

ICANN 8 SEPTEMBER 2014 NGPC MEETING
Committee Papers



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New gTLD Program Committee Meeting 8 September 2014 Agenda

Consent Agenda

- 1. Approval of Minutes from 21 June 2014, 18 July 2014 and 30 July 2014**

Main Agenda

- 1. GAC Advice Scorecard**
- 2. BGC Recommendation on Reconsideration Request 14-27, Amazon EU S.a.r.l.**
- 3. Perceived Inconsistent String Confusion Expert Determinations**
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ICANN NGPC PAPER NO. 2014.09.08.NG2a

TITLE: **Remaining Items from Beijing, Durban, Buenos Aires, Singapore and London GAC Advice: Updates and Actions**

PROPOSED ACTION: **For Resolution**

EXECUTIVE SUMMARY:

The Governmental Advisory Committee (GAC) delivered advice on the New gTLD Program in its Beijing Communiqué issued 11 April 2013, its Durban Communiqué issued 18 July 2013, its Buenos Aires Communiqué issued 20 November 2013, its Singapore Communiqué issued 27 March 2014 (as amended 16 April 2014), and its London Communiqué issued 25 June 2014. Over the past year, the NGPC developed and adopted a series of scorecards to respond to the GAC's advice concerning the New gTLD Program. At this time, the NGPC is being asked to consider adopting another iteration of the scorecard to continue to resolve the remaining items from the Beijing, Durban, Buenos Aires, and Singapore GAC advice, and to address the new items of GAC advice in the London Communiqué.

The scorecard provides updates on the NGPC's progress, and where appropriate, includes actions to be undertaken to continue to make progress on resolving the open items of GAC advice.

Consistent with the Applicant Guidebook, ICANN has notified relevant applicants of strings named in the Buenos Aires Communiqué of the GAC advice, and has provided at least 21 days for those applicants to submit responses to the NGPC for consideration. The applicants submitted comments by 4 August 2014, which are publically available for review on the New gTLD microsite < <http://newgtlds.icann.org/en/applicants/gac-advice/london50> >. The Reference Materials include a summary of the responses from applicants concerning the GAC's London Communiqué.

With the adoption of this scorecard, only a handful of GAC advice items would remain for the NGPC to resolve over the coming months, including GAC advice on the following:

1. Particular strings: .RAM
2. Second-level IGO and Red Cross/Red Crescent protections
3. Category 2 Safeguard advice

The NGPC may consider additional iterations of the scorecard at subsequent meetings as it continues to address the remaining items of GAC advice.

STAFF RECOMMENDATION:

Staff recommends the NGPC adopt the [scorecard](#) (included as Reference Material 2014-09-08-2a-NGPC-Ref Mat-GAC Advice Scorecard) to address open items from Beijing, Durban, Buenos Aires and Singapore GAC advice, in addition to new items of GAC advice issued in London. .

PROPOSED RESOLUTION:

Whereas, the GAC met during the ICANN 46 meeting in Beijing and issued a Communiqué on 11 April 2013 (“Beijing Communiqué”).

Whereas, the GAC met during the ICANN 47 meeting in Durban and issued a Communiqué on 18 July 2013 (“Durban Communiqué”).

Whereas, the GAC met during the ICANN 48 meeting in Buenos Aires and issued a Communiqué on 20 November 2013 (“Buenos Aires Communiqué”).

Whereas, the GAC met during the ICANN 49 meeting in Singapore and issued a Communiqué on 27 March 2014, which was amended on 16 April 2014 (“Singapore Communiqué”).

Whereas, the GAC met during the ICANN 50 meeting in London and issued a Communiqué on 25 June 2014 (“London Communiqué”).

Whereas, the NGPC adopted scorecards to respond to certain items of the GAC’s advice, which were adopted on 4 June 2013, 10 September 2013, 28 September 2013, 5 February 2014 and 14 May 2014.

Whereas, the NGPC has developed another iteration of the scorecard to respond to certain remaining items of GAC advice in the Beijing Communiqué, the Durban Communiqué, the Buenos Aires Communiqué, the Singapore Communiqué, and new advice in the London Communiqué.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board’s authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.09.08.NGxx), the NGPC adopts the scorecard titled [“GAC Advice \(Beijing, Durban, Buenos Aires, Singapore, and London\): Actions and Updates \(8 September 2014\)”](#) in response to open items of Beijing, Durban, Buenos Aires, Singapore and London GAC advice.

PROPOSED RATIONALE:

Article XI, Section 2.1 of the ICANN Bylaws

<https://www.icann.org/resources/pages/bylaws-2012-02-25-en - XI> permit the GAC to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, its Buenos Aires Communiqué dated 20 November 2013, its Singapore Communiqué dated 27 March 2014 (as amended 16 April 2014), and its London Communiqué dated 25 June 2014. The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the

GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The NGPC has previously addressed items of the GAC's Beijing, Durban, Buenos Aires, and Singapore advice, but there are some items that the NGPC continues to work through. Additionally, the GAC issued new advice in its London Communiqué that relates to the New gTLD Program. The NGPC is being asked to consider accepting some of the remaining open items of the Beijing, Durban, Buenos Aires, and Singapore GAC advice, and new items of advice from London as described in [scorecard](#) (dated 8 September 2014).

As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The Beijing GAC advice was posted on 18 April 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>>; the Durban GAC advice was posted on 1 August 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>; the Buenos Aires GAC advice was posted on 11 December 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-11dec13-en>>; the Singapore advice was posted on 11 April 2014 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-11apr14-en>>; and the London advice was posted on 14 July 2014 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-14jul14-en>>. The complete set of applicant responses are provided at: <<http://newgtlds.icann.org/en/applicants/gac-advice/>>.

In addition, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address Beijing GAC advice regarding safeguards applicable to broad categories of new gTLD strings <<http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>>. The NGPC has considered the applicant responses in addition to the community feedback on how ICANN could

implement the GAC's safeguard advice in the Beijing Communiqué in formulating its response to the remaining items of GAC advice.

As part of its deliberations, the NGPC reviewed various materials, including, but not limited to, the following materials and documents:

- GAC Beijing Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2
- GAC Durban Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2
- GAC Buenos Aires Communiqué:
https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2
- GAC Singapore Communiqué (as amended):
https://gacweb.icann.org/download/attachments/27132037/GAC_Amended_Communique_Singapore_20140327%5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2
- GAC London Communiqué:
<https://gacweb.icann.org/download/attachments/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2>
- Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice/>

- Applicant Guidebook, Module 3:

<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

In adopting its response to remaining items of Beijing, Durban, Buenos Aires, and Singapore GAC advice, and the new London advice, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Communiqués, and the procedures established in the AGB and the ICANN Bylaws. The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

As part of ICANN's organizational administrative function, ICANN posted the London Communiqué and officially notified applicants of the advice on 14 July 2014. The Singapore Communiqué, the Buenos Aires Communiqué, the Durban Communiqué, and the Beijing Communiqué were posted on 11 April 2014, 11 December 2013, 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Programs

Date Noted: 25 August 2014

Email: jamie.hedlund@icann.org

ICANN NEW gTLD PROGRAM COMMITTEE SUBMISSION NO. 2014.09.08.NG2b

TITLE: **Reconsideration Request 14-27**

PROPOSED ACTION: **For Committee Consideration and Approval**

EXECUTIVE SUMMARY:

Amazon EU S.à.r.l (“Requester”) filed Reconsideration Request 14-27 asking the Board (or here the NGPC) to: (i) reverse Resolution 2014.05.14.NG03; (ii) reject the GAC¹ advice on .AMAZON and the related internationalized domain names (“IDNs”); and (iii) direct ICANN staff to proceed with the Requester’s applications for .AMAZON and the related IDNs.

The Requester applied for .AMAZON and the related IDNs in Japanese and Chinese (collectively, the “Amazon Applications”). In its Durban Communiqué, the GAC informed the Board that it had reached consensus GAC advice on .AMAZON and the related IDNs (“GAC Durban Advice”). After significant and careful consideration, on 14 May 2014, the NGPC passed Resolution 2014.05.14.NG03 (“Resolution”) accepting the GAC Durban Advice and directed that the Amazon Applications should not proceed.

On 30 May 2014, the Requester sought reconsideration of the NGPC’s acceptance of the GAC Durban Advice regarding the Amazon Applications. The Requester argues that the GAC Durban Advice was untimely and was improperly accorded a strong presumption by the NGPC. In addition, the Requester argues that the NGPC considered false or inaccurate material information and failed to consider other material information in accepting the advice.

The BGC² considered Reconsideration Request 14-27 and concluded that: (i) there is no evidence that the NGPC’s actions in adopting the Resolution support reconsideration; (ii) the Requester has not demonstrated that the NGPC failed to consider any material information in passing the Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution; and (iii) the NGPC properly considered the GAC Durban Advice in accordance with ICANN’s Bylaws and the procedures set forth in the gTLD Applicant Guidebook. The BGC recommended that Reconsideration Request 14-27 be denied without

¹ Governmental Advisory Committee.

² Board Governance Committee.

further consideration. A summary of the BGC Recommendation is provided in the rationale below.

BOARD GOVERNANCE COMMITTEE RECOMMENDATION:

The BGC recommends that Reconsideration Request 14-27 be denied and that no further action be taken in response to the Request, as the BGC determined that the Requester has not stated proper grounds for reconsideration.

