) has issued advice to the ICANN Board of Directors regarding New gTLD applications. Please see Section IV of the [GAC Durban Communiqué](#) for the full list of advice on individual strings, categories of strings, and strings that may warrant further GAC consideration.

Respondents should use this form to ensure their responses are appropriately tracked and routed to the ICANN Board for their consideration. Complete this form and submit it as an attachment to the ICANN Customer Service Center via your [CSC Portal](#) with the Subject, “[Application ID] Response to GAC Advice” (for example “1-111-11111 Response to GAC Advice”). All GAC Advice Responses to the GAC Durban Communiqué must be received no later than 23:59:59 UTC on 23-August-2013.

Respondent:

Applicant Name	Amazon EU S.à r.l.
Application ID	1-1318-12524
Applied for TLD (string)	.YUN

Response:

August 23, 2013

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehadé, President & CEO
Mr. Cherine Chalaby, Chair of the New gTLD Committee
Members of the New gTLD Program Committee
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: **Amazon’s Response to the ICANN Board of Directors on the GAC Durban Communiqué**

Dear Dr. Crocker, Messrs. Chehadé and Chalaby, and Members of the ICANN Board of Directors New gTLD Program Committee,

Thank you for the opportunity to respond to the Governmental Advisory Committee’s (“GAC”) Advice set forth in the Durban Communiqué (the “GAC Advice”).

As Amazon indicated in its response to the GAC’s Beijing Communiqué, .YUN means “cloud,” in Pinyin, which is the reason we applied for the string. Representatives from the Government of the People’s Republic of China, however, note that the Yunnan Province is sometimes locally shortened to “Yun.”

Amazon wrote to representatives from China as soon as we received the Early Warning, but due to communication issues, those representatives were unable to respond until

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the Beijing meeting. We have been and continue to be in active negotiations since Beijing. We welcome discussions with representatives from the Yunnan Province government and already have offered to implement safeguards to ensure that the string is not used in a manner that may cause confusion. Although we are hopeful this matter will be resolved to both parties' satisfaction in coming months, for the same underlying reasons discussed in our .AMAZON applications (attached for your reference), there is no basis for a GAC "hold" until resolution.

We ask the New gTLD Program Committee to reject this portion of the Communiqué, and thank the Committee for its time and consideration of our comments.

With best regards,

Stacey King
Sr. Corporate Counsel, Amazon

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Respondent:

Applicant Name	Amazon EU S.à r.l.
Application ID	.AMAZON (1-1315-58086) .アマゾン [AMAZON] (1-1318-83995) .亚马逊 [AMAZON] (1-1318-5591)
Applied for TLD (string)	As displayed above

Response:

August 23, 2013

Dr. Steve Crocker, Chairman of the Board
Mr. Fadi Chehadé, President & CEO
Mr. Cherine Chalaby, Chair of the New gTLD Committee
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Re: **Amazon’s Response to the ICANN Board of Directors on the GAC Durban Communiqué**

Dear Dr. Crocker, Messrs. Chehadé and Chalaby, and Members of the ICANN Board of Directors New gTLD Program Committee,

Thank you for the opportunity to respond to the Governmental Advisory Committee’s (“GAC”) Advice set forth in the Durban Communiqué (the “GAC Advice”). Amazon respects the vital role of the GAC and its contribution to the multi-stakeholder model of governance. Under the Applicant Guidebook (“AGB”), GAC advice creates a rebuttable presumption for the ICANN Board of Directors New gTLD Program Committee (“NGPC”) that the application

should not proceed. Not only is that presumption plainly rebutted here, but following that advice would violate national and international law and upend the settled international consensus embodied in ICANN's Bylaws, Articles of Incorporation, and Affirmation of Commitments (the "Governing Documents").

Advice provided by the GAC to the NGPC is just that: advice. Of course, ICANN must act in accordance with its Governing Documents and international and national laws. The GAC Advice as it relates to the .AMAZON, .アマゾン and .亚马逊 applications (collectively the "AMAZON Applications") ignores both of these key limitations on ICANN's power to do precisely what the advice advocates – selectively rejecting an application for a new gTLD.¹ Instead, contrary to those limitations, the GAC has injected into the ICANN process political issues already addressed and rejected by international consensus in the ICANN rulemaking process in contravention of the objecting governments' own national laws and international laws to which they themselves are signatories.

In short, the GAC Advice as it relates to the AMAZON Applications should be rejected because it (1) is inconsistent with international law;² (2) would have discriminatory impacts that conflict directly with ICANN's Governing Documents; and (3) contravenes policy recommendations implemented within the AGB achieved by international consensus over many years. Failure to reject the GAC Advice will fundamentally undermine the multi-stakeholder model and place at risk, and destroy trust in the fairness of, the gTLD process for both current and future applicants.³

I. Background

Amazon and the Amazonia region of South America have coexisted amicably, both regionally and globally, with no interference on regional matters or consumer confusion or harm for more than seventeen years. We have been and continue to be pleased to serve countless customers in the region throughout much of that period. Amazon is not the recognized term for the region in most of South America, which use Amazonas or Amazonia.

¹ See, generally, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Judge Stephen M. Schwebel, Presiding. (Feb. 19, 2010).

² For the convenience of the NGPC, the Board of Directors, and ICANN legal team as a whole, Amazon has attached as Appendix A Chapters 5-9 of Heather Ann Forrest's recently published book Protection of Geographic Names in International Law and Domain Name System Policy by Heather Ann Forrest (Wolters Kluwer Law International 2013). Professor Forrest's research clearly supports the Amazon position that there are no legal rights by a country in a sub-regional or geographic feature name, or any geographical name per se.

³ See, e.g., Lisa Schuchman, "Amazon's Domain Name Trouble Threatens ICANN Program", CORPORATE COUNSEL (Aug. 7, 2013), available at: <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202614276487&slreturn=20130719190909>.

