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Former United States District Judge

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EXHIBITS MARKED IN THIS VOLUME

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1 Los Angeles, California, Tuesday, May 2, 2017

2 9:36 a.m.

3
4 ARBITRATOR BONNER: Good morning, everyone.

5 Are we ready to get started?

6 MR. LeVEE: We are. I have one housekeeping
7 matter.

8 ARBITRATOR BONNER: Yes, of course.

9 MR. LeVEE: Yesterday the parties gave you their
10 respective list of issues. And I had realized that our
11 list was the intent at a combined list which had failed.
12 And so overnight, we simply corrected the list. So this
13 will be ICANN's version of the issues so identified.

14 ARBITRATOR BONNER: Have you shown this to
15 counsel for Amazon?

16 MR. LeVEE: No, I did not.

17 ARBITRATOR BONNER: But you are now.

18 MR. LeVEE: It's not much of a change from what
19 we -- ck end)

20 ARBITRATOR MATZ: Is the only change the deletion
21 of No. 8?

22 MR. LeVEE: Well, we deleted what was previously
23 No. 2.

24 ARBITRATOR MATZ: I see.

25 MR. LeVEE: There's a couple of word tinkers.

1 ARBITRATOR O'BRIEN: So should we mark this as
2 Hearing Exhibit 3? The prior one, do you want to
3 replace it?

4 MR. LeVEE: Sure. We can mark it as 3 since the
5 previous one is --

6 ARBITRATOR BONNER: All right. So it will be
7 marked as Hearing Exhibit 3. It's ICANN's list of
8 issues.

9 (Hearing Exhibit 3 marked for
10 identification.)

11 ARBITRATOR BONNER: Counsel, are you ready to
12 proceed?

13 MR. THORNE: We are, Your Honor.

14

15 OPENING ARGUMENT

16 BY MR. THORNE:

17 We've also put together a group of slides as a
18 way of helping to organize what we hope to get through.
19 If I can approach, I'll give you a hard copy. We're
20 going to show them on the screen, too, but the hard copy
21 is probably easier to work on.

22 So let me start by thanking the panel for the
23 extraordinary attention to the case. Thanks to our
24 opponents for hosting us again.

25 I thought that yesterday's testimony from

1 Mr. Atallah was helpful. On the very first slide, we
2 picked out -- this is based on the rough transcript that
3 we received late last night -- what I thought was an
4 important starting point for our side.

5 (As read):

6 "Did the NGPC make an independent
7 inquiry as to whether or not there was a
8 valid public interest rationale for the
9 GAC advice in this matter.

10 "Answer: No, it did not."

11 MR. THORNE: That was your question, Judge
12 Bonner. We will get the hearing transcript cleaned up.
13 Our fault for talking too fast and names being hard to
14 spell. But once we have a clean transcript, we will get
15 that to the panel.

16 ARBITRATOR BONNER: When would you expect that,
17 by the way? I guess that's the court reporter's -- as
18 to that.

19 THE REPORTER: Two weeks is the normal
20 turnaround.

21 MR. THORNE: Is that acceptable, Your Honor?

22 ARBITRATOR BONNER: I think it might be. It
23 depends -- if the parties want a reasonably expeditious
24 decision, it would be helpful to have that sooner than
25 two weeks, I think.

1 MR. THORNE: Can we --

2 THE REPORTER: Sure.

3 MR. THORNE: We'd like to do that.

4 THE REPORTER: Like a week? Would you like a
5 week?

6 MR. THORNE: Can you do it sooner?

7 THE REPORTER: Sure. Yeah.

8 ARBITRATOR BONNER: Mid next week I think would
9 be great.

10 MR. THORNE: We will do that, Your Honor.

11 ARBITRATOR BONNER: Well, no, we're in early this
12 week, I guess. Maybe by Monday or something like that,
13 actually, if not the end of this week.

14 THE REPORTER: Monday would be better.

15 ARBITRATOR BONNER: All right.

16 MR. THORNE: The parties will do their part to
17 get a transcript to you by Monday.

18 ARBITRATOR MATZ: And will it be e-mailed? If
19 so, we can print it out. If you can deliver it by hard
20 copy, that would be great, also. It's up to you.

21 MR. THORNE: We'll do both, and we'll include
22 your assistant, Judge Matz.

23 ARBITRATOR BONNER: Thank you.

24 Proceed, Mr. Thorne.

25 MR. THORNE: So starting point is the NGPC did

1 not make an independent inquiry. The next slide is the
2 Lenin question, what's to be done?

3 The role of the panel is to hold ICANN
4 accountable for operating consistent with its bylaws.
5 And also, the articles, the articles of incorporation,
6 with due regard to the core values that are identified
7 in the bylaws.

8 We briefed this extensively, so I'm not going to
9 argue about the role. But I do want to point out one
10 thing that was litigated in prior IRP decisions, which
11 we'll see in some of the precedents, and that was, is
12 your review limited to the three questions at the bottom
13 of the slide?