PROPOSED RESOLUTION:

Whereas, Amazon EU S.à.r.l (“Requester”) filed Reconsideration Request 14-27 asking the New gTLD Program Committee (“NGPC”) to: (i) reverse Resolution 2014.05.14.NG03; (ii) reject the Governmental Advisory Committee’s advice on .AMAZON and the related internationalized domain names (collectively, the “Amazon Applications”); and (iii) direct ICANN staff to proceed with the Amazon Applications.

Whereas, the BGC considered the issues raised in Reconsideration Request 14-27.

Whereas, the BGC recommended that the Request be denied because the Requester has not stated proper grounds for reconsideration and the NGPC agrees.

Resolved (2014.09.08.NGxx), the NGPC adopts the BGC Recommendation on Reconsideration Request 14-27, which can be found at <https://www.icann.org/en/system/files/files/recommendation-amazon-22aug14-en.pdf>.

PROPOSED RATIONALE:

I. Brief Summary

Amazon EU S.à.r.l. (the “Requester”) applied for .AMAZON and related internationalized domain names (“IDNs”) in Japanese and Chinese (the “Amazon Applications”). In its Durban Communiqué, the Governmental Advisory Committee (“GAC”) informed the Board that it had reached consensus advice on .AMAZON and the related IDNs (“GAC Durban Advice”). After significant and careful consideration, on 14 May 2014, the NGPC passed Resolution

2014.05.14.NG03 (“Resolution”) accepting the GAC Durban Advice and directed that the Amazon Applications should not proceed.

On 30 May 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC’s acceptance of the GAC Durban Advice. The Requester argues that the GAC Durban Advice was untimely and was improperly accorded a strong presumption by the NGPC. In addition, the Requester argues that the NGPC considered false or inaccurate material information and failed to consider other material information in accepting the advice.

The BGC concluded that the Requester has not stated proper grounds for reconsideration. Specifically, the BGC concluded that: (i) there is no evidence that the NGPC’s actions in adopting the Resolution support reconsideration; (ii) the Requester has not demonstrated that the NGPC failed to consider any material information in passing the Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution; and (iii) the NGPC properly considered the GAC Durban Advice in accordance with ICANN’s Bylaws and the procedures set forth in the gTLD Applicant Guidebook. Therefore, the BGC recommended that Reconsideration Request 14-27 be denied (and the entirety of the BGC Recommendation is incorporated by reference as though fully set forth in this rationale). The NGPC agrees.

II. Relevant Background Facts

The Requester applied for the Amazon Applications.

On 17 June 2012 the GAC Chair sent a letter to ICANN’s Board, which included the following:

Given the delays in the gTLD application process, the timing of the upcoming ICANN meetings, and the amount of work involved, **the GAC advises the Board** that it will not be in a position to offer any new advice on the gTLD applications in 2012. For this reason, the GAC is considering the implications of providing any GAC advice on gTLD applications. These considerations are not expected to be finalized before the Asia-Pacific meeting in April 2013.³

On 20 November 2012, the GAC representatives for the governments of Brazil and Peru submitted an Early Warning with respect to the Amazon Applications.⁴

³ 17 June 2013 Letter available at <https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-17jun12-en.pdf> (emphasis in original).

⁴ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en>

On 14 February 2013, the GAC declared that it would be posting a list of applications that the GAC would consider as a whole during the GAC meeting to be held in Beijing in April 2013.⁵ On 25 February 2013, the GAC further stated that it was “still compiling and processing inputs received from GAC members” and would post further information as soon as possible.⁶

In March 2013, the Requester wrote to the Board regarding its Public Interest Commitments with respect to the Amazon Applications,⁷ and ICANN’s Independent Objector (“IO”) objected to the Amazon Applications on behalf of the “Amazon Community,” *i.e.*, the “South-American region with the same English name around the Amazon River” (“Community Objection”).⁸

On 11 April 2013, in its Beijing Communiqué the GAC identified the Amazon Applications as warranting further GAC consideration and advised the Board not to proceed with those applications beyond Initial Evaluation (“GAC Beijing Advice”).⁹ The Requester responded to the GAC Beijing Advice arguing that the GAC had not reached consensus advice on the Applications, and that the New gTLD Applicant Guidebook (“Guidebook”) did not provide for ICANN to delay specific applications for further GAC consideration.¹⁰ The Requester also argued that it had relied on the Guidebook’s provisions regarding geographic strings, which included a provision for Community Objections to geographic strings, and that the GAC Beijing Advice represented a “new attempt to isolate strings that raise geographic issues” and acted “as an effective veto on Community-driven policies.”¹¹

In early July 2013, the U.S. Government stated its intent to “remain neutral” with respect to the Amazon Applications, “thereby allowing [the] GAC to present consensus objections on these strings to the Board, if no other government objects.”¹² Also in early July 2013, the Requester

⁵ <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

⁶ <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

⁷ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-05mar13-en.pdf>

⁸ Determination on Community Objection, ¶¶ 40, 59, *available at* <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.

⁹ Beijing Communiqué *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

¹⁰ Response to GAC Beijing Advice, at Pgs. 3-5, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

¹¹ Response to GAC Beijing Advice, at Pgs. 2-3, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

¹² http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf

wrote to the Board about its ongoing efforts to negotiate with Brazil and Peru regarding the Amazon Applications. The Requester also submitted proposed Public Interest Commitments.¹³

On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on the Amazon Applications.¹⁴

On 23 August 2013, the Requester responded to the GAC Durban Advice, arguing that it: “(1) is inconsistent with international law; (2) would have discriminatory impacts that conflict directly with ICANN’s Governing Documents; and (3) contravenes policy recommendations implemented within the [Guidebook] achieved by international consensus over many years.”¹⁵

On 3 December 2013, the Requester sent another letter to the Board, providing further detail and clarification regarding the Requester’s ongoing attempts to negotiate with the governments of Brazil and Peru regarding the Amazon Applications.¹⁶ Just about a month later the Requester wrote to the Board contending that the Amazon Applications do not fall within any of the five Guidebook categories of “geographic names” requiring government or public authority support.¹⁷

On 27 January 2014, the Panel appointed by the ICC¹⁸ to hear the IO’s Community Objection to the Amazon Applications issued an Expert Determination in favor of the Requester, stating that the IO had “not shown that there is a substantial opposition to [the Applications] within [the Amazon Community] or that [the Applications] would lead to substantial detriment.”¹⁹

On 7 April 2014, the NGPC provided the Requester and the GAC with an independent, third-party report it had commissioned from French Law Professor Jérôme Passa regarding specific issues of law raised by the Amazon Applications (“Expert Analysis”).²⁰ In its cover letter, the NGPC stated that it “welcomes any additional information that [the parties] believe is relevant to

¹³ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-04jul13-en.pdf>

¹⁴ Durban Communiqué available at <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

¹⁵ Response to GAC Durban Advice, at Pg. 2, available at <http://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/correspondence/king-to-chehade-et-al-03dec13-en.pdf>

¹⁷ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-10jan14-en.pdf>

¹⁸ International Chamber of Commerce.

¹⁹ Expert Determination, at ¶ 107, available at <https://www.icann.org/en/system/files/files/request-annex-amazon-2-30may14-en.pdf>.

²⁰ <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>

the NGPC in making its final decision on the GAC’s advice on [the Amazon Applications].”²¹

In April 2014, both the Peruvian Government²² and the Brazilian Government²³ sent letters to the ICANN Board, reiterating their respective objections to the Amazon Applications.

That same day, the Requester sent a letter to the Board responding to the Expert Analysis. The Requester agreed with the “core conclusions” of the Expert Analysis, but reiterated its objections to the GAC Durban Advice.²⁴

On 14 May 2014, the NGPC accepted the GAC Durban Advice and determined that the Amazon Applications should not proceed. The NGPC noted “[its] decision is without prejudice to the continuing efforts by [the Requester] and members of the GAC to pursue dialogue on the relevant issues.”²⁵

On 30 May 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC’s acceptance of the GAC Durban Advice. The Requester argues that the GAC Durban Advice was untimely and was improperly accorded a strong presumption by the NGPC. In addition, the Requester argues that the NGPC considered false or inaccurate material information and failed to consider material information in accepting the advice.²⁶

On 26 July 2014, the BGC asked the Requester for clarification regarding its allegation that the NGPC considered false or inaccurate material information in passing the Resolution. Amazon responded to the BGC’s request clarifying the allegedly false or inaccurate material information that Amazon claims the NGPC relied upon in passing the Resolution. (“2 August Letter”).²⁷

III. Issues

The issues for reconsideration are whether the NGPC failed to consider material information or relied on false or inaccurate material information in:

²¹ <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>

²² <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-11apr14-en.pdf>

²³ <https://www.icann.org/en/system/files/correspondence/filho-almeida-to-crocker-14apr14-en.pdf>

²⁴ <https://www.icann.org/en/system/files/correspondence/hayden-to-crocker-et-al-14apr14-en.pdf>

²⁵ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en-/2.b>

²⁶ <https://www.icann.org/en/system/files/request-amazon-30may14-en.pdf>

²⁷ <https://www.icann.org/en/system/files/petillion-to-ngpc-bgc-02aug14-en.pdf>

1. Accepting the GAC Durban Advice although it was filed after the close of the objection filing period²⁸;
2. Individually considering the Amazon Applications, although the NGPC should only do so “under exceptional circumstances,”²⁹;
3. Failing to adhere to appropriate GAC Governing Principles by applying a “strong presumption” to the GAC Durban Advice³⁰;
4. Improperly relying on the Early Warning as rationale for the GAC Durban Advice³¹;
5. Improperly: (i) considering false or inaccurate material information in correspondence submitted from representatives of the governments of Brazil and Peru; and (ii) failing to consider material correspondence and comments from the Requester and other parties³²;
6. Failing to consider material information provided by the United States Government in its July 2013 statement³³;
7. Failing to consider the Expert Determination rejecting the IO’s Community Objection to the Amazon Applications³⁴;
8. Failing to consider the Expert Analysis and the Requester’s request for additional studies³⁵;
9. Failing to consider its obligations under ICANN’s Bylaws and Articles of Incorporation in accepting the GAC Durban Advice³⁶; and
10. Failing to consider the fiscal implications of its acceptance of the GAC Durban Advice.³⁷

²⁸ See Request 14-27, § 8, Pgs. 6-7.