Although geographic denominations may be registered with the local trademark offices, the term AMAZON is not registered as a geographical denomination by either the Brazilian or the Peruvian trademark offices (or any other government trademark offices in the Amazonia region).⁴

AMAZON, along with AMAZON-formative marks such as AMAZON.COM and AMAZON and Design (collectively the “AMAZON Marks”) is a trademark registered by Amazon more than 1300 times in over 149 countries world-wide – including registrations in the trademark offices and in the ccTLDs of the very regions that now claim Amazon should not be allowed to use its global mark as a gTLD.⁵ Amazon has never used its mark as a geographic term. Nor have the governments of South America ever themselves used the names of their geographic regions – “Amazonia,” “Amazonas,” or “Amazon”⁶ – or any variation of these terms, as trademarks for Internet services or any other goods and/or services.

The AGB, which was “the result of years of careful implementation of GNSO policy recommendations and thoughtful review and feedback from the ICANN stakeholder community,”⁷ does not prohibit or require government approval of the terms .AMAZON, .アマゾン and .亚马逊. Amazon submitted the AMAZON Applications in January 2012 after careful review of, and fully consistent with, those rules.⁸

Despite our long-standing presence throughout the region, the Governments of Brazil and Peru opposed the AMAZON Applications (first through an Early Warning against only the .AMAZON application, and later seeking GAC consensus advice against .アマゾン and .亚马逊 as well). In response, Amazon actively engaged with the governments of the Amazonia region and the Organización del Tratado de Cooperación Amazónica (“OTCA”), the treaty

⁴ See discussion infra starting at p. 4.

⁵ See the list of Amazon Trademarks and domain names issued in countries of the Amazonia region, attached as Appendix B.

⁶ Guyana is the only country in the Amazonia region to use the term “Amazon” in reference to the region.

⁷ “About the Program”, ICANN. <http://newgtlds.icann.org/en/about/program> (visited Aug. 12, 2013).

⁸ .AMAZON, .アマゾン and .亚马逊 are not country or territory names, and thus are not prohibited as gTLD strings under Section 2.2.1.4.1 of the AGB, nor are they geographic names that require documentation of support or non-objection from any government or public authority pursuant to Section 2.2.1.4.2 of the AGB. Five specific categories of strings are considered “geographic names” requiring such government or public authority support, including “any string that is an exact match of a sub-national place name, such as a county, province, or state, listed in the ISO 3166-2 standard.” AGB §2.2.1.4.2. Despite the Peruvian GAC representative’s statement to the contrary during the Durban Meeting, .AMAZON, .アマゾン and .亚马逊 do not fall within any of the five categories, including the ISO 3166-2 list. The Geographic Names Panel has never contacted Amazon regarding its AMAZON Applications, and has not taken the position that the applied-for strings are “geographic names”. In addition, the AMAZON Applications have all passed Initial Evaluation with perfect scores of 100%, putting them in the top 5% of all applications passing evaluation.

organization that represents the Amazonia region, through letters, video-teleconference, and an in-person meeting in Brasilia leading up to the ICANN meeting in Beijing. Despite a number of proposals presented by Amazon, including support of a future gTLD to represent the region using the geographic terms actually used by the Brazilian and Peruvian regions, such as .AMAZONIA or .AMAZONAS, the GAC representatives for Brazil and Peru insisted that Amazon withdraw its application or change the strings to “.AMAZONINCORPORATED”, “.AMAZONINC” or “.AMAZONCOMPANY.”

Despite knowing the Community Objection process is the appropriate avenue designated by ICANN for governments wanting to contest geographic terms not included in the AGB, no representative from Brazil or Peru (or any of the other Amazonia region countries or the OTCA) filed a Community Objection. Instead, a third party – the “Independent Objector” (a person known to represent the Government of Peru) – filed a Community Objection on behalf of the region.⁹

At the Beijing meeting, GAC representatives from Brazil and Peru sought GAC consensus advice against the AMAZON Applications. After failing to achieve consensus through that process to block the applications outright, Brazil and Peru instead requested (via the GAC) that the AMAZON Applications – instead of being allowed to proceed as the AGB requires – be delayed so the GAC could “further consider” the strings at the Durban meeting. This Board agreed to the delay.

At the ICANN Durban Meeting the Brazilian and Peruvian GAC representatives asked the GAC to revisit its objection to the AMAZON Applications. Both the Brazilian and Peruvian GAC representatives made public statements emphasizing the attention the Applications had drawn by their own governments and governmental organizations.¹⁰ In its second consideration of the AMAZON Applications, from our understanding following political and economic discussions by several of the objecting countries to persuade others to not block

⁹ As noted in our response to the Beijing GAC Advice and for completeness, the “Independent Objector” (“IO”) represents the Government of Peru in an ongoing case at the International Court of Justice, arguing on its behalf as recently as December 2012. We have separately raised serious concerns over the potential issue of conflicts with ICANN’s legal department – by telephone, in three separate letters, and in two in-person meetings (both before and after the IO filed his objection) – but have yet to receive a response from ICANN.

¹⁰ Indeed, in mid-June a Brazilian Senator held widely-publicized hearings on the issue and created an online petition to gather signatures against the AMAZON Applications. The petition was supposed to be delivered to the ICANN Community at the Durban meeting, purportedly evidencing large scale community support against the AMAZON Applications. The Brazilian GAC representative referenced the petition when requesting the renewed objection be upheld – “we had a huge reaction from the civil society which is organizing a document signed by thousands of people to be sent to the ... ICANN Board” – but the petition itself was never delivered.

their objection, the GAC agreed on consensus advice to reject the AMAZON Applications that are before this Board.

II. The GAC Advice is Inconsistent with International Law

ICANN is required to “operate for the benefit of the Internet community as a whole, carrying out its activities *in conformity with relevant principles of international law and applicable international conventions and local law*”.¹¹ While the GAC has an appropriate role to play in providing advice to the ICANN Board on matters related to government policy and international and national laws, the GAC Advice here substantially oversteps those bounds. ICANN’s failure to reject that advice would plainly violate relevant principles of international law and applicable conventions and local law, and therefore violate ICANN’s Governing Documents.