14 ICANN used to take the position that you were
15 pigeonholed and was there a conflict of interest? Did
16 the board exercise due diligence and care in having a
17 reasonable amount of facts in front of it? Did the
18 board exercise independent judgment in taking a decision
19 believed to be in the best interest of ICANN. They used
20 to say, we're going to divide this up, and if you don't
21 fit one, two, or three, we win.

22 The precedents recently, for example, Corn Lake
23 (phonetic) discussed in our briefs, say that that's part
24 of the inquiry, but that's -- and it's good focus and I
25 think we went under just those questions.

1 But the more general question is has ICANN been
2 accountable to the community by complying with its
3 articles and bylaws.

4 So that's the general --

5 ARBITRATOR MATZ: And what is the precedent that
6 you say provides that characterization of our
7 responsibility?

8 MR. THORNE: There are several. The Corn Lake
9 cite, I think it's page 30 of our prehearing brief, as
10 an example.

11 Let me turn to the next slide and what our core
12 argument is.

13 There are two levels of operation in this scheme.
14 There is the GAC, and there's the NGPC. The
15 Governmental Advisory Committee is there to give advice
16 on laws, international agreements, public policy
17 issues -- that's what the bylaws says the GAC does.

18 It's not a decision-maker. If you recall in the
19 prehearing brief that we filed I stuck in and I thought
20 it was the right place in the brief two pages of the key
21 provisions of the articles, bylaws, and guidelines that
22 would be useful. And in looking back through that, I
23 think I missed one. If I could hand it, this is not an
24 exhibit. This is just -- these are excerpts of --

25 ARBITRATOR BONNER: Bylaws?

1 MR. THORNE: -- key provisions of the articles,
2 bylaws, and the guidebook.

3 It is the same -- same as what was in our
4 prehearing brief with the exception that I had omitted
5 and it's now on the top of the second page bylaws
6 Article XI, Section 1, which says (as read):

7 "The advisory committees,
8 generally including the GAC, shall have
9 no legal authority to act for ICANN."

10 And that was a point that the DCA Trust panel
11 found important, that if you have a scheme or the GAC
12 makes a decision, they take a vote, and that's ratified
13 by the NGPC without any investigation by the NGPC,
14 that's improper under that bylaws provision.

15 Again, I'm on a structural point, that the GAC
16 advisors and the NGPC is the decision-maker. And the
17 precedents are clear that the NGPC is required to issue
18 a reasoned judgment of all of the bylaws provisions
19 governing the NGPC, including a duty to supervise the
20 integrity of the entire process such as its constituent
21 bodies. Some of the bylaws provisions we've talked
22 about before and they're elaborated in the briefs apply
23 to the GAC directly, but the key structural difference
24 is GAC advises; NGPC decides.

25 And what happened here -- and, Judge Bonner, you

1 mentioned this yesterday -- in an aside with
2 Mr. Atallah, you said it was interesting that the way
3 it's set up in this case, the GAC doesn't need to give a
4 reason or didn't give a reason, and the NGPC could just
5 approve that. But if the NGPC decided not to follow the
6 GAC advice, would have to give a reason.

7 So the only burden of giving a rationale was if
8 the NGPC failed to accept the GAC advice. But the
9 advice itself was unreasoned, and its acceptance would
10 be unreasoned, too. That's not what the process is
11 that's accounted for here. That's the key structural
12 problem.

13 So next slide.

14 It's clear from precedents like DCA Trust, the
15 GAC must give reasons. It's clear from precedents like
16 GCC --

17 ARBITRATOR BONNER: You might want to cite where
18 that is in the DC Trust case. What page would we find a
19 holding, in essence, that the GAC must give reasons for
20 its consensus advice?

21 MR. THORNE: We'll have that in just a moment,
22 Your Honor.

23 And then the same question, I assume, applies to
24 the holding in GCC, that -- this is a quote from the
25 decision. I'll get you the cite (as read):

1 "That ICANN bodies, including and
2 especially NGPC, but also other bodies."

3 And then it comes out of the bylaws. If you make
4 a decision or a recommendation, you have to give a
5 reasoned explanation for that.

6 ARBITRATOR BONNER: So where is that in the
7 bylaws?

8 I don't want to bog you down, Mr. Thorne, but my
9 colleague here suggested and I think it would make sense
10 that in your slides you cite DC Trust and that sort of
11 thing. Actually give us the page citations and that
12 sort of thing --

13 MR. THORNE: I will do that, Your Honor.

14 ARBITRATOR BONNER: -- for your cites here so
15 we'll have them, because I'm not altogether sure DCA
16 Trust stands for that, but I know we'll hear from
17 Mr. LeVee on that.

18 But that's a threshold question; that is, is the
19 GAC, when it gives consensus advice, is it required
20 under the articles, bylaws, or guidebook or case
21 precedent to state its reason or reasons or the
22 rationale for its advice. And you're asserting it does,
23 so that's an issue in the case if we need to decide.

24 If there actually is -- I don't see anything in
25 the bylaws that require that, I'll just tell you right

1 now, so you better cite the bylaw to me. I don't see
2 anything in the articles that require that. I'm not
3 flyspeck the DCA Trust case, and if it does say that, in
4 which case it would be at least potentially persuasive
5 precedent on that issue.