²⁹ See Request 14-27, § 8, Pgs. 7-8.

³⁰ See Request 14-27, § 8, Pgs. 8-9.

³¹ See Request 14-27, § 8, Pgs. 10-11.

³² See Request 14-27, § 8, Pgs. 11-14.

³³ See Request 14-27, § 8, Pgs. 14-16.

³⁴ See Request 14-27, § 8, Pgs. 16-18.

³⁵ See Request 14-27, § 8, Pgs. 18-19.

³⁶ See Request 14-27, § 8, Pgs. 19-21.

³⁷ See Request 14-27, § 8, Pgs. 21-22.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and, for challenged Board (or NGPC) action, make recommendations to the Board (or NGPC) with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-27 and finds the analysis sound.³⁸

V. Analysis and Rationale

A. The Requester Has Not Stated a Proper Basis for Reconsideration with Respect to the Timeliness of the GAC Durban Advice.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the timeliness of the GAC Durban Advice. The Requester argues that the NGPC should not have accepted the GAC Durban Advice because that advice was submitted on 18 July 2013, after the 13 March 2013 close of the objection filing period. The Requester, however, neither argues nor provides any evidence demonstrating that the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the allegedly untimely GAC Durban Advice. Accordingly, there is no basis for reconsideration.

Further, contrary to what the Requester argues, the NGPC must consider GAC advice on new gTLDs submitted at any time. Notwithstanding the Guidebook, ICANN's Bylaws affirmatively require the Board to consider any issues that the GAC may put to the Board by way of comment or advice. (Bylaws, Art. XI, §§ 2.1.i and 2.1.j.) The provisions of the Guidebook regarding the treatment of GAC Advice do not supplant the requirements of the Bylaws on this subject matter.

³⁸ Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

B. The Requester Has Not Stated A Proper Basis for Reconsideration With Respect To The NGPC’s Consideration Of The Amazon Applications.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the NGPC’s consideration of the Amazon Applications. The Requester argues that the NGPC improperly “individually” considered the Amazon Applications failing to explain why the circumstances surrounding its Applications are sufficiently “exceptional” to warrant individual consideration.³⁹ Again, the Requester does not argue that the NGPC considered false or inaccurate material information, or failed to consider material information, in passing the Resolution and therefore has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

In any event, Requester’s argument contradicts Section 5.1 of the Guidebook, which explicitly provides for the Board to individually consider any new gTLD application, including as the result of GAC Advice:

The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet Community. Under exceptional circumstances, the Board may individually consider a gTLD application. *For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs* or of the use of an ICANN accountability mechanism.

(Guidebook, § 5.1) (emphasis added). As the Guidebook makes clear, GAC Advice is precisely the sort of “exceptional circumstance” that would justify the Board’s individual consideration of a gTLD application. Further, as discussed above, ICANN’s Bylaws affirmatively require the Board to consider any issues that the GAC may put to the Board by way of comment or advice. (Bylaws, Art. XI, §§ 2.1.i and 2.1.j.)

C. The Requester’s Claim that the NGPC Afforded a Strong Presumption to the GAC Durban Advice Does Not Support Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester has not stated proper grounds for reconsideration with respect to the alleged presumption applied to the GAC Durban Advice on the Amazon Applications.

³⁹ See Request 14-27, § 8, Pg. 8.

Requester claims that the GAC Durban Advice should not have created a strong presumption for the ICANN Board that the Amazon Applications should not proceed.⁴⁰ In support, the Requester contends that because the GAC Durban Advice was provided after the close of the objection period, it was not provided pursuant to the Guidebook, and thus was not subject to the presumption standards set forth therein regarding GAC Advice.⁴¹ Once again, because the Requester does not argue that the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the GAC Durban Advice, it has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

D. The NGPC Properly Considered The Rationale Given In Early Warnings.

The BGC concluded, and the NGPC agrees, that the NGPC properly considered the rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru. The Requester argues that the NGPC improperly considered the rationale given in the Early Warning because, the Requester claims, that rationale “reflects only the concerns of two governments and cannot be used as the consensus rationale of the entire GAC.”⁴² The Requester’s claims do not support reconsideration.

In its rationale for the Resolution, the NGPC stated that although it “d[id] not have the benefit of the rationale relied upon by the GAC in issuing [the GAC Durban Advice], the NGPC considered the reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru”⁴³ The NGPC did not state that it considered or relied on the rationale of the Early Warning to represent the rationale for the GAC Durban Advice—to the contrary, it explicitly stated that it “d[id] not have the benefit” of that rationale. There simply is no evidence that the NGPC relied on false or inaccurate material information in accepting the GAC Durban Advice. Further, insofar as the Requester argues that the NGPC failed to consider material information in failing to “conduct further inquiry of the GAC as to the basis and reason for the consensus advice,”⁴⁴ nothing in ICANN’s Bylaws, the Guidebook, or the GAC’s Operating Principles requires the GAC to provide a rationale for its advice.

⁴⁰ See Request 14-27, § 8, Pgs. 8-9.

⁴¹ See Request 14-27, § 8, Pgs. 8-9.

⁴² Request 14-27, § 8, Pg.10.

⁴³ Resolution 2014.05.14.NG03 Rationale available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en-2.b>.

⁴⁴ Request 14-27, § 8, Pg. 10.

Finally, the BGC notes that the NGPC did not “rely” on the Early Warning in determining whether to accept the GAC Durban Advice. Rather, as is reflected in the resolution, the NGPC considered, among other materials, numerous documents, legal advice and letters submitted by the Requester and by other community stakeholders.

E. The NGPC Did Not Rely on False or Inaccurate Material Information or Fail to Consider Material Information in its Consideration of Public Comments and Correspondence to the Board.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC relied on false or inaccurate material information or failed to consider material relevant information with respect to public comments and correspondence to the Board.

The Requester argues that the NGPC: (i) relied on false or inaccurate material information in considering correspondence sent to the Board by the governments of Brazil and Peru; and (ii) failed to consider material information in failing to consider other correspondence, including correspondence sent by the Requester.⁴⁵

As to consideration of correspondence sent by the governments of Brazil and Peru, the Requester appears to argue that the “NGPC accepts the views of two governments and infers that these opinions represent consensus advice of all GAC members.”⁴⁶ The claim is unsupported. In its rationale for the Resolution, the NGPC stated only that it “considered as part of the NGPC’s action” an 11 April 2014 letter from the Vice Minister of Foreign Affairs for Peru, and a 14 April 2014 letter from a Director in the Ministry of External Relations of Brazil. Nowhere does the NGPC state, or even imply, that it took the correspondence from Brazil and Peru as GAC consensus advice. Furthermore, the Requester cites to no Guidebook or Bylaws provision that prohibits the NGPC from taking into consideration correspondence duly submitted to ICANN.

The Requester also argues that, although the 11 April 2014 letter from the Peruvian Government contained false information regarding whether Amazon has an ISO 3166-2 code,⁴⁷ the NGPC

⁴⁵ See Request 14-27, § 8, Pgs. 11-14.

⁴⁶ See Request 14-27, § 8, Pg. 11; see also Request 14-27, § 8, Pgs. 13-14.

⁴⁷ The ISO 3166-2 code is published by the International Organization for Standardization and assigns five-digit alphanumeric strings to countries’ administrative divisions and dependent territories. (See http://www.iso.org/iso/home/standards/country_codes/updates_on_iso_3166.htm?show=tab3.)

“failed to identify any false and inaccurate information contained in the letter.”⁴⁸ However, alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to a decision. The NGPC’s rationale does not state that it relied on the Peruvian Government’s representation regarding the ISO 3166-2 code in deciding to accept the GAC Durban Advice, and the Requester does not explain how the NGPC did so rely, or how the information is at all relevant.⁴⁹ Furthermore, the NGPC is not required to identify any and all false or inaccurate information contained in the correspondence it considers and explain that the NGPC did not rely on that specific information in reaching its determination, particularly when that information is not relevant or material to the decision being made.