Governments do not have a per se national or global exclusive right to terms that are also used to represent a geographic area – be it a country, city, town, mountain, river, tributary, volcano, or other. Any rights in geographic terms are granted by law and, generally, cannot prohibit other uses of the term in a non-geographic manner. Indeed, the international legal system has well-established mechanisms for protecting terms, including use of geographical names. These mechanisms fall into one of four major categories: (1) Intellectual Property; (2) Regulatory Recognition; (3) National Sovereignty; and (4) Indigenous Rights. None of these mechanisms has ever been used by the objecting countries to protect the geographic term “Amazon” or any other translation or variation (as opposed to Amazon’s non-geographic use of the separate trademark AMAZON for Internet and e-commerce services).

1. Intellectual Property: Trademark Rights

The Paris Convention of 1883 (“Paris Convention”) is the basic building block for modern international intellectual property law. Importantly, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) incorporates by reference Paris Convention Articles 1-12 and 19, and mandates that all World Trade Organization members enforce these provisions whether they are members of the Paris Convention or not. Under TRIPS and the Paris Convention, several forms of intellectual property protections and rights are recognized.

First, trademark protection is provided to terms that may act separately as geographic references, but are for trademark purposes distinctive of particular goods or services and

¹¹ Articles of Incorporation of ICANN, § 4.

indicate a particular source of these goods or services.¹² The AMAZON Marks use the term AMAZON not as a geographic reference, which locally would be AMAZONIA and/or AMAZONAS, but as a fanciful term unrelated to the region. In fact, on July 26, 2013, the Peruvian trademark office, in considering the registrability of a third party's trademark applications for AMAZONAS, AMAZONASPERU and AMAZONAS.PE, and related oppositions, noted no similarities between these marks and AMAZON *"since the denomination AMAZONAS makes reference to one of the regions located north of Peru, while the denomination AMAZON will be perceived by the average consumer as a fanciful sign."*¹³

Here, Amazon holds trademark rights in and to the mark AMAZON as it relates to Internet and e-commerce services, among others. Amazon does not use the AMAZON Marks in any way that references or relates to the Amazonia region (in other words, the AMAZON Marks are not geographic terms; they are trademarks). The AMAZON Marks have been registered more than 1300 times in over 149 countries world-wide, *including in Brazil and Peru*. The very governments that now object to Amazon's use of the AMAZON Marks globally in connection with Internet and e-commerce services are now trying to ignore and erase not only the fact that Amazon has existed on the Internet for more than 17 years, but the fact that *these and other governments outside of their region have already expressly granted Amazon the right to use its marks for these services*.

Article 16(1) of TRIPS gives the owner of a registered trademark certain exclusive rights in that mark. Such rights can legally prevent other parties from using the same mark, including objecting countries or other parties, in the course of trade. The objecting governments have no superior legally recognized trademark rights in the term AMAZON for Internet-related services.

Second, Article 8 of the Paris Convention also gives international rights to protect trade names of commercial entities. To the best of Amazon's knowledge, none of the objecting countries owns legally recognized trade name rights in the term AMAZON.

Third, Article 6-ter of the Paris Convention protects various official names, insignia, flags, emblems, or hallmarks which indicate warranty and control. Brazil and Peru have sought to protect several of their insignia in this manner, but not the term AMAZON. For example, a design mark for CAFÉ DO BRASIL and the Official Seal of Peru, owned by Peru, were filed by Brazil and Peru respectively in the US Patent and Trademark Office under 6-ter. No such action was taken for the term AMAZON.

¹² Examples are LONDON FOG for raincoats (the capital city of the United Kingdom), TSINGTAO for beer (a city in China), and HAWAIANAS for flip flops (Hawaiian in Portuguese).

¹³ *Maribel Portella Fonseca v. Amazon Technologies, Inc.*, Resolución N. 2154-2013/CSD-INDECOPI.

Fourth, Articles 10 and 10 *bis* of the Paris Convention mandate that Member States undertake to protect against all acts of unfair competition and to give infringed parties remedies to protect their rights. Unfair competition protects against acts which deceive the public and are used by competitors in bad faith to undermine each other's businesses. Unfair competition protection could theoretically be available for geographical names if such names were used in a commercial activity. Because they have no commercial use of the term AMAZON, the objecting governments have no legally recognized unfair competition rights in the term AMAZON.

Fifth, another way that a geographical term may receive intellectual property protection is as an "appellation of origin" or "geographical indication" (hereinafter, collectively, "geographical denomination"). The principal methods for protecting geographical denominations arise under national law, bilateral treaties and global treaties. The most well-known geographic denomination is CHAMPAGNE for a sparkling wine from a particular region of France produced under strict protocols. In the international context, the principal global treaties that include references to geographical denominations are the Paris Convention of 1883, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891, the Lisbon Agreement on the Protection of Appellations of Origin, and the WTO TRIPS Agreement of 1994. The objecting governments have not protected and have not sought to protect the term AMAZON as a geographical denomination under the framework provided by any of these treaties.¹⁴

The principal treaty recognizing geographical denominations (which it terms "geographical indications") is the TRIPS Agreement,¹⁵ which provides relative protection against false geographical indications that are misleading (including misleading use of a previously recognized geographical indication as a trademark). Even if the objecting governments were now to establish geographical indication rights in the term AMAZON (which, as noted above, they presently do not hold), these rights would be limited to a particular set of goods or services that these governments had shown to "originate" in the Amazonia region or for which "a given quality, reputation or other characteristic...[were] essentially attributable to" the Amazonia Region.¹⁶ Internet-related services would certainly not qualify.

As a result, none of the objecting governments can claim intellectual property rights in and to the term AMAZON, nor take advantage of geographical denominations protections under

¹⁴Some of the objecting governments have protected geographic indications for other terms. Peru, for example, has protected over 700 geographic indications under the Lisbon Agreement, but none is for AMAZON.