6 ARBITRATOR MATZ: May I ask a different question?
7 And it's one that I think it would be incumbent on
8 Mr. LeVee to address also, and that is, we understand, I
9 think -- well, I'll speak for myself -- that prior panel
10 rulings constitute precedents. But if there are
11 inconsistencies or different precedents that are not
12 entirely in sync, do you have any recommendation or any
13 authority for how we should go about choosing which
14 prior panel?

15 So I'm asking you that question now in the hope
16 that it will guide you in your comments, because you're
17 citing, and understandably, prior IRP panels. If
18 there's conflicting authority or different authority,
19 please give us guidance on how we should pick and choose
20 or resolve the conflicts.

21 ARBITRATOR BONNER: Same question to Mr. LeVee,
22 too, by the way.

23 ARBITRATOR MATZ: Yes, that's what I said.

24 MR. THORNE: I think that's a straightforward
25 question. If I were in your position, I would pick the

1 more persuasive precedent if you find a conflict. I
2 actually don't see a conflict. We'll get the cite in a
3 second, the DCA Trust. I don't see a conflict between
4 its holding and --

5 MS. BEYNON: Judge Bonner, in response to your
6 question of where DCA Trust spoke about giving reasons,
7 if you look at paragraph 74 of that decision, it's the
8 panel there wrote (as read):

9 "Accountability requires an
10 organization to explain or give reasons
11 for its activities, to accept
12 responsibility for them, and to disclose
13 the results in a transparent manner."

14 And that same proposition is also referred to in
15 DCA Trust, in addition to paragraph 74, paragraphs 102,
16 109, and 113.

17 In addition, if you take a look at the GCC
18 decision, paragraph 76 also refers to the requirement
19 that the NGPC provide a reasoned analysis.

20 ARBITRATOR BONNER: Okay. So let's -- I just
21 heard the precedent. And it may well be that that
22 applies to the board and the NGEC -- I got that wrong
23 again, didn't I? Let's say it does. It doesn't
24 necessarily mean it applies to the GAC.

25 But you're arguing that, essentially. And I

1 understand the argument; I just want to know what the
2 authority for it is. You're arguing that the generality
3 of that principle should apply to the GAC.

4 MR. THORNE: No, no, Your Honor. It's actually
5 more specific than that.

6 ARBITRATOR O'BRIEN: Is it the case that DCA
7 Trust applies to the GAC and GCC applies to the NGPC?

8 MR. THORNE: GCC applies to all (unintelligible)
9 entities; and DCA Trust, like this case, applies to the
10 NGPC's mechanical adoption of GAC advice, but it
11 criticizes the GAC's inability to give a rationale.

12 ARBITRATOR O'BRIEN: I may have misheard this
13 one. Counsel gave us the cite, 74, 102, 109, 113 on DCA
14 Trust. It sounded like that applied to the GAC. They
15 were discussing the GAC, whereas -- and I may have
16 misheard. With GCC, it sounded like that comment
17 applied to the board, but I could be wrong on that.
18 That's why I was asking.

19 MR. THORNE: GCC held that as to the board.

20 ARBITRATOR O'BRIEN: Right.

21 MR. THORNE: And DCA Trust held that as to the
22 GAC, as well.

23 ARBITRATOR O'BRIEN: Okay. That's why I was
24 asking if there was a difference between those two
25 cites.

1 MR. THORNE: Let's walk through the bylaws that
2 give -- we'll talk about the GAC's duties to provide a
3 rationale. That probably is a helpful way to walk this
4 through.

5 Basically Articles I, II, III, and IV all support
6 the DCA Trust holding that the GAC must give a
7 rationale.

8 So looking at the cheat sheet that I passed out,
9 there's an Article I requirement to strike a defensible
10 balance between competing core values.

11 You can't create a defensible balance without an
12 explanation or conducting something like a reasoned
13 decision-making process. And that's the -- one of the
14 bases the DCA Trust relies upon.

15 Now, Article I, if you look at its prelude, it
16 talks about actions of a GAC.

17 I'm sorry, actions of ICANN. And so there's a
18 further leap that the GAC is an ICANN body making a
19 decision or a recommendation.

20 Article II prohibits singling out a party for
21 disparate treatment without justification. And we
22 heard, for example, yesterday from Mr. Atallah that it's
23 a rare event for the GAC to single out an application
24 for advice. Singling out requires justification. It
25 should be justification offered by the entity that is

1 doing the singling out.

2 Article III applies directly to the GAC by its
3 terms.

4 (As read):

5 "ICANN and its constituent bodies
6 shall operate to the maximum extent
7 feasible in an open and transparent
8 manner and consistent with procedures
9 designed to ensure fairness."

10 And Article IV, which DCA Trust relied upon,
11 Article IV defined accountability as (as read):

12 "Requiring an organization to
13 explain or give reasons for its
14 activities and to accept responsibility
15 for them. Disclose the results in a
16 transparent manner."

17 And that was applied by DCA Trust to the GAC.

18 ARBITRATOR BONNER: So the thought would be that
19 if you took all or some of these articles, the necessary
20 implication of them is that they require a reasoned
21 action by ICANN.