Finally, in its 2 August Letter responding to the BGC’s request for clarification, the Requester argues that the 14 April 2014 letter from the Brazilian government inaccurately states that “all steps prescribed in the gTLD Applicant Guidebook in order to object to [the Amazon Applications] . . . have been timely taken by Brazil and Peru”⁵⁰ The Requester claims that this statement is inaccurate because the GAC Durban Advice was not timely. Again, the NGPC’s alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to the NGPC’s determination. And, once again, the Requester does not explain how the NGPC relied upon the Brazilian Government’s allegedly inaccurate representation in deciding to accept the GAC Durban Advice. Further, as is discussed above, the Requester’s argument regarding the alleged untimeliness of the GAC Durban Advice is not a proper basis for reconsideration.⁵¹

The Requester also argues that the NGPC failed to consider material public comments and correspondence. For instance, the Requester argues that, while the NGPC considered the responses of the governments of Brazil and Peru to the Expert Analysis, it did not consider the

⁴⁸ See Request 14-27, § 8, Pgs. 13-14.

⁴⁹ In its 2 August Letter responding to the BGC’s request for clarification, the Requester adds that this same representation was made by Peru’s GAC representative to the GAC prior to its vote on the GAC Durban Advice. (2 August Letter at 1-2.) However, the GAC is an independent advisory committee, and not part of ICANN’s Board. As such, the materials considered by the GAC in rendering its advice are not a proper basis for reconsideration.

⁵⁰ 2 August Letter, Pg. 2, available at <https://www.icann.org/en/system/files/files/petillion-to-ngpc-bgc-02aug14-en.pdf>

⁵¹ In its 2 August Letter, the Requester also argues that following the issuance of the GAC Durban Advice but prior to the NGPC vote on the Resolution, it requested, and was denied, the opportunity to meet with the NGPC to present its position. The Requester does not challenge this staff and/or Board action and points to no Bylaw or ICANN policy or procedure that would require such a meeting.

Requester's response.⁵² However, in its rationale the NGPC explicitly noted that it considered communications it received in response to the Expert Analysis, including the 14 April 2014 response from Scott Hayden, the Requester's Vice President, Intellectual Property, as well as letters from the Peruvian government and the Brazilian government. The Requester identifies no other specific public comment or piece of correspondence that it claims the NGPC failed to consider, and the NGPC's rationale for the Resolution clearly states that its "review of significant materials included, but [was] not limited to," the listed materials.⁵³ In any event, the Requester does not identify any provision in the Bylaws or Guidebook that would require the NGPC to consider (much less identify and discuss) every comment or piece of correspondence received.⁵⁴

F. The NGPC Did Not Fail to Consider Material Information from the United States Government.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the United States Government's statement.

The Requester argues that the NGPC failed to consider material information by failing to consider the July 2013 statement from the United States Government on geographic indicators.⁵⁵ In its statement, the United States Government expressed its intent to "remain neutral" on the Applications, so as to "allow[] the GAC to present consensus objections on those strings to the Board, if no other government objects." Nonetheless, the Requester argues that "[t]he statement from the U.S. Government calls into direct question the belief that the GAC Durban Advice is clearly representative of the consensus adoption of the entire GAC of the opinion set forth by Brazil and Peru in its Early Warning or follow-up correspondence."⁵⁶

Further, the United States Government's statement does not negate the fact that the GAC Durban Advice represents consensus GAC Advice. Pursuant to GAC Operating Principle 47,

⁵² See Request 14-27, § 8, Pg. 12.

⁵³ Resolution 2014.05.14.NG03 Rationale available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en - 2.b>.

⁵⁴ The Requester also appears to argue that the NGPC should have solicited opinions from other governments. (Request, § 8, Pg. 12.) However, it cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

⁵⁵ See Request 14-27, § 8, Pgs. 14-15.

⁵⁶ See Request 14-27, § 8, Pg. 15.

“consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”⁵⁷ As the statement makes clear, the United States did not object to the GAC Durban Advice. The mere fact that the United States remained neutral with respect to the GAC Durban Advice was not material to the NGPC’s consideration of that advice.

G. The NGPC Did Not Fail to Consider Material Information with Respect to the Expert Determination.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the Expert Determination.

The Requester argues that the NGPC improperly failed to consider the Expert Determination rejecting the IO’s Community Objection to the Amazon Applications.⁵⁸ The Requester appears to contend that the Expert Determination was material because: (1) the objections of the Brazilian and Peruvian governments would have been properly raised in the context of a Community Objection—which those governments did not bring; and (2) a Community Objection by those governments would have failed, as is evidenced by the Expert Determination.⁵⁹

GAC members are not limited to raising objections that could have been raised in, or that meet the standards required to prevail upon, one of the four enumerated grounds for formal objections. (Guidebook Module 3, § 3.2.) Rather, GAC Advice on new gTLD applications is generally “intended to address applications that are identified by national governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” (Guidebook Module 3, § 3.1.) GAC members’ discretion with respect to their reasons for objecting to gTLD applications is reflected in the fact that the GAC is not required to issue a rationale for its advice. In any event, the briefing materials of the NGPC’s 29 April 2014 and 14 May 2014 meetings reflect that the Expert Determination was considered by the NGPC during its deliberations on the Amazon Applications.⁶⁰

⁵⁷ GAC Operating Principle 47 *available at* <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

⁵⁸ *See* Request 14-27, § 8, Pgs. 16-17.

⁵⁹ *See* Request 14-27, § 8, Pg. 17.

⁶⁰ Briefing materials of NGPC 29 April 2014 meeting *available at* <https://www.icann.org/en/system/files/bm/briefing-materials-1-29apr14-en.pdf> and <https://www.icann.org/en/system/files/bm/briefing-materials-2-29apr14-en.pdf>; Briefing materials of

H. The NGPC Did Not Fail to Consider Material Information with Respect to the Expert Analysis.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the Expert Analysis.

The Requester argues that ICANN instructed Professor Passa “to address only whether under intellectual property laws, governments could claim legally recognized sovereign or geographic rights in the term ‘Amazon’ or whether ICANN was ‘obliged’ to grant .AMAZON based on pre-existing trademark registrations,” when “[t]he real question is whether, by accepting GAC advice, which is not rooted in any existing law, ICANN would be violating either national [or] international law.”⁶¹

The Guidebook sets forth the parameters in which GAC Advice will be given under the New gTLD Program:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board *may consult with independent experts*, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

(Guidebook, § 3.1) (emphasis added). Under this provision, the Board has the discretion to seek an independent expert opinion on issues raised by GAC Advice. The Board may also define the scope of its consultation with independent experts. As such, the Requester’s objection to the scope of Professor Passa’s assignment is not a basis for reconsideration.

The Requester has not cited to any provision of the Bylaws or Guidebook that would require ICANN to commission additional legal studies at the request of a New gTLD Applicant. Reconsideration for failure to consider material information is not proper where “the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of the action or refusal to act.” (Bylaws, Art. IV, § 2.b.) The Requester was given multiple opportunities to present materials for the NGPC’s consideration, including the opportunity—which it accepted—to respond to the Expert Analysis. In fact, the Requester

NGPC 14 May 2014 meeting available at <https://www.icann.org/en/system/files/bm/briefing-materials-1-14may14-en.pdf> and <https://www.icann.org/en/system/files/bm/briefing-materials-2-14may14-en.pdf>.

⁶¹ Request 14-27, § 8, Pgs. 18-19 (emphasis in original).

attached to its response to the GAC Durban Advice a lengthy except from a legal treatise on the protection of geographic names.⁶² If the Requester believed that additional legal analysis was required, it was free to commission that analysis and submit it to the NGPC.

I. The NGPC Did Not Fail to Consider Material Information with Respect to Its Bylaws, Articles of Incorporation, and Affirmations of Commitment.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the NGPC’s consideration of its obligations under ICANN’s Bylaws, Articles of Incorporation, and Affirmations of Commitment.

The Requester alleges that the NGPC failed to take into account material information regarding its obligations under Articles I.2, II.3, and III.1 of ICANN’s Bylaws; Article 4 of its Articles of Incorporation; and Sections 4, 5, 7, and 9.3 of its Affirmations of Commitment.⁶³ The Requester’s disagreement with the Resolution does not, however, demonstrate that the NGPC failed to consider those obligations. And, as the rationale for the Resolution makes clear, the NGPC acted pursuant to its obligation under Article XI, Section 2.1 of the Bylaws, to duly address advice put to it by the GAC.⁶⁴

J. The NGPC Did Not Fail to Consider Material Information with Respect to the Fiscal Implications of the Resolution.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the fiscal implications of the Resolution. The Requester contends that “[s]hould it be determined that the [Resolution] in fact violates various national and international laws, the costs of defending an action (whether through the Independent Review Process or through U.S. courts) will have significant fiscal impacts on ICANN. . . .”⁶⁵ The Requester has not demonstrated that the NGPC did not consider the potential for litigation arising out of the Resolution, including the potential fiscal impact of

⁶² See Response to GAC Durban Advice, Appx. A, available at <https://www.icann.org/en/system/files/files/request-annex-amazon-2-30may14-en.pdf>.

⁶³ See Request 14-27, § 8, Pgs. 19-21.

⁶⁴ The Requester also argues that the NGPC “should have sought comment from the [Generic Names Supporting Organization (“GNSO”)] as to whether [the GAC Durban Advice was] in violation of GNSO Policy.” (Request, § 8, Pg. 21.) However, the Requester cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

⁶⁵ Request 14-27, § 8, Pgs. 21-22.

such litigation. In any event, the Requester has not demonstrated how the speculative possibility of litigation is material to the NGPC's determination here. As such, the Requester has not identified a proper ground for reconsideration.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Request 14-27. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 14-27 (<https://www.icann.org/en/system/files/files/recommendation-amazon-22aug14-en.pdf>), which shall be deemed a part of this Rationale and is attached to the Reference Materials to the NGPC Submission on this matter.