¹⁵ All members of the WTO are members of the TRIPS Agreement. As of the date of this letter, 159 countries are members of the WTO.

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

¹⁶ TRIPS Agreement, Article 22(1).

national and international laws. Even under the narrowest interpretation of Amazon’s trademark rights, Amazon’s right to use the term AMAZON for Internet-related services would prevail under existing national and international laws. Respect of well-established national and international intellectual property laws alone requires rejection of the GAC Advice.

2. Regulatory Recognition

In many legal systems, certain commodities have specific naming protocols to avoid confusion in the international marketplace. For example, the term NAPA is protected for wines from the Napa Valley in California, USA, under the U.S. system of “American Viticultural Areas.” This type of governmental protection is a helpful system for protection of geographical names that do not fall within the various intellectual property rights granted nationally and internationally. In addition, geographical names are protected under international, national, and municipal laws as they relate to consumer protection, such as regulations designed to prevent consumer confusion and harm.

The objecting countries have no legally recognized regulatory rights in the term AMAZON.

3. National Sovereignty

Under international law, sovereign states have certain rights to control their national boundaries and be represented in international organizations and related interests. These rights, however, do not extend to preventing use of terms in a non-geographic manner (i.e., as a trademark or for use in connection with services that bear no relation to a physical, geographic region), particularly when their own national laws allow such use. The very countries objecting to Amazon’s use of AMAZON for Internet services – as well as numerous other sovereign countries – granted registrations in the AMAZON Marks under their own laws on this very basis. Indeed, there is no international consensus as to whether sovereign rights over boundaries extend to country names, let alone any sub-region or physical feature such as a river, nor are there any current global mechanisms for recognizing such rights, but there is consensus on the protection of a trademark owner’s rights through the treaty provisions found in the TRIPS Agreement.

The objecting countries have no legally recognized independent sovereignty rights in any sub-regional names for the term AMAZON.

4. Indigenous Rights

Certain human rights are protected under international law (and even under ICANN policy where the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights are mentioned). In addition, consideration is given to the UNESCO cultural indicia, human rights in property ownership, self-determination, and free expression, and other inherent political rights. However, the objecting countries have no legally recognized rights in the term AMAZON.

To the contrary, corporate ownership of trademarks is clearly protected under human rights. In the European Union case *Anheuser-Busch, Inc. v. Portugal*, Application No. 73049/01 (1/11/2007), the Grand Chamber of the European Court of Human Rights upheld trademarks as valid possessions ruled by human rights law. It is important to note as well that human and indigenous rights under these doctrines belong to the individual, not the state, and these rights protect individuals from state action to take away their rights and property. In this matter, not only do the objecting governments not have any human or indigenous rights in the word AMAZON, but international law forbids them from globally limiting and devaluing this well-known trademark.

Despite all the methods listed above to provide protection for geographical names, the objecting countries have pursued none of them in connection with the term AMAZON. Amazon does not dispute this region's importance to its inhabitants and their governments. This importance, however, does not grant the region – or national governments – per se rights to prevent use of an otherwise unprotected geographic term, nor does it give the GAC or ICANN the right to create extraterritorial, sui generis, per se rights in geographic terms. Indeed, to the extent that this is a “matter of principle,”¹⁷ the principle at stake is the obligation of WTO Member states and the ICANN Board to follow international law as set out in the applicable treaties, including most pertinently the TRIPS Agreement administered by the WTO. As noted above and further discussed below, such treaties carefully balance the competing interests in protecting geographic denominations and trademarks. It is to these international treaties that the ICANN Board must look for guidance, not the vague and unsubstantiated concerns upon which the GAC Advice is grounded.

¹⁷ The Peruvian GAC representative in Durban stated, “dot Amazon is a geographic name that represents important territories of some of our countries which have relevant communities with their own culture and identity directly connected with the name. Beyond the specifics, this should also be understood as a matter of principle.” Quotes taken from the live scribe feed as provided by ICANN: <http://icann.adobeconnect.com/p2y1517vnt2/>. Transcripts attached as Appendix C.

Both the TRIPs Agreement and the Lisbon Agreement contain provisions relating to the resolution of conflicts between trademarks and geographical denominations. International discussions and negotiations on ways to interpret, reshape, or amend these treaty provisions remain ongoing. Many third-party organizations and NGOs active in the protection of trademarks or geographical denominations have also weighed in with their opinions on ways to address situations where one party's trademark rights appear to conflict with another party's interest in protecting a geographical denomination. *Not once in the history of debate and discussion of this issue has a nation or organization with an interest in this topic advanced the extreme position now taken by the governments of Brazil and Peru with respect to the term AMAZON: that a local region's newly-expressed interest in a particular geographical term **per se** – which is not used or commonly recognized as a source identifier for any product or service – be privileged over a third-party's longstanding, established trademark rights that the countries of this very local region have themselves recognized, registered and protected for over a decade.*

To the contrary, where a trademark has been protected in a particular jurisdiction before the date on which the TRIPs Agreement becomes effective in that jurisdiction, or before the protection of a conflicting geographical indication in its country of origin, Article 24(5) of the TRIPs Agreement further specifies that the implementation of the provisions of the section on Geographic Indications “shall not prejudice eligibility for or the validity of the registration of [such] trademark, or the right to use [such] trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.”¹⁸

A 2005 WTO Panel addressed whether the exception provided for in Article 24(5) of the TRIPs Agreement amounts to a “first in time, first in right” rule or mandates coexistence of the relevant trademark and geographical indication. In that case, Australia and the United States challenged a 1992 European Union regulation for protecting geographical denominations for agricultural products and foodstuffs.¹⁹ The WTO Panel concluded that in

¹⁸ TRIPs Agreement, Article 24(5). The full text of this section reads: “Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either: (a) before the date of application of these provisions in that Member as defined in Part VI; or (b) before the geographical indication is protected in its country of origin; measures adopted to implement this Section shall not prejudice eligibility for or the validity of the registration of a trademark, or the right to use a trademark, on the basis that such a trademark is identical with, or similar to, a geographical indication.”