22 MR. THORNE: In order for the NGPC to be able to
23 use the advice, they need more than a vote. All they
24 got here was the fact of consensus. The NGPC rationale
25 says we lacked the benefit of -- it would have been a

1 benefit to be getting advice that identified a public
2 interest that was -- or a national guard (verbatim),
3 international treaty that was at risk.

4 ARBITRATOR BONNER: No question it's desirable.
5 It would be desirable for any reviewing body of the
6 board of ICANN and the NGPC would be desirable to have a
7 statement of rationale or reasons.

8 But I think I understand, and I think maybe we'll
9 just need to take a look at the case -- we'll hear from
10 Mr. LeVee on what these cases stand for, the precedent,
11 if there's any conflicting precedent.

12 And then we will take a look at whether or not
13 there actually is -- whether we can conclude that there
14 is an obligation on the part of GAC when it's giving
15 consensus advice to state a reason or reasons or
16 rationale for its advice.

17 That's your argument, if you're correct, by the
18 way, you win --

19 MR. THORNE: That's right.

20 ARBITRATOR O'BRIEN: Mr. Thorne, along those
21 lines -- I'm sorry --

22 ARBITRATOR BONNER: -- on Issue No. 1, I guess.
23 Go ahead.

24 ARBITRATOR O'BRIEN: Sorry about that, Your
25 Honor.

1 So I don't have the DCA Trust case in front of
2 me. I know it's been cited in the briefs.

3 Can you just -- we went through the bylaws. Can
4 you just read us the relevant paragraphs that support
5 the position that the GAC has to give a reason to work.

6 MR. THORNE: I actually have extra copies of DCA
7 Trust if that would be helpful to the panel.

8 ARBITRATOR O'BRIEN: Sure.

9 ARBITRATOR BONNER: Again, I don't want to get
10 totally bogged down here because you have a finite
11 amount of time to make --

12 MR. THORNE: Your Honor, this is a potentially
13 winning point. We should do it carefully.

14 ARBITRATOR BONNER: It is. It's potentially
15 dispositive.

16 ARBITRATOR MATZ: Mr. Thorne, I don't want to
17 dissuade you from telling -- walking us through what you
18 just handed out, but please keep in mind I have a
19 question about the last substantive comment you made
20 concerning the absence of the rationale to which the
21 NGPC alluded.

22 So I don't want to disrupt your presentation. I
23 can ask it now or you can continue with this.

24 MR. THORNE: Thank you Your Honor.

25 So let's start this is on page 22, if you look at

1 the bottom page numbers, but it's paragraph 74 of the
2 decision.

3 (As read):

4 "As previously decided by this
5 panel, there have been some prior
6 orders. Such accountability" --

7 This is referring to the accountability
8 obligations of Article IV, Section 3 of the bylaws and
9 paragraph 4 of the bylaws.

10 (As read):

11 "Such accountability requires an
12 organization to explain or give reasons
13 for its activities, accept
14 responsibility for them, and to disclose
15 the results in a transparent manner."

16 If you are going to hold anyone here accountable
17 for the decision that had some reasons that were better
18 than opposing reasons, you've -- got to either hold the
19 GAC or the board, which has accepted the GAC's advice,
20 accountable. And DCA Trust is focused in this paragraph
21 on holding the GAC accountable for failing to reason.

22 Take a look at paragraph 102, which is on
23 page 43. This is reciting DCA Trust's argument the GAC
24 was bound to transparency and fairness to operate at the
25 maximum extent feasible in a transparent manner. That's

1 Article III, which applies specifically to all the
2 constituent bodies, including the GAC.

3 And then it goes onto explain that ICANN's
4 witness, Ms. Heather Dryden -- I'd like to talk more
5 about her in a bit, but Ms. Heather Dryden acknowledged
6 that GAC had not done that.

7 Paragraph 109. And this is the -- one of the
8 culminating paragraphs of the panel's decision. Having
9 described what the GAC did in .africa. This is the same
10 chair, basically the same decision-making body at the
11 same time as Amazon.

12 What had been described above combined with the
13 fact that DCA Trust was never given any notice or an
14 opportunity in Beijing or elsewhere to make its position
15 known or defend its own interest before the GAC reached
16 consensus and then that the board of ICANN did not take
17 any steps to address this issue leads this panel to
18 conclude that both the actions and inactions of the
19 board with respect to the application for .africa were
20 not procedures designed to ensure fairness under Article
21 III, Section 1, and therefore, inconsistent with the
22 articles and bylaws.

23 So in this case, just to compare it for a second,
24 Mr. LeVee said, Well, if Peru made a mistake in the
25 Durban meeting, advocating that the name is on the

1 list -- yesterday for the first time ICANN concedes
2 that's a mistake, Amazon had a chance to try to address
3 that with the NGPC.