In terms of timing of the BGC's Recommendation, Sections 2.16 and 2.17 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical and the Board [or NGPC as appropriate] shall issue its decision on the BGC's recommendation within 60 days of receipt of the Reconsideration Request, or as soon thereafter as feasible. (*See* Bylaws, Article IV, Sections 2.16 and 2.17.) The BGC required additional time to make its recommendation due to its request for clarification from the Requester, and due to the volume of Reconsideration Requests received within recent months. As such, the first practical opportunity for the BGC to make a decision on this Request was on 22 August 2014; it was impractical for the BGC to do so sooner. Then, the first feasible chance for the NGPG to consider Request 14-27 was on 8 September 2014.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel
Dated Noted: 25 August 2014
Email: amy.stathos@icann.org

ICANN NGPC PAPER NO. 2014.09.08.NG2c

TITLE: **Perceived Inconsistent String Confusion Objection
Expert Determinations**

PROPOSED ACTION: **For Resolution**

EXECUTIVE SUMMARY:

Over the past ten months, the ICANN Board New gTLD Program Committee (NGPC) has considered potential paths forward to address perceived inconsistent Expert Determinations resulting from the New gTLD Program String Confusion Objections (SCO) proceedings, including the possibility of implementing an unanticipated review mechanism. All things considered, including public comments, and analysis of the risks, staff continues to recommend that for this round of the New gTLD Program, no new review mechanism for Expert Determinations be adopted.

A draft resolution and rationale adopting staff's recommendation is included in this briefing paper as Option A for the NGPC's consideration. However, to further assist the NGPC's deliberations on this matter, staff has also prepared alternative versions of resolutions and rationales if the NGPC is inclined to take a different course of action. Option B presents a draft resolution and rationale if the NGPC decides to adopt the proposed review mechanism for perceived inconsistent SCO Expert Determinations that was posted for public comment. Option C presents a draft resolution and rationale if the NGPC decides not to implement the proposed review mechanism, or an expanded review mechanism, but to exercise its discretion to individually consider and possibly send to the ICDR for further review, specific perceived inconsistent or otherwise seemingly unreasonable SCO Expert Determinations.

STAFF RECOMMENDATION:

Taking into account the public comments on the proposed review mechanism on perceived inconsistent String Confusion Objection Expert Determinations, the provisions in the Applicant Guidebook, the potential risks and benefits associated with adopting a

review mechanism at this stage of the New gTLD Program, and engaging with the NGPC on the matter, staff continues to recommend that, for this round of the Program, no further review mechanism for Expert Determinations be adopted. A draft resolution and rationale to adopt this recommendation is included in this briefing paper as Option A.

As previously noted in the Executive Summary, to further assist the NGPC's deliberations on this matter, staff has also prepared alternative versions of resolutions (Options B and C) and rationales if the NGPC is inclined to take a different course of action. (Certain text of the three alternative resolutions and rationales is highlighted in yellow to help the NGPC easily identify the differences between the various options.)

PROPOSED RESOLUTION (Option A):

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

PROPOSED RATIONALE:

Rationale not considered. The NGPC briefing materials included drafts of three versions of rationales corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the rationales at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

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PROPOSED RESOLUTION (Option B):

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

PROPOSED RATIONALE:

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PROPOSED RESOLUTION (Option C):

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

PROPOSED RATIONALE:

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Signature Block:

Submitted by: Amy Stathos

Position: Deputy General Counsel

Date Noted: 26 August 2014

Email: amy.stathos@icann.org



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1. Consent Agenda:

a. Approval of Minutes

Resolved (2014.09.08.NGxx), the Board New gTLD Program Committee (NGPC) approves the minutes of its 21 June, 18 July and 30 July NGPC meetings.

2. Main Agenda:

a. Remaining Items from Beijing, Durban, Buenos Aires, Singapore and London GAC Advice: Updates and Actions

Whereas, the GAC met during the ICANN 46 meeting in Beijing and issued a Communiqué on 11 April 2013 (“Beijing Communiqué”).

Whereas, the GAC met during the ICANN 47 meeting in Durban and issued a Communiqué on 18 July 2013 (“Durban Communiqué”).

Whereas, the GAC met during the ICANN 48 meeting in Buenos Aires and issued a Communiqué on 20 November 2013 (“Buenos Aires Communiqué”).

Whereas, the GAC met during the ICANN 49 meeting in Singapore and issued a Communiqué on 27 March 2014, which was amended on 16 April 2014 (“Singapore Communiqué”).

Whereas, the GAC met during the ICANN 50 meeting in London and issued a Communiqué on 25 June 2014 (“London Communiqué”).

Whereas, the NGPC adopted scorecards to respond to certain items of the GAC’s advice, which were adopted on 4 June 2013, 10 September 2013, 28 September 2013, 5 February 2014 and 14 May 2014.

Whereas, the NGPC has developed another iteration of the scorecard to respond to certain remaining items of GAC advice in the Beijing Communiqué, the Durban Communiqué, the Buenos Aires

Communiqué, the Singapore Communiqué, and new advice in the London Communiqué.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.09.08.NGxx), the NGPC adopts the scorecard titled "[GAC Advice \(Beijing, Durban, Buenos Aires, Singapore, and London\): Actions and Updates \(8 September 2014\)](#)" in response to open items of Beijing, Durban, Buenos Aires, Singapore and London GAC advice.

Rationale for Resolution 2014.09.08.NGxx

Article XI, Section 2.1 of the ICANN Bylaws [https://www.icann.org/resources/pages/bylaws-2012-02-25-en - XI](https://www.icann.org/resources/pages/bylaws-2012-02-25-en-XI) permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, its Buenos Aires Communiqué dated 20 November 2013, its Singapore Communiqué dated 27 March 2014 (as amended 16 April 2014), and its London Communiqué dated 25 June 2014. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The NGPC has previously addressed items of the GAC's Beijing, Durban, Buenos Aires, and Singapore advice, but there are some items that the NGPC continues to work through. Additionally, the

GAC issued new advice in its London Communiqué that relates to the New gTLD Program. The NGPC is being asked to consider accepting some of the remaining open items of the Beijing, Durban, Buenos Aires, and Singapore GAC advice, and new items of advice from London as described in scorecard (dated 8 September 2014).

As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The Beijing GAC advice was posted on 18 April 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>>; the Durban GAC advice was posted on 1 August 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>>; the Buenos Aires GAC advice was posted on 11 December 2013 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-11dec13-en>>; the Singapore advice was posted on 11 April 2014 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-11apr14-en>>; and the London advice was posted on 14 July 2014 <<http://newgtlds.icann.org/en/announcements-and-media/announcement-14jul14-en>>. The complete set of applicant responses are provided at: <<http://newgtlds.icann.org/en/applicants/gac-advice/>>.

In addition, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address Beijing GAC advice regarding safeguards applicable to broad categories of new gTLD strings <<http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>>. The NGPC has considered the applicant responses in addition to the community feedback on how ICANN could implement the GAC's safeguard advice in the Beijing Communiqué in formulating its response to the remaining items of GAC advice.

As part of its deliberations, the NGPC reviewed various materials, including, but not limited to, the following materials and documents:

- GAC Beijing Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2
- GAC Durban Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2
- GAC Buenos Aires Communiqué:
https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2
- GAC Singapore Communiqué (as amended):
https://gacweb.icann.org/download/attachments/27132037/GAC_Amended_Communique_Singapore_20140327%5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2
- GAC London Communiqué:
<https://gacweb.icann.org/download/attachments/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2>
- Applicant responses to GAC advice:
<http://newgtlds.icann.org/en/applicants/gac-advice/>
- Applicant Guidebook, Module 3:
<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>

In adopting its response to remaining items of Beijing, Durban, Buenos Aires, and Singapore GAC advice, and the new London advice, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Communiqués, and the procedures established in the AGB and the ICANN Bylaws. The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

As part of ICANN's organizational administrative function, ICANN posted the London Communiqué and officially notified applicants of the advice on 14 July 2014. The Singapore Communiqué, the Buenos Aires Communiqué, the Durban Communiqué, and the Beijing Communiqué were posted on 11 April 2014, 11 December 2013, 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

**b. BGC Recommendation on Reconsideration Request 14-27,
Amazon EU S.a.r.l.**

Whereas, Amazon EU S.à.r.l ("Requester") filed Reconsideration Request 14-27 asking the New gTLD Program Committee ("NGPC") to: (i) reverse Resolution 2014.05.14.NG03; (ii) reject the Governmental Advisory Committee's advice on .AMAZON and the related internationalized domain names (collectively, the "Amazon Applications"); and (iii) direct ICANN staff to proceed with the Amazon Applications.

Whereas, the BGC considered the issues raised in Reconsideration Request 14-27.

Whereas, the BGC recommended that the Request be denied because the Requester has not stated proper grounds for reconsideration and the NGPC agrees.

Resolved (2014.09.08.NGxx), the NGPC adopts the BGC Recommendation on Reconsideration Request 14-27, which can be found at

<https://www.icann.org/en/system/files/files/recommendation-amazon-22aug14-en.pdf>.