¹⁹ *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R (15 March 2005) (hereinafter “WTO Decision 290”). Full information on this case, including a copy of the Report of the WTO Panel, is available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds290_e.htm. See also Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (hereinafter “E.U. Foodstuffs Regulation”), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R2081:EN:HTML>. This E.U. Regulation was subsequently amended to comply with the WTO panel's decision in the case

accordance with Article 17, the TRIPs Agreement allows for a limited exception to a trademark owner's rights – namely, that the trademark owner may be compelled to accept coexistence when trademark and geographical indication rights conflict.²⁰ Notably, this decision does not suggest that geographical indication rights should be allowed to trump trademark rights.

Peru, Brazil and the other South American countries of the Amazonia region that support the objection to the AMAZON Applications are WTO members and therefore legally bound to implement the terms of the TRIPs Agreement and to follow the rulings of the WTO on its interpretation of the TRIPs Agreement. *Under the rule of international law established by the WTO's decision discussed above, it is clear that even if Brazil and Peru were to now recognize the term AMAZON as a protected geographical denomination, such protection would not permit them to prohibit or limit the use of the previously recognized trademark AMAZON.* In other words, neither Brazil nor Peru, and likely no other governments, could bar the AMAZON Applications in their own countries under their own laws, and to do so would violate international laws.

Ironically, the Brazilian government filed third-party arguments in the WTO case discussed above that were far more sympathetic to trademark-owner concerns than the position it is now taking regarding the AMAZON Applications. Brazil's arguments stressed the importance of maintaining the value of trademarks and referred dismissively to "a theoretical hypothesis of coexistence between a trademark and a geographical indication."²¹ As Brazil candidly and correctly concluded at that time:

Brazil believes that without disregarding the peculiar features surrounding the use of a geographical indication and the need to protect it, one must not do so at the expense of both the trademark owners and the consumers. Otherwise, the commercial value of a trademark may be undermined, which runs contrary to the 'exclusive rights' of a trademark owner provided for in Article 16.1 of the TRIPs Agreement.²²

The Brazilian government further elaborated that in its view, resolution of conflicts between trademarks and geographical denominations should:

discussed here; the replacement regulation is Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (hereinafter "E.U. Amended Foodstuffs Regulation"), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:093:0012:01:EN:HTML>.

²⁰ *Id.* at 143-50.

²¹ WTO Decision 290, Annex C, C-7.

²² *Id.* at C-7 - C-8.

[T]ake due account of the fact that (a) geographical indications do not *a priori* prevail over registered trademarks[.]²³

Thus, under Brazil's *own* interpretation of the TRIPs Agreement, one thing is clear: any rights that Brazil or any of its neighboring countries may have accrued in the geographical term AMAZON should not *a priori* prevail over Amazon's registered trademark rights in the term AMAZON, which have long been recognized in the region. A government cannot selectively use ICANN to override the protections found in TRIPs and other international laws.

The ICANN Board had it right when it approved the policy recommendations resulting in the AGB. It was – and is – essential that the new gTLD application process be transparent, predictable, and non-discriminatory. *The ICANN Board recognized that allowing governments to retroactively determine names that are of concern because of geographic connotations would lead to discriminatory and chaotic consequences.*²⁴ To provide the GAC with an effective veto power over individual strings injects unpredictability²⁵ and politics²⁶ into the gTLD application process. It allows governments to use the ICANN Board to take actions the governments could not take – and have not taken – under their own laws, creating a new form of *sui generis* rights along the way.

At minimum, Amazon requests that, pursuant to the authority reserved to itself in AGB Section 3.1, the NGPC obtain, before it considers the GAC Advice against the AMAZON Applications, independent expert advice on the protection of geographic names in international law generally and the violations of relevant principles of international law and applicable conventions and local law represented by the GAC Advice. Amazon believes that the legal treatise cited in notes 1-2 above and the discussion in Section II above provide

²³ *Id.* at C-9.

²⁴ See the attached highlighted communications between the ICANN Board and the GAC from the period 2009 to 2011 on the issue of geographic names, attached as Appendix D.

²⁵ From the Ugandan GAC representative in Durban: "We're going through a process of generating similar strings which may be of concern to us. So I'm wondering should we always have to come here and make statements like this or there's going to be a general way of protecting those strings that we think are sensitive to us."

From the Brazilian GAC representative in Durban: "Now we have dot amazon. But in the future, maybe you can have dot sahara, dot sahel, dot Nile, dot Danube. I don't know if the names are there. I don't have the list by heart. But maybe the names are not there. But it doesn't mean they're not important for national culture and traditional concerns in your countries."

Quotes taken from the live scribe feed as provided by ICANN:

<http://icann.adobeconnect.com/p2y1517vnt2/>. Transcripts attached as Appendix C.

²⁶ From the Sri Lankan GAC representative in Durban: "This issue of dot amazon has reached our foreign ministry and has gone to the highest level of attention between discussions with the Brazilian government on a lot of bilateral trade related issues." Quotes taken from the live scribe feed as provided by ICANN: <http://icann.adobeconnect.com/p2y1517vnt2/>. Transcripts attached as Appendix C.

material information to the NGPC that demonstrate why the NGPC should not accept GAC Advice against the AMAZON Applications, and why it should allow the AMAZON Applications to proceed.

NGPC acceptance of the GAC Advice would destroy hard fought international consensus and well-settled expectations on geographic names. It would impermissibly place ICANN above accepted international and national laws at the behest of individual governments in ways that will not hold up on review in other forums.

III. ICANN Must Act in a Predictable, Transparent, and Non-Discriminatory Manner

In addition to violating various international laws, accepting the GAC Advice would violate ICANN's Governing Documents. The right to provide advice on individual applications based on sensitivities, as granted by the Community, could not have intended such consequences. If so, the entire process itself may be in violation of ICANN's guiding principles.