4 Well, you go to the NGPC and tell them that we
5 saw Peru making a mistake. There's a transcript for the
6 first time in Durban. But Durban did not allow Amazon
7 to present correctives or to appear -- if the Durban GAC
8 was the actual decision or where the decision got made,
9 we were not allowed to make the presentation there.
10 That was requested in Mr. Hayden's testimony,
11 paragraph 37. Mr. Hayden describes how they asked
12 before the GAC meetings, Could Amazon make a
13 presentation, please? Could we even hand out materials
14 so the GAC can see, for example, that Peru was wrong?
15 And that was denied.

16 ARBITRATOR BONNER: Where is that found? Is that
17 in the declaration of Mr. Hayden?

18 MR. THORNE: Mr. Hayden's written statement,
19 paragraph 37 describes that Amazon asked for an
20 opportunity to distribute the materials and that was
21 denied.

22 The rules of the GAC don't allow non-GAC members
23 to address the body. And until the Durban meeting,
24 nobody actually knew what happened. So yesterday
25 Mr. Atallah told you he didn't know what happened to

1 Beijing because it was secret.

2 ARBITRATOR BONNER: But they changed that, right?
3 That's a different fact from our case --

4 MR. THORNE: Correct.

5 ARBITRATOR BONNER: -- because in our case, the
6 hearing -- or the proceeding of the GAC actually was
7 open, recorded, and apparently open to having people
8 present at it, correct?

9 MR. THORNE: That is not correct, Your Honor.

10 After the fact, a transcript was available of
11 what had occurred there, but there was no participation
12 from the public.

13 ARBITRATOR BONNER: Yeah, I know there was --

14 ARBITRATOR MATZ: Was there attendance?

15 MR. THORNE: Yes.

16 ARBITRATOR MATZ: Was that participation?

17 MR. THORNE: Yes.

18 ARBITRATOR BONNER: See, there are two issues
19 here. One is a transparency issue under the bylaws,
20 right? So a lack of -- if GAC is subject to the
21 transparency requirement, you can't have secret meetings
22 debating whether or not to give the consensus advice.

23 So that was, I think, true in the DCA Trust case
24 but not true here, but I want you to disabuse me if I'm
25 wrong on that.

1 Then there's a second issue, and that's
2 procedural fairness with respect to how GAC does things.
3 And that doesn't matter whether they are transparent or
4 not, but procedural fairness would be do the bylaws and
5 the case precedent, do they create a duty on GAC
6 basically to allow the applicant in this case, the
7 entity whose ox is being gored, to distribute materials
8 and/or to make a statement to the GAC? That has to do
9 with procedural fairness.

10 And I don't know the answers to these things, but
11 they are, I think, discrete issues. So I'm just trying
12 to clarify. You don't seem to have a transparency
13 argument here because it appears that the Durban meeting
14 of the GAC was open, people could attend it that weren't
15 necessarily government representatives and that sort of
16 thing. But I don't know. I'm asking you factually,
17 what does the record show factually on that issue?

18 MR. THORNE: I now understand that observers were
19 permitted in Durban. So the transparency issue you
20 described, there were observers there. There is a
21 transcript.

22 ARBITRATOR BONNER: And there was a transcript
23 that was prepared that made available to any interested
24 party, not just governmental entities, that would be
25 interested in seeing the transcript; is that correct? I

1 ask that as a question.

2 MS. ROSETTE: It is correct that the GAC session
3 in Durban, during which the GAC reached consensus advice
4 on the .amazon applications, was open to anyone who was
5 at the ICANN meeting to attend.

6 However, it is important to note that the Durban
7 discussion of the .amazon applications was cumulative,
8 picking up from where the GAC left off in Beijing, and
9 that discussion was completely closed and without a
10 transcript.

11 ARBITRATOR BONNER: I understand that
12 distinction.

13 MR. THORNE: That was my colleague, Ms. Kristina
14 Rosette.

15 So to come back to procedural fairness, it was
16 the same in both Beijing and Durban. There was no
17 opportunity for Amazon to make its position known or
18 defend -- defend its interests.

19 Bylaws -- this is the bottom of the first page of
20 the excerpts. Bylaws Article III, Section 1, ICANN and
21 its constituent bodies.

22 Yesterday Mr. Atallah agreed the GAC is a
23 constituent body. In the DCA Trust case, Mr. LeVee was
24 questioned by the panel, "Is the GAC a constituent
25 body?" He answered, "Yes." DCA Trust panel accepting

1 ICANN's concession there agreed the GAC is a constituent
2 body.

3 Constituent bodies have to operate with
4 procedures designed to ensure fairness. And it would be
5 fundamental to fairness to be allowed to defend your
6 interests and make a presentation. That was not allowed
7 before the GAC made its decision.

8 So going to the NGPC afterward, Mr. LeVee said
9 afterward -- after the GAC had decided, potentially
10 based on mistakes, potentially based on politics,
11 whatever, we'll talk about some of the things that may
12 have been the bases.

13 Going to the NGPC afterward, say, Wait a minute.
14 We see the transcript. Peru made a mistake. That did
15 not lead to any NGPC action here.

16 ARBITRATOR MATZ: May I ask you the question I
17 alluded to before, now, if you are finished dealing with
18 this page of your handout?