Rationale for Resolution 2014.09.08.NGxx

I. Brief Summary

Amazon EU S.à.r.l. (the “Requester”) applied for .AMAZON and related internationalized domain names (“IDNs”) in Japanese and Chinese (the “Amazon Applications”). In its Durban Communiqué, the Governmental Advisory Committee (“GAC”) informed the Board that it had reached consensus advice on .AMAZON and the related IDNs (“GAC Durban Advice”). After significant and careful consideration, on 14 May 2014, the NGPC passed Resolution 2014.05.14.NG03 (“Resolution”) accepting the GAC Durban Advice and directed that the Amazon Applications should not proceed.

On 30 May 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC’s acceptance of the GAC Durban Advice. The Requester argues that the GAC Durban Advice was untimely and was improperly accorded a strong presumption by the NGPC. In addition, the Requester argues that the NGPC considered false or inaccurate material information and failed to consider other material information in accepting the advice.

The BGC concluded that the Requester has not stated proper grounds for reconsideration. Specifically, the BGC concluded that: (i) there is no evidence that the NGPC’s actions in adopting the Resolution support reconsideration; (ii) the Requester has not

demonstrated that the NGPC failed to consider any material information in passing the Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution; and (iii) the NGPC properly considered the GAC Durban Advice in accordance with ICANN's Bylaws and the procedures set forth in the gTLD Applicant Guidebook. Therefore, the BGC recommended that Reconsideration Request 14-27 be denied (and the entirety of the BGC Recommendation is incorporated by reference as though fully set forth in this rationale). The NGPC agrees.

II. Relevant Background Facts

The Requester applied for the Amazon Applications.

On 17 June 2012 the GAC Chair sent a letter to ICANN's Board, which included the following:

Given the delays in the gTLD application process, the timing of the upcoming ICANN meetings, and the amount of work involved, **the GAC advises the Board** that it will not be in a position to offer any new advice on the gTLD applications in 2012. For this reason, the GAC is considering the implications of providing any GAC advice on gTLD applications. These considerations are not expected to be finalized before the Asia-Pacific meeting in April 2013.¹

On 20 November 2012, the GAC representatives for the governments of Brazil and Peru submitted an Early Warning with respect to the Amazon Applications.²

On 14 February 2013, the GAC declared that it would be posting a list of applications that the GAC would consider as a whole during the

¹ 17 June 2013 Letter available at <https://www.icann.org/en/system/files/correspondence/dryden-to-crocker-17jun12-en.pdf> (emphasis in original).

² <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en>

GAC meeting to be held in Beijing in April 2013.³ On 25 February 2013, the GAC further stated that it was “still compiling and processing inputs received from GAC members” and would post further information as soon as possible.⁴

In March 2013, the Requester wrote to the Board regarding its Public Interest Commitments with respect to the Amazon Applications,⁵ and ICANN’s Independent Objector (“IO”) objected to the Amazon Applications on behalf of the “Amazon Community,” *i.e.*, the “South-American region with the same English name around the Amazon River” (“Community Objection”).⁶

On 11 April 2013, in its Beijing Communiqué the GAC identified the Amazon Applications as warranting further GAC consideration and advised the Board not to proceed with those applications beyond Initial Evaluation (“GAC Beijing Advice”).⁷ The Requester responded to the GAC Beijing Advice arguing that the GAC had not reached consensus advice on the Applications, and that the New gTLD Applicant Guidebook (“Guidebook”) did not provide for ICANN to delay specific applications for further GAC consideration.⁸ The Requester also argued that it had relied on the Guidebook’s provisions regarding geographic strings, which included a provision for Community Objections to geographic strings, and that the GAC Beijing Advice represented a “new attempt to isolate strings that raise geographic issues” and acted “as an effective veto on Community-driven policies.”⁹

³ <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

⁴ <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>

⁵ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-05mar13-en.pdf>

⁶ Determination on Community Objection, ¶¶ 40, 59, *available at* <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.

⁷ Beijing Communiqué *available at* <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.

⁸ Response to GAC Beijing Advice, at Pgs. 3-5, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

⁹ Response to GAC Beijing Advice, at Pgs. 2-3, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.

In early July 2013, the U.S. Government stated its intent to “remain neutral” with respect to the Amazon Applications, “thereby allowing [the] GAC to present consensus objections on these strings to the Board, if no other government objects.”¹⁰ Also in early July 2013, the Requester wrote to the Board about its ongoing efforts to negotiate with Brazil and Peru regarding the Amazon Applications. The Requester also submitted proposed Public Interest Commitments.¹¹ On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on the Amazon Applications.¹²

On 23 August 2013, the Requester responded to the GAC Durban Advice, arguing that it: “(1) is inconsistent with international law; (2) would have discriminatory impacts that conflict directly with ICANN’s Governing Documents; and (3) contravenes policy recommendations implemented within the [Guidebook] achieved by international consensus over many years.”¹³

On 3 December 2013, the Requester sent another letter to the Board, providing further detail and clarification regarding the Requester’s ongoing attempts to negotiate with the governments of Brazil and Peru regarding the Amazon Applications.¹⁴ Just about a month later the Requester wrote to the Board contending that the Amazon Applications do not fall within any of the five Guidebook categories of “geographic names” requiring government or public authority support.¹⁵

¹⁰ http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf

¹¹ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-04jul13-en.pdf>

¹² Durban Communiqué available at <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.

¹³ Response to GAC Durban Advice, at Pg. 2, available at <http://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315-58086-en.pdf>.

¹⁴ <https://www.icann.org/en/system/files/correspondence/king-to-chehade-et-al-03dec13-en.pdf>

¹⁵ <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-10jan14-en.pdf>

On 30 May 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC's acceptance of the GAC Durban Advice. The Requester argues that the GAC Durban Advice was untimely and was improperly accorded a strong presumption by the NGPC. In addition, the Requester argues that the NGPC considered false or inaccurate material information and failed to consider material information in accepting the advice.¹⁶

On 26 July 2014, the BGC asked the Requester for clarification regarding its allegation that the NGPC considered false or inaccurate material information in passing the Resolution. Amazon responded to the BGC's request clarifying the allegedly false or inaccurate material information that Amazon claims the NGPC relied upon in passing the Resolution. ("2 August Letter").¹⁷

III. Issues

The issues for reconsideration are whether the NGPC failed to consider material information or relied on false or inaccurate material information in:

1. Accepting the GAC Durban Advice although it was filed after the close of the objection filing period¹⁸;
2. Individually considering the Amazon Applications, although the NGPC should only do so "under exceptional circumstances,"¹⁹;
3. Failing to adhere to appropriate GAC Governing Principles by applying a "strong presumption" to the GAC Durban Advice²⁰;
4. Improperly relying on the Early Warning as rationale for the GAC Durban Advice²¹;
5. Improperly: (i) considering false or inaccurate material information in correspondence submitted from representatives of the governments of Brazil and Peru; and (ii)

¹⁶ <https://www.icann.org/en/system/files/files/request-amazon-30may14-en.pdf>

¹⁷ <https://www.icann.org/en/system/files/files/petition-to-ngpc-bgc-02aug14-en.pdf>

¹⁸ See Request 14-27, § 8, Pgs. 6-7.

¹⁹ See Request 14-27, § 8, Pgs. 7-8.

²⁰ See Request 14-27, § 8, Pgs. 8-9.

²¹ See Request 14-27, § 8, Pgs. 10-11.

- failing to consider material correspondence and comments from the Requester and other parties²²;
6. Failing to consider material information provided by the United States Government in its July 2013 statement²³;
 7. Failing to consider the Expert Determination rejecting the IO's Community Objection to the Amazon Applications²⁴;
 8. Failing to consider the Expert Analysis and the Requester's request for additional studies²⁵;
 9. Failing to consider its obligations under ICANN's Bylaws and Articles of Incorporation in accepting the GAC Durban Advice²⁶; and
 10. Failing to consider the fiscal implications of its acceptance of the GAC Durban Advice.²⁷

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and, for challenged Board (or NGPC) action, make recommendations to the Board (or NGPC) with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-27 and finds the analysis sound.²⁸

V. Analysis and Rationale

²² *See* Request 14-27, § 8, Pgs. 11-14.

²³ *See* Request 14-27, § 8, Pgs. 14-16.

²⁴ *See* Request 14-27, § 8, Pgs. 16-18.

²⁵ *See* Request 14-27, § 8, Pgs. 18-19.

²⁶ *See* Request 14-27, § 8, Pgs. 19-21.

²⁷ *See* Request 14-27, § 8, Pgs. 21-22.

²⁸ Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

A. The Requester Has Not Stated a Proper Basis for Reconsideration with Respect to the Timeliness of the GAC Durban Advice.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the timeliness of the GAC Durban Advice. The Requester argues that the NGPC should not have accepted the GAC Durban Advice because that advice was submitted on 18 July 2013, after the 13 March 2013 close of the objection filing period. The Requester, however, neither argues nor provides any evidence demonstrating that the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the allegedly untimely GAC Durban Advice. Accordingly, there is no basis for reconsideration.

Further, contrary to what the Requester argues, the NGPC must consider GAC advice on new gTLDs submitted at any time. Notwithstanding the Guidebook, ICANN's Bylaws affirmatively require the Board to consider any issues that the GAC may put to the Board by way of comment or advice. (Bylaws, Art. XI, §§ 2.1.i and 2.1.j.) The provisions of the Guidebook regarding the treatment of GAC Advice do not supplant the requirements of the Bylaws on this subject matter.