A. GAC Advice Throws Out the Transparency and Predictability Carefully Balanced in the Development of the AGB

ICANN's Governing Documents require ICANN to operate in an "open and transparent" manner.²⁷ At the outset, the GNSO Council New gTLD Policy Recommendations emphasized the need to support these requirements and to provide new gTLD applicants with a transparent and predictable process.²⁸ Both the GAC²⁹ and the ICANN Board³⁰ itself adopted and endorsed the importance of providing new gTLD applicants with a transparent and predictable process.

²⁷ Articles of Incorporation of ICANN, § 4. ICANN Bylaws, Article II, §2(7). Affirmation of Commitments, §9.1.

²⁸ "The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." ICANN GNSO Final Report, Policy Recommendation 1, Aug. 8, 2007.

²⁹ "The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process." Annex B, "GAC Principles Regarding New gTLDs", §2.5, GAC Communique – Lisbon, Mar. 28, 2007.

³⁰ "Resolved (2008.06.26.02), based on both the support of the community for New gTLDs and the advice of staff that the introduction of new gTLDs is capable of implementation, the Board adopts the GNSO policy recommendations for the introduction of new gTLDs." Adopted Board Resolutions – Paris, June 26, 2008.

The ICANN Community and Board underscored the importance of predictability for applicants during discussions about blocking terms that governments determined caused “sensitivities” to a region.³¹ The GAC repeatedly requested that the Board and ICANN Community afford the same protections to names that do not appear in the AGB-referenced ISO lists as to names that do appear. To ensure predictability and fairness to applicants – and prevent precisely the sort of ad hoc undermining of ICANN’s rules now playing out here – the Board expressly rejected these requests.³² To address government concerns over strings that raise “national, cultural, geographic, religious and/or linguistic sensitivities or objections that could result in intractable disputes”, the AGB was revised to include section 2.2.1.4.2 of the AGB and the ability by individual governments to file both Community and Limited Public Interest Objections.³³

In order to ensure transparency and predictability, the ICANN Board specifically precluded the GAC and/or governments from having broad post-application discretion to block applications based on non-geographic use of specific terms. Advice must be based on more than a “principle” of dislike.

The GAC would now have the Board sweep away years of multi-stakeholder input and policy developments, retroactively implementing the proposed but never adopted GAC’s 2007 Principles in connection with geographic names, and reject applications in violation of ICANN’s Governing Documents. If the Board accepts the GAC Advice on the AMAZON Applications, no applicant can ever be sure that its application – and the significant resources needed to support it – meets the requisite standards for filing. Applicants instead become pawns in politics unrelated to the DNS or Internet, subject to negotiations with governments over business models and branding that they would not otherwise be required to undertake under national laws.

B. GAC Advice Has A Discriminatory Effect on Amazon

Pursuant to ICANN’s Governing Documents, ICANN must act in a non-discriminatory, neutral

³¹ “The Board’s intent is, to the extent possible, to provide a bright line rule for applicants. . . . It is felt that the sovereign rights of governments continue to be adequately protected as the definition [of geographic names] is based on a list developed and maintained by an international organization.” Letter from ICANN (Dengate-Thrush) to GAC (Karklins), Sept. 22, 2009.

³² “The Board has sought to ensure [...] that there is a clear process for applicants, and appropriate safeguards for the benefit of the broad community including governments. *The current criteria for defining geographic names as reflected in the Proposed Final Version of the Applicant Guidebook as considered to best meet the Board’s objectives* and are also considered to address to the extent possible the GAC principles.” ICANN Board – GAC Consultation: Geographic Names, Feb. 21, 2011 (emphasis added).

³³ ICANN Board – GAC Consultation: Objections, Feb. 21, 2011. See also ICANN Board – GAC Consultation: Geographic Names, Feb. 21, 2011.

and fair manner.³⁴ Indeed, one of the core values guiding ICANN’s decisions and actions is “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness.”³⁵ The GAC now asks this Board to ignore these requirements.

In his July 16, 2013 public statement to request GAC Consensus Advice against the AMAZON Applications, the Brazilian GAC representative stated that the AMAZON Applications are of “deep concern” to the Brazilian Society and create a “risk to have the registration of a very important cultural, traditional, regional and geographical name related to the Brazilian culture.” The Brazilian GAC representative contended that there is concern over “the registration of this very important name to the Brazilian Society.” He claimed that representatives from Brazil and other countries met with Amazon in good faith – that Amazon is willing to “make a good job” – but “*for a matter of principle*, [Brazil] cannot accept this registration” and asked the GAC to “reinforce the Brazilian demand to the GAC members to approve a rejection on the registration of dot amazon by a private company in name of the public interest.”³⁶

Notably, neither the objecting countries nor the GAC objected to another gTLD application with a nearly identical fact pattern. Ipiranga Produtos de Petroleo S.A. (“Ipiranga”), the applicant for .IPIRANGA, Appl. No. 1-1047-90306, is a Brazilian private, joint stock company. Ipiranga is “one of the largest oil distribution companies in Brazil and is the largest private player in the Brazilian fuel distribution market.”³⁷ Ipiranga “holds various trademarks in Brazil to protect its brand. . . . [as well as] various trademarks in South America” and various domain names to protect its brand, such as *ipiranga.com.br* and *ipiranga.net.br*. “Ipiranga’s operations also include a successful, promotion-based e-commerce website *ipirangashop.com*.” Ipiranga states it has invested heavily in brand awareness and has received extensive recognition, including “Second Most Remembered and Preferred Trademark” in the field of oil distribution in Brazil, and “Most Well-Known and Preferred Brand in the field of fuels.”

According to the .IPIRANGA Application, Ipiranga applied for a gTLD to, (1) “secure and protect the Applicant’s key brand” (“IPIRANGA”) as a gTLD; (2) “reflect the IPIRANGA brand

³⁴ ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. ICANN Bylaws, Article II, §3.