19 MR. THORNE: I've got more, but ask the question
20 now, please.

21 ARBITRATOR MATZ: I think it may help us all.

22 You understandably have emphasized the
23 pronouncement by the NGPC that it didn't have a written
24 rationale for the consensus advise.

25 But are you arguing to us that the full record

1 that was established yesterday that was available to the
2 NGPC -- the e-mails, the proposals for explaining what
3 the applicable standards were that GAC was going to
4 evaluate, the information that had been developed as a
5 result of the early warning, are you -- is it your
6 position, Mr. Thorne, that the availability of that
7 information before and to the NGPC should not be taken
8 into account by this panel because the NGPC was
9 otherwise -- without that would have been functioning on
10 a blind basis?

11 MR. THORNE: Your Honor, I'm absolutely arguing
12 that. The -- any rational decision that says we've
13 decided for a mechanical reason, the GAC said so, we've
14 decided this party wins, and here's a list of all the
15 letters that came in. Here is the docket sheet of all
16 briefs that were filed. We read your briefs and we've
17 decided one party wins -- that would not be a rational
18 decision.

19 I know sometimes courts have power to issue
20 abbreviated decisions in very simple cases. But in
21 cases that are important and that tend to be
22 precedential, a rational decision means you have offered
23 a testable hypothesis, you've gone through the
24 discipline, the accountability of explaining why someone
25 wins and someone loses based on the competing

1 consideration. That's not in anything the NGPC did.

2 ARBITRATOR MATZ: Now, wait a second. I really
3 think it's important to your client that I understand
4 you.

5 You are not disputing that the NGPC had all this
6 other information, alluded to it, and reviewed it, are
7 you?

8 MR. THORNE: There is no evidence in the record
9 that they reviewed anything. There's a list of the
10 things that came in. We've received your letters.

11 ARBITRATOR MATZ: Didn't the substance of
12 Mr. Atallah's testimony confirm that not only was there
13 a citation to that additional material, but
14 consideration of it?

15 MR. THORNE: There's no evidence of the
16 consideration in the decision of the NGPC.

17 ARBITRATOR MATZ: I'm asking you about your
18 recollection of yesterday's testimony of Mr. Atallah.

19 MR. THORNE: I recall he said they spent a long
20 time where they had a lot of material in front of them.
21 I did not hear him say ever that the NGPC balanced
22 competing considerations and weighed them as the bylaws
23 require them to.

24 ARBITRATOR MATZ: I'm not in the position to know
25 by memory what he said. We'll all be able to find out

1 when we review the transcript. But I take it, then,
2 that regardless of what he said, from your client's
3 point of view, you're asking this panel to treat that
4 part of the record as nonexistent in deciding whether or
5 not the NGPC complied with its duties and
6 responsibilities; is that correct?

7 MR. THORNE: I'm asking the panel to treat what
8 ICANN did here as it had done in the .africa case and in
9 the .persiangulf case of the same period where it was a
10 basically mechanical application. If you had consensus
11 GAC advice, that was sufficient. That was the
12 rationale.

13 One of the questions I think it was Judge O'Brien
14 asked yesterday is: "So the only thing standing in the
15 way of Amazon and the gTLD, the only in between is the
16 GAC advice?" It was all based on the GAC advice.

17 ARBITRATOR MATZ: You know, I understand why the
18 cases you are citing are helpful, and I assure you, I
19 will review again every single word in those cases. So
20 it's a perfectly appropriate thing for you to rely on
21 this, but I don't think you really answered my question.

22 This case may be much like the other IRP panels
23 that you are alluding to, and this panel will make an
24 informed decision as to which of the prior precedents is
25 closest or most applicable.

1 But my question to you is: Is it your position
2 that when we independently review the record and when we
3 collectively confer, we are not supposed to take into
4 account the full record that was before the NGPC?

5 Don't answer with respect to other cases; just
6 answer with respect to this case.

7 MR. THORNE: The record before the NGPC is
8 relevant to what the NGPC might have considered.

9 I don't think you've heard any testimony
10 yesterday, and there's nothing in the NGP's (sic)
11 decision that says it did what the bylaws in the cases
12 describe of balancing competing factors and reaching a
13 reasoned decision.

14 ARBITRATOR BONNER: Those are two different
15 things. Let me try this, though, just -- because I
16 think it's important for both counsel to kind of follow
17 the logic track here.

18 On the one hand you are arguing that the bylaws
19 and precedent requires that the GAC provide a -- reasons
20 or a rationale for its consensus advice.

21 If you are correct, end of case, really, I mean,
22 in the sense that that did not happen on this record.

23 But if, in fact, the NGPC -- if we decide that
24 even without a -- that there is not that requirement --
25 by the way, I don't know. But let's just -- we need to

1 have what the fallbacks are here. So let's assume
2 arguendo that there is no requirement. And to those
3 circumstances, we assume it would be appropriate for the
4 NGPC to take a look at the record in terms of what were
5 the underlying public policy interest or rationale for
6 the GAC decision.

7 And that's, I think -- that's not exactly the
8 question Judge Matz was asking, but that's the question
9 I have, because the next -- if I disagree with you, the
10 next step I have to know is can we consider that and are
11 there legitimate public policy reasons or interests in
12 the record that was before the NGPC.