B. The Requester Has Not Stated A Proper Basis for Reconsideration With Respect To The NGPC's Consideration Of The Amazon Applications.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the NGPC's consideration of the Amazon Applications. The Requester argues that the NGPC improperly "individually" considered the Amazon Applications failing to explain why the circumstances surrounding its Applications are sufficiently "exceptional" to warrant individual consideration.²⁹ Again, the Requester does not argue that the NGPC

²⁹ See Request 14-27, § 8, Pg. 8.

considered false or inaccurate material information, or failed to consider material information, in passing the Resolution and therefore has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

In any event, Requester's argument contradicts Section 5.1 of the Guidebook, which explicitly provides for the Board to individually consider any new gTLD application, including as the result of GAC Advice:

The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet Community. Under exceptional circumstances, the Board may individually consider a gTLD application. ***For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs*** or of the use of an ICANN accountability mechanism.

(Guidebook, § 5.1) (emphasis added). As the Guidebook makes clear, GAC Advice is precisely the sort of "exceptional circumstance" that would justify the Board's individual consideration of a gTLD application. Further, as discussed above, ICANN's Bylaws affirmatively require the Board to consider any issues that the GAC may put to the Board by way of comment or advice. (Bylaws, Art. XI, §§ 2.1.i and 2.1.j.)

C. The Requester's Claim that the NGPC Afforded a Strong Presumption to the GAC Durban Advice Does Not Support Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester has not stated proper grounds for reconsideration with respect to the alleged presumption applied to the GAC Durban Advice on the Amazon Applications.

Requester claims that the GAC Durban Advice should not have created a strong presumption for the ICANN Board that the Amazon Applications should not proceed.³⁰ In support, the Requester contends that because the GAC Durban Advice was provided after the close of the objection period, it was not provided pursuant to the Guidebook, and thus was not subject to the presumption standards set forth therein regarding GAC Advice.³¹ Once again, because the Requester does not argue that the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the GAC Durban Advice, it has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

D. The NGPC Properly Considered The Rationale Given In Early Warnings

The BGC concluded, and the NGPC agrees, that the NGPC properly considered the rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru. The Requester argues that the NGPC improperly considered the rationale given in the Early Warning because, the Requester claims, that rationale “reflects only the concerns of two governments and cannot be used as the consensus rationale of the entire GAC.”³² The Requester’s claims do not support reconsideration.

In its rationale for the Resolution, the NGPC stated that although it “d[id] not have the benefit of the rationale relied upon by the GAC in issuing [the GAC Durban Advice], the NGPC considered the reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru”³³ The NGPC did not state that it considered or relied on the rationale of the Early Warning to represent the rationale for the GAC Durban Advice—to the contrary, it explicitly stated that it “d[id] not have the benefit” of that rationale. There simply is no evidence that the NGPC relied on

³⁰ See Request 14-27, § 8, Pgs. 8-9.

³¹ See Request 14-27, § 8, Pgs. 8-9.

³² Request 14-27, § 8, Pg.10.

³³ Resolution 2014.05.14.NG03 Rationale available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en - 2.b>.

false or inaccurate material information in accepting the GAC Durban Advice. Further, insofar as the Requester argues that the NGPC failed to consider material information in failing to “conduct further inquiry of the GAC as to the basis and reason for the consensus advice,”³⁴ nothing in ICANN’s Bylaws, the Guidebook, or the GAC’s Operating Principles requires the GAC to provide a rationale for its advice.

Finally, the BGC notes that the NGPC did not “rely” on the Early Warning in determining whether to accept the GAC Durban Advice. Rather, as is reflected in the resolution, the NGPC considered, among other materials, numerous documents, legal advice and letters submitted by the Requester and by other community stakeholders.

E. The NGPC Did Not Rely on False or Inaccurate Material Information or Fail to Consider Material Information in its Consideration of Public Comments and Correspondence to the Board.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC relied on false or inaccurate material information or failed to consider material relevant information with respect to public comments and correspondence to the Board.

The Requester argues that the NGPC: (i) relied on false or inaccurate material information in considering correspondence sent to the Board by the governments of Brazil and Peru; and (ii) failed to consider material information in failing to consider other correspondence, including correspondence sent by the Requester.³⁵

As to consideration of correspondence sent by the governments of Brazil and Peru, the Requester appears to argue that the “NGPC accepts the views of two governments and infers that these opinions represent consensus advice of all GAC members.”³⁶ The claim is

³⁴ Request 14-27, § 8, Pg. 10.

³⁵ See Request 14-27, § 8, Pgs. 11-14.

³⁶ See Request 14-27, § 8, Pg. 11; see also Request 14-27, § 8, Pgs. 13-14.

unsupported. In its rationale for the Resolution, the NGPC stated only that it “considered as part of the NGPC’s action” an 11 April 2014 letter from the Vice Minister of Foreign Affairs for Peru, and a 14 April 2014 letter from a Director in the Ministry of External Relations of Brazil. Nowhere does the NGPC state, or even imply, that it took the correspondence from Brazil and Peru as GAC consensus advice. Furthermore, the Requester cites to no Guidebook or Bylaws provision that prohibits the NGPC from taking into consideration correspondence duly submitted to ICANN.

The Requester also argues that, although the 11 April 2014 letter from the Peruvian Government contained false information regarding whether Amazon has an ISO 3166-2 code,³⁷ the NGPC “failed to identify any false and inaccurate information contained in the letter.”³⁸ However, alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to a decision. The NGPC’s rationale does not state that it relied on the Peruvian Government’s representation regarding the ISO 3166-2 code in deciding to accept the GAC Durban Advice, and the Requester does not explain how the NGPC did so rely, or how the information is at all relevant.³⁹ Furthermore, the NGPC is not required to identify any and all false or inaccurate information contained in the correspondence it considers and explain that the NGPC did not rely on that specific information in reaching its determination, particularly when that information is not relevant or material to the decision being made.

³⁷ The ISO 3166-2 code is published by the International Organization for Standardization and assigns five-digit alphanumeric strings to countries’ administrative divisions and dependent territories. (*See* http://www.iso.org/iso/home/standards/country_codes/updates_on_iso_3166.htm?show=tab3.)

³⁸ *See* Request 14-27, § 8, Pgs. 13-14.

³⁹ In its 2 August Letter responding to the BGC’s request for clarification, the Requester adds that this same representation was made by Peru’s GAC representative to the GAC prior to its vote on the GAC Durban Advice. (2 August Letter at 1-2.) However, the GAC is an independent advisory committee, and not part of ICANN’s Board. As such, the materials considered by the GAC in rendering its advice are not a proper basis for reconsideration.

Finally, in its 2 August Letter responding to the BGC's request for clarification, the Requester argues that the 14 April 2014 letter from the Brazilian government inaccurately states that "all steps prescribed in the gTLD Applicant Guidebook in order to object to [the Amazon Applications] . . . have been timely taken by Brazil and Peru . . ." ⁴⁰ The Requester claims that this statement is inaccurate because the GAC Durban Advice was not timely. Again, the NGPC's alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to the NGPC's determination. And, once again, the Requester does not explain how the NGPC relied upon the Brazilian Government's allegedly inaccurate representation in deciding to accept the GAC Durban Advice. Further, as is discussed above, the Requester's argument regarding the alleged untimeliness of the GAC Durban Advice is not a proper basis for reconsideration. ⁴¹

The Requester also argues that the NGPC failed to consider material public comments and correspondence. For instance, the Requester argues that, while the NGPC considered the responses of the governments of Brazil and Peru to the Expert Analysis, it did not consider the Requester's response. ⁴² However, in its rationale the NGPC explicitly noted that it considered communications it received in response to the Expert Analysis, including the 14 April 2014 response from Scott Hayden, the Requester's Vice President, Intellectual Property, as well as letters from the Peruvian government and the Brazilian government. The Requester identifies no other specific public comment or piece of correspondence that it claims the NGPC failed to consider, and the NGPC's rationale for the Resolution clearly states that its "review of significant materials

⁴⁰ 2 August Letter, Pg. 2, available at <https://www.icann.org/en/system/files/files/petillion-to-ngpc-bgc-02aug14-en.pdf>

⁴¹ In its 2 August Letter, the Requester also argues that following the issuance of the GAC Durban Advice but prior to the NGPC vote on the Resolution, it requested, and was denied, the opportunity to meet with the NGPC to present its position. The Requester does not challenge this staff and/or Board action and points to no Bylaw or ICANN policy or procedure that would require such a meeting.

⁴² See Request 14-27, § 8, Pg. 12.

included, but [was] not limited to,” the listed materials.⁴³ In any event, the Requester does not identify any provision in the Bylaws or Guidebook that would require the NGPC to consider (much less identify and discuss) every comment or piece of correspondence received.⁴⁴

F. The NGPC Did Not Fail to Consider Material Information from the United States Government.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the United States Government’s statement.

The Requester argues that the NGPC failed to consider material information by failing to consider the July 2013 statement from the United States Government on geographic indicators.⁴⁵ In its statement, the United States Government expressed its intent to “remain neutral” on the Applications, so as to “allow[] the GAC to present consensus objections on those strings to the Board, if no other government objects.” Nonetheless, the Requester argues that “[t]he statement from the U.S. Government calls into direct question the belief that the GAC Durban Advice is clearly representative of the consensus adoption of the entire GAC of the opinion set forth by Brazil and Peru in its Early Warning or follow-up correspondence.”⁴⁶

Further, the United States Government’s statement does not negate the fact that the GAC Durban Advice represents consensus GAC Advice. Pursuant to GAC Operating Principle 47, “consensus is understood to mean the practice of adopting decisions by general

⁴³ Resolution 2014.05.14.NG03 Rationale available at [https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en - 2.b](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en-2.b).