³⁵ ICANN Bylaws, Article I, §2(8).

³⁶ Quotes taken from the live scribe feed as provided by ICANN: <http://icann.adobeconnect.com/p2y1517vnt2/>. Transcripts attached as Appendix C (emphasis added).

³⁷ New gTLD Application Submitted to ICANN by: Ipiranga Produtos de Petroleo S.A. Taken from the public portion of the application as found at <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1509> (hereinafter “.IPIRANGA Application”), Response to Question 18(a).

at the top level of the DNS' hierarchy"; (3) provide "stakeholders of the Applicant with a recognizable and trusted identifier on the Internet"; (4) provide "stakeholders with a secure and safe Internet environment, under the control of the Applicant;" and (5) "use social communities to increase brand awareness and consumer trust." Ipiranga stated that its .IPIRANGA Application was not a geographic name.

Ipiranga is a district of São Paulo.³⁸ The Ipiranga Brook is a river in the São Paulo state in southeastern Brazil where Dom Pedro I declared independence in 1822, ending 322 years of colonial rule by Portugal over Brazil.³⁹ Indeed, the Ipiranga is so important to Brazilian culture and heritage that it is included in the first stanza of the national anthem.⁴⁰

Nowhere in the .IPIRANGA Application does Ipiranga state that it obtained approval (or non-objection) from the Brazilian government for its application.⁴¹ Nowhere in the application does Ipiranga state that it will act in any interest but the protection of its rights as a private company. The Brazilian GAC representatives did not issue an Early Warning against the .IPIRANGA Application nor did Ipiranga submit a Public Interest Commitment.⁴²

Notwithstanding the obvious importance of the term "Ipiranga" to Brazil's heritage, the GAC did not object to the .IPIRANGA Application nor, to Amazon's knowledge, did the GAC even discuss the .IPIRANGA Application during the GAC sessions in Beijing⁴³ or Durban.

Amazon does not believe the .IPIRANGA Application should be rejected; quite to the contrary. Just like Ipiranga, the oil company, Amazon is a company that has a globally established reputation separate and distinct from a geographic term.⁴⁴ Amazon does not believe that the Brazilian government is purposefully acting in a discriminatory way towards non-Brazilian companies, but the facts - intentional or not - highlight the discriminatory effect of allowing governments to retroactively decide "winners" and "losers".

³⁸ See Ipiranga, Wikipedia <<http://en.wikipedia.org/wiki/Ipiranga>>. Attached as Appendix E.

³⁹ See Ipiranga Brook, Wikipedia <http://en.wikipedia.org/wiki/Ipiranga_Brook>. Attached as Appendix E.

⁴⁰ English translation: "The placid shores of Ipiranga heard; the resounding cry of a heroic people; and in shining rays, the sun of liberty; shone in our homeland's skies at this very moment." See Brazilian National Anthem, Wikipedia <http://en.wikipedia.org/wiki/Brazilian_National_Anthem>. Attached as Appendix E.

⁴¹ Even if the oil company has received permission, it would again show a potential bias toward local companies over foreign companies in approving applications.

⁴² See New gTLD Current Application Status <<https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>>. Attached as Appendix F.

⁴³ The majority of the GAC sessions held in Beijing were closed to the community.

⁴⁴ And unlike in the .IPIRANGA Application, the AMAZON Applications are not matches of the geographic term at issue with the Government of Brazil.

Other gTLD applicants have applied for strings that also could be considered “geographic” strings or may cause cultural sensitivities, but have not been the subject of GAC Advice.⁴⁵ Indeed some of these applicants not only provided no documentation of governmental or regional support or non-objection, and received no GAC advice, but have even successfully sought trademark registrations in the region.⁴⁶ Again, Amazon does not suggest that the NGPC should reject these and all other applications that may fit one country’s definition of “geographic” or “sensitive.” But the Board has a legal and institutional duty to ensure that the rules set forth in the AGB are applied in a consistent, non-discriminatory way. It was for these very reasons the ICANN Community insisted on a definition of geographic names and a clearly defined process for considering any objections.

Instead of applying the clear definitions on geographic names set forth in the AGB, the GAC is attempting to apply the 2007 GAC Principles retroactively and selectively – principles never approved or adopted by ICANN and that have no effect as policy – and ask the NGPC, in violation of the Bylaws, to uphold its decision. The intent behind GAC advice on individual applications was not to allow the GAC to override the rules set forth regarding geographic names in the AGB; to override years of multi-stakeholder created policy; and to apply a discriminatory veto against certain applications in direct violation of the ICANN Bylaws.⁴⁷ ICANN should not permit GAC Advice to be used to achieve any individual government’s political goals – be it *de facto* protections a government is unable to get under ongoing intergovernmental treaty negotiations or under its own national laws or as part of a wider discussion on Internet governance. The Board should reject the GAC Advice against the AMAZON Applications.

IV. GAC Advice Contravenes Policy Recommendations as Implemented in the AGB

Years of policy development led to the creation of the AGB. Despite retroactive characterizations by various GAC representatives, the 2007 Principles proposed by the GAC were never approved or adopted by the multi-stakeholder ICANN Community or Board. Instead, they were recommendations that were taken into account by the Generic Names Supporting Organization (“GNSO”) and Board and considered as part of the multi-stakeholder process that developed the AGB, which was adopted by the Board. Attempts to reinstate the 2007 Principles as ICANN policy contravene the Policy Development Process (“PDP”) set forth in ICANN’s Bylaws and undermine the entire multi-stakeholder process. If

⁴⁵ For example, applications were submitted for LATINO, LAT, CHESAPEAKE, JAVA, LINCOLN, DODGE, EARTH, and others.

⁴⁶ For example, a Chilean trademark registration, Registration Number 1.008.605, issued on May 6, 2013 to a gTLD applicant for the mark LATINO in connection with domain name registration services in class 45.