13 And let me say parenthetically -- I'm sure
14 Mr. LeVee will clarify this, but I thought I saw
15 yesterday that in the recitations of the NGPC with
16 respect to this matter and when it made the May decision
17 that it said that it had considered various documents
18 and things that had been presented to it. That's a
19 separate fact issue, I guess, that will be probably
20 easily resolved one way or the other.

21 But anyway, I'm just sort of interested. So if
22 you don't prevail, what is your argument? Is that it?

23 MR. THORNE: No, Your Honor. There are
24 several --

25 ARBITRATOR BONNER: I mean don't prevail on the

1 issue that there's a required rationale that the GAC was
2 required to, under the bylaws and articles and so forth
3 and case precedent, to give reasons.

4 ARBITRATOR O'BRIEN: Can I ask a question that
5 goes along with that? It's somewhat corollary to that.

6 Is it your position -- so looking at the DCA
7 Trust case, paragraph 74 (as read):

8 "As previously decided by this
9 panel, such accountability" --

10 And this is a question for Mr. LeVee as well.

11 (As read):

12 -- "such accountability requires
13 an organization to explain or give
14 reasons for its activities, accept
15 responsibility for them, and to disclose
16 the results in a transparent manner."

17 Is it your position that just listing all of the
18 things that have been submitted to the NGPC does not
19 satisfy giving reasons for its activity, accepting
20 responsibility for them, and disclosing results in a
21 transparent manner?

22 MR. THORNE: That's correct.

23 ARBITRATOR O'BRIEN: And that would be applicable
24 to the NGCP (sic) and the GAC?

25 MR. THORNE: That's particularly applicable to

1 the NGPC but also to the GAC.

2 ARBITRATOR O'BRIEN: So in other words, just
3 saying, Yeah, we received it -- it's not a reasoned
4 opinion, in your view, to say, We received all these
5 documents and this is our decision?

6 MR. THORNE: That's correct. It would be like a
7 trial court saying, Here's the docket sheet of things --
8 I've considered everything, here is my decision, with no
9 rationale attached to it. You wouldn't know why.

10 There would be no way -- in this case, there's no
11 review in court, so you don't have a court of appeals to
12 review your work. But there's a community that you are
13 holding ICANN accountable to, and they want to know, did
14 ICANN do something that was accountable or just pro
15 forma.

16 ARBITRATOR BONNER: Why don't you proceed,
17 Mr. Thorne.

18 MR. THORNE: Go ahead to the next slide.

19 So there is no dispute that the --

20 Next slide.

21 What I would like to do is very briefly talk
22 about the rationales that GAC may have had, that GAC
23 members may have had.

24 We know from Mr. Atallah's testimony -- I think
25 he agreed yesterday -- I think he agreed that there was

1 no consensus on the rationale at the GAC. Every country
2 had their own reasons. Maybe only a few countries had
3 reasons and everybody else went along with it. But
4 there was no consensus on a rationale. I think he
5 agreed with that.

6 When we started this case, there were two things
7 that were apparent to us. One was that in lieu of a GAC
8 rationale, the NGPC in its decision credited the early
9 warning statement of Brazil and Peru, which was based on
10 things that ICANN now largely admits were wrong.

11 Peru thought this was a geographic name on the
12 list. And both Brazil and Peru thought they had
13 sovereign rights, which the independent legal expert
14 that ICANN hired said, This isn't the case.

15 So we thought, okay, the reasons in the early
16 warning are wrong. And so if that's what the NGPC
17 thinks was the rationale that they were approving,
18 they're approving something that was wrong.

19 In the document discovery that we've done,
20 including documents that we got only Friday night, we
21 now have a different story of additional reasons that
22 appear to have motivated at least the -- some of the
23 countries that were advocating for the consensus advice
24 and ICANN itself.

25 So we talked about some of that with Mr. Atallah

1 yesterday, and I'd like to very briefly walk through a
2 few pieces of that now, make sure that that was clear.

3 You all have in front of you the set of Atallah
4 exhibits from yesterday.

5 ARBITRATOR MATZ: I do.

6 ARBITRATOR BONNER: I think so.

7 MR. THORNE: I want to talk about four: It's
8 Exhibit 11, Exhibit 10, Exhibit 15, Exhibit 5.

9 Starting with Exhibit 11. We saw in other
10 documents and Mr. Atallah confirmed in the documents
11 that it was basic missionary work done by ICANN
12 leadership. The CEO, Fadi Chehadé, and his man on the
13 ground, Everton Lucero, and then sometimes accompanied
14 by others, went to visit different countries in Latin
15 America.

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16 MS. BEYNON: We've just noticed that somebody may
17 not have the complete set of exhibits, so would it be
18 helpful if we provided the stickered set of exhibits
19 that was used yesterday?

20 ARBITRATOR MATZ: I organized them. I don't --

21 MS. BEYNON: Okay.

22 ARBITRATOR O'BRIEN: I'm missing 12, is the only
23 one I'm missing.

24 ARBITRATOR BONNER: So I'm just trying to

25 synthesize this. Redacted - Information Designated
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4 It's another way of stating there's a strong
5 presumption if there's consensus GAC advice that an
6 application will be rejected or that the application
7 will not proceed. And so I see that.