⁴⁴ The Requester also appears to argue that the NGPC should have solicited opinions from other governments. (Request, § 8, Pg. 12.) However, it cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

⁴⁵ See Request 14-27, § 8, Pgs. 14-15.

⁴⁶ See Request 14-27, § 8, Pg. 15.

agreement in the absence of any formal objection.”⁴⁷ As the statement makes clear, the United States did not object to the GAC Durban Advice. The mere fact that the United States remained neutral with respect to the GAC Durban Advice was not material to the NGPC’s consideration of that advice.

G. The NGPC Did Not Fail to Consider Material Information with Respect to the Expert Determination.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the Expert Determination.

The Requester argues that the NGPC improperly failed to consider the Expert Determination rejecting the IO’s Community Objection to the Amazon Applications.⁴⁸ The Requester appears to contend that the Expert Determination was material because: (1) the objections of the Brazilian and Peruvian governments would have been properly raised in the context of a Community Objection—which those governments did not bring; and (2) a Community Objection by those governments would have failed, as is evidenced by the Expert Determination.⁴⁹

GAC members are not limited to raising objections that could have been raised in, or that meet the standards required to prevail upon, one of the four enumerated grounds for formal objections. (Guidebook Module 3, § 3.2.) Rather, GAC Advice on new gTLD applications is generally “intended to address applications that are identified by national governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” (Guidebook Module 3, § 3.1.) GAC members’ discretion with respect to their reasons for objecting to gTLD applications is reflected in the fact that the GAC is not required to issue a rationale for its advice. In any

⁴⁷ GAC Operating Principle 47 *available at* <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.

⁴⁸ *See* Request 14-27, § 8, Pgs. 16-17.

⁴⁹ *See* Request 14-27, § 8, Pg. 17.

event, the briefing materials of the NGPC’s 29 April 2014 and 14 May 2014 meetings reflect that the Expert Determination was considered by the NGPC during its deliberations on the Amazon Applications.⁵⁰

H. The NGPC Did Not Fail to Consider Material Information with Respect to the Expert Analysis.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the Expert Analysis.

The Requester argues that ICANN instructed Professor Passa “to address only whether under intellectual property laws, governments could claim legally recognized sovereign or geographic rights in the term ‘Amazon’ or whether ICANN was ‘obliged’ to grant .AMAZON based on pre-existing trademark registrations,” when “[t]he real question is whether, by accepting GAC advice, which is not rooted in any existing law, ICANN would be violating either national [or] international law.”⁵¹

The Guidebook sets forth the parameters in which GAC Advice will be given under the New gTLD Program:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board **may consult with independent experts**, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

⁵⁰ Briefing materials of NGPC 29 April 2014 meeting *available at* <https://www.icann.org/en/system/files/bm/briefing-materials-1-29apr14-en.pdf> and <https://www.icann.org/en/system/files/bm/briefing-materials-2-29apr14-en.pdf>; Briefing materials of NGPC 14 May 2014 meeting *available at* <https://www.icann.org/en/system/files/bm/briefing-materials-1-14may14-en.pdf> and <https://www.icann.org/en/system/files/bm/briefing-materials-2-14may14-en.pdf>.

⁵¹ Request 14-27, § 8, Pgs. 18-19 (emphasis in original).

(Guidebook, § 3.1) (emphasis added). Under this provision, the Board has the discretion to seek an independent expert opinion on issues raised by GAC Advice. The Board may also define the scope of its consultation with independent experts. As such, the Requester's objection to the scope of Professor Passa's assignment is not a basis for reconsideration.

The Requester has not cited to any provision of the Bylaws or Guidebook that would require ICANN to commission additional legal studies at the request of a New gTLD Applicant. Reconsideration for failure to consider material information is not proper where "the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of the action or refusal to act." (Bylaws, Art. IV, § 2.b.) The Requester was given multiple opportunities to present materials for the NGPC's consideration, including the opportunity—which it accepted—to respond to the Expert Analysis. In fact, the Requester attached to its response to the GAC Durban Advice a lengthy excerpt from a legal treatise on the protection of geographic names.⁵² If the Requester believed that additional legal analysis was required, it was free to commission that analysis and submit it to the NGPC.

I. The NGPC Did Not Fail to Consider Material Information with Respect to Its Bylaws, Articles of Incorporation, and Affirmations of Commitment.

The BGC concluded, and the NGPC agrees, that the Requester has not stated a proper basis for reconsideration with respect to the NGPC's consideration of its obligations under ICANN's Bylaws, Articles of Incorporation, and Affirmations of Commitment.

The Requester alleges that the NGPC failed to take into account material information regarding its obligations under Articles I.2, II.3, and III.1 of ICANN's Bylaws; Article 4 of its Articles of Incorporation;

⁵² See Response to GAC Durban Advice, Appx. A, available at <https://www.icann.org/en/system/files/files/request-annex-amazon-2-30may14-en.pdf>.

and Sections 4, 5, 7, and 9.3 of its Affirmations of Commitment.⁵³ The Requester's disagreement with the Resolution does not, however, demonstrate that the NGPC failed to consider those obligations. And, as the rationale for the Resolution makes clear, the NGPC acted pursuant to its obligation under Article XI, Section 2.1 of the Bylaws, to duly address advice put to it by the GAC.⁵⁴

J. The NGPC Did Not Fail to Consider Material Information with Respect to the Fiscal Implications of the Resolution.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material information with respect to the fiscal implications of the Resolution. The Requester contends that “[s]hould it be determined that the [Resolution] in fact violates various national and international laws, the costs of defending an action (whether through the Independent Review Process or through U.S. courts) will have significant fiscal impacts on ICANN. . . .”⁵⁵ The Requester has not demonstrated that the NGPC did not consider the potential for litigation arising out of the Resolution, including the potential fiscal impact of such litigation. In any event, the Requester has not demonstrated how the speculative possibility of litigation is material to the NGPC's determination here. As such, the Requester has not identified a proper ground for reconsideration.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Request 14-27. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's

⁵³ See Request 14-27, § 8, Pgs. 19-21.

⁵⁴ The Requester also argues that the NGPC “should have sought comment from the [Generic Names Supporting Organization (“GNSO”)] as to whether [the GAC Durban Advice was] in violation of GNSO Policy.” (Request, § 8, Pg. 21.) However, the Requester cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

⁵⁵ Request 14-27, § 8, Pgs. 21-22.

Recommendation on Request 14-27

(<https://www.icann.org/en/system/files/files/recommendation-amazon-22aug14-en.pdf>), which shall be deemed a part of this Rationale and is attached to the Reference Materials to the NGPC Submission on this matter.

In terms of timing of the BGC's Recommendation, Sections 2.16 and 2.17 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical and the Board [or NGPC as appropriate] shall issue its decision on the BGC's recommendation within 60 days of receipt of the Reconsideration Request, or as soon thereafter as feasible. (See Bylaws, Article IV, Sections 2.16 and 2.17.) The BGC required additional time to make its recommendation due to its request for clarification from the Requester, and due to the volume of Reconsideration Requests received within recent months. As such, the first practical opportunity for the BGC to make a decision on this Request was on 22 August 2014; it was impractical for the BGC to do so sooner. Then, the first feasible chance for the NGPG to consider Request 14-27 was on 8 September 2014.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

c. Perceived Inconsistent String Confusion Expert Determinations

PROPOSED RESOLUTION (Option A):

Resolution not considered. The NGPC briefing materials included drafts of three versions of resolutions corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

Pages 71/93 – 91/93 removed. Pages contained duplicates of the draft resolutions and rationales included on pages 27/93 – 46/93 for the Perceived Inconsistent String Confusion Objection Expert Determinations agenda item. As noted on pages 27/93 – 46/93, the NGPC briefing materials for the 8 September 2014 meeting included drafts of three versions of resolutions and rationales corresponding to potential options to address Perceived Inconsistent String Confusion Objection Expert Determinations. The NGPC did not consider the resolutions and rationales at its 8 September 2014 meeting, but directed that additional briefing materials be provided for action at its meeting during ICANN 51 in Los Angeles.

New gTLD Program Committee Members,

Attached below please find Notice of the following New gTLD Program Committee Meeting:

8 September 2014 – NGPC Meeting at 13:00 UTC (4:00pm in Istanbul, Turkey). This Committee meeting is estimated to last 2 hours.

<http://www.timeanddate.com/worldclock/fixetime.html?msg=New+gTLD+Program+Committee+Meeting&iso=20140908T16&p1=107&ah=2>

Some other helpful time zones:

8 September 2014 – 6:00 a.m. PDT Los Angeles, CA

8 September 2014 – 9:00 a.m. EDT Washington, D.C.

8 September 2014 – 3:00 p.m. CEST Brussels

Consent Agenda

1. Approval of Minutes from:

- 21 June 2014**
- 18 July 2014**
- 30 July 2014**

Main Agenda

- 1. GAC Advice Scorecard**
- 2. BGC Recommendation on Reconsideration Request 14-27, Amazon EU S.a.r.l.**
- 3. Perceived Inconsistent String Confusion Expert Determinations**
- 4. AOB**

If you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

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