⁴⁷ See, generally, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Judge Stephen M. Schwebel, Presiding. (Feb. 19, 2010).

the ICANN Board accepts this advice, it will unravel years of policy development in violation of the ICANN Bylaws and have far reaching effects on the whole program.

Under the ICANN Bylaws, “there shall be a policy-development body known as the [GNSO], which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.”⁴⁸ ICANN relies on the GNSO to create gTLD policy, and its advisory committees, including the GAC, to provide *advice* on policy recommendations before the Board.

The GNSO spent several years developing the policy recommendations for the introduction of new gTLDs, including limitations to potential entrants. The PDP involved numerous debates, changes, and variations, which included stakeholders from the entire ICANN Community (including the “Principles” proposed by the GAC in 2007), and resulted in the final new gTLD policy recommendations. These recommendations were accepted by a supermajority of both the GNSO and the ICANN Board of Directors. The AGB represents the implementation of these policy recommendations.⁴⁹

Among many of the topics that were considered as part of the PDP was the question of “geographic terms” and governments’ rights to object to strings representing geographic terms. In 2007 the GAC issued a set of “public policy” principles that the GAC advised should be implemented in the new gTLD process, including the avoidance of “country, territory or place names, and country, territory or regional language or people descriptions” and that new gTLDs should “respect” “sensitivities regarding terms with national, cultural, geographic and religious significance.”⁵⁰ These principles, however, are not policy and neither the ICANN Board nor the ICANN Community wholesale adopted them.

Instead, the ICANN Board took the principles as advice – as per the role of the GAC – and individually adopted or modified them over the course of several years. The Board and the ICANN Community identified the GAC principles on geographic names, in particular, as problematic. No list of geographic terms (beyond the AGB definition) could be agreed upon – *including by the GAC itself* – to provide applicants with the relevant transparency and predictability that all parties agreed Applicants needed, and which ICANN’s Governing Documents require.

⁴⁸ ICANN Bylaws, Article X, §1.

⁴⁹ Amazon is not making separate comments on the policy versus implementation debate. It is clear, however, that GNSO policy recommendations, accepted by the ICANN Board, must be the subject of a PDP before they can be modified.

⁵⁰ Annex B, “GAC Principles Regarding New gTLDs”, §2.1-2.2, GAC Communique – Lisbon, Mar. 28, 2007.

As late as February 23, 2011, the GAC requested a mechanism to protect governmental interests and define names considered geographic. The GAC requested clarification that “ICANN will exclude an applied for string from entering the new gTLD process when the government formally states that this string is considered to be a name for which this country is commonly known as.”⁵¹ The ICANN Board responded:

The process relies on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government. Governments and other representatives of communities will continue to be able to utilize the community objection process to address attempted misappropriation of community labels. . . . *ICANN will continue to rely on pre-existing lists of geographic names for determining which strings require the support or non-objection of a government.*⁵²

Section 3.1 of the AGB states that “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.” Section 3.1 of the AGB was not intended to give government broad retroactive discretion to block any term in any language/script based solely on a government’s general “principle” or dislike, nor for a non-geographic, fanciful use for a term not included in the lists of banned terms found in the AGB.⁵³ Otherwise the GAC would have “an automatic veto” over the outcome of a PDP that was adopted by two super majorities on a string-by-string basis (as “sensitivities” could include any potential issue to a government). Indeed, communications between the GAC and the Board make it clear the opposite is true. “While freedom of expression in gTLDs is not absolute, those claiming to be offended on national, cultural, geographic or religious grounds do not have an automatic veto over gTLDs.”⁵⁴

Amazon followed the rules set forth in the AGB and submitted its AMAZON Applications in full compliance with and reliance on the policies developed and agreed upon by the ICANN Community and reflected in the AGB. The GAC Advice now asks that the ICANN Board ignore this multi-year, multi-stakeholder process. Providing the GAC with the veto power that this GAC Advice represents, and adoption of such Advice, puts in to play violations of ICANN’s own founding principles and Governing Documents not only for this round of applications, but future rounds as well. Rejection of the GAC Advice on the Amazon Applications by the NGPC is the correct course of action.

⁵¹ Letter from ICANN (Dengate-Thrush) to GAC (Dryden), March 5, 2011.

⁵² *Id.* (emphasis added).

⁵³ And it certainly was not intended to create new rights in a government in opposition with international law. See discussion above starting at p. 4.

⁵⁴ Letter from ICANN (Dengate-Thrush) to GAC (Dryden), November 23, 2010.

V. Summary

Amazon has no doubt that individual country representatives believe they are representing the best interests of their regions. These same countries had the option to file for a new gTLD or file a Community Objection to the AMAZON Applications. They did neither. Instead, they now seek to use the GAC Advice process as a means to (1) override years of Community policy development; (2) violate ICANN's Governing Documents; and (3) violate both international and national law.

Individual governments have an important role in the multi-stakeholder model. But they plainly cannot exercise veto power over multi-stakeholder policy and ICANN's Governing Documents or use ICANN to override the very laws under which the same governments operate.⁵⁵ The NGPC should not allow any government to accomplish through the GAC what they have not – and cannot – accomplish through their national legislatures.

ICANN has already independently “reaffirmed its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as ‘Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.’”⁵⁶ Amazon respectfully requests that the NGPC stand by that commitment, abide by relevant international and national law, and reject the GAC Advice on the AMAZON Applications.

We thank the NGPC for its time and consideration of our comments. We request an opportunity to meet with the New gTLD Program Committee and the ICANN General Counsel to discuss this submission in more detail.

With best regards,

Stacey King
Sr. Corporate Counsel, Amazon

⁵⁵ This is one of the reasons preserving a multi-stakeholder model, where no one entity – including government – can use the process for political means and/or inject external issues into the process, is so important.

⁵⁶ Letter from ICANN (Dengate-Thrush) to GAC (Dryden), November 23, 2010.