8 I actually looked at all your documents. I think
9 your argument is that we could draw an inference from
10 those documents that -- perhaps a reasonable inference
11 that one of the -- one or perhaps the real reason for a
12 deference on the part of the NGPC to the GAC advice here
13 is the concerns with the ITR treaty and the like.

14 I mean, I don't know that you have proven that,
15 but I think you could argue that there's an inference
16 that one might draw that the -- whatever else --
17 whatever other reasons were given were make wait reasons
18 and that the real reason was -- at least the real reason
19 that ICANN or the NGPC essentially -- I think you might
20 argue -- adopted the consensus advice without a lot of
21 questioning of it in terms of whether there were
22 legitimate and valid public interest reasons was that it
23 was more concerned about its relationship with
24 governments and the ITR treaty.

25 I don't know that you quite made that case, by

1 the way, because that's a big inference to draw here.
2 But I'm not saying -- I don't know. That seems to be
3 what you're arguing to.

4 MR. THORNE: To react to it, I think you're right
5 about the factual inference that we see in these
6 documents. But the argument is more modest.

7 The argument is simply there's enough smoke here
8 that the NGPC exercising its duties of transparency and
9 accountability should have investigated.

10 These documents, these meetings, these
11 discussions -- they are not mentioned anywhere in the
12 NGPC rationale.

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22 ARBITRATOR BONNER: Then there will be
23 consequences if the -- there's the threat there will be
24 some consequences if the ICANN board granted the .amazon
25 applications, right? I mean, that's in one of these

1 documents.

2 MR. THORNE: Correct. If that was a rationale
3 relied on by the NGPC, it wasn't expressed. This --
4 they listed, faithfully, all the letters that were sent.
5 They didn't list any of these other inputs to the
6 decision. There's enough here they should have
7 investigated. And if they had investigated, this is not
8 a situation of harmless error or if they looked, they
9 wouldn't have found anything. It looks like they would
10 have found something. Mr. Lucero knew a lot. He was
11 their employee.

12 ARBITRATOR MATZ: Well, what would they have
13 found? What is the smoke that you say there was enough
14 smoke to warrant something?

15 MR. THORNE: Let me just show you the next
16 document. Maybe that will help.

17 ARBITRATOR MATZ: In answering the question,
18 perhaps you can also at least anticipate that I would
19 appreciate guidance on your view as to whether or not
20 there's any different weight or stature that any given
21 government has compared to any given commercial member
22 of the much broader ICANN aren't governments no less --
23 don't governments and commercial entities enjoy the same
24 rights and the same status is something I would
25 appreciate your touching on as well.

1 MR. THORNE: Let me start with that. Judge Matz,
2 thank you for the questions.

3 Looking at the excerpts provision, bylaws Article
4 I, Section 2, paragraph 11 in the middle of the first
5 page says (as read):

6 "ICANN is rooted in the private
7 sector, recognizing that governments and
8 public authorities are responsible for
9 public policy."

10 And we're going to duly take into account their
11 consideration, but where do you start it's rooted in the
12 private sector? Here, the private sector was ignored.
13 It was totally subordinated to the public.

14 Let me ask -- answer the question about the quid
15 pro quo or the horse trading that was going on.

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5 ARBITRATOR O'BRIEN: Is the point that you are
6 making here, Mr. Thorne, when you look at the GAC, which
7 has no reasoning to support its consensus, and you look
8 at the NGCP, the only two reasons that you can discern
9 are geographic list, which was a mistake, and sovereign
10 right, which the professor disagrees with, hired by
11 ICANN, it sounds kind of like a China/South China Sea
12 type argument.

13 Those would be the only reasons that could back
14 up the decision, and they are both inaccurate as a
15 matter of law and as a matter of fact.

16 And then you point out that in these undisclosed
17 documents that weren't disclosed in the reasoning, that
18 there's all this smoke, basically that the Latin
19 Americans are saying, we are done with ICANN. If we
20 lose this, we are out.

21 And then I think we saw some documents yesterday
22 where the U.S. and U.K. basically took a pass on it to
23 keep ICANN together, and Amazon was sacrificed to the
24 expediency of keeping ICANN together and keeping the
25 Latins in ICANN.

1 Is that basically what you are arguing these
2 documents show?

3 MR. THORNE:

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10 ARBITRATOR O'BRIEN: Okay. So let's assume all
11 that's true.

12 Is it your explanation that we don't need to make
13 those findings as a panel, but it certainly would
14 explain -- or would offer a motive, so to speak, for why
15 the decision was issued without any rationale?

16 MR. THORNE: Exactly, Your Honor.

17 I do think we are making a more modest claim.
18 Like we're not asking you based on these documents,
19 please find the real reason was horse trading on other
20 issues. There's substantial evidence of that. But
21 just -- there was enough here that the NGPC should have
22 done some further investigation and provided a rationale
23 for condemning Amazon other -- based on the incorrect
24 rationales.

25 One more -- two quick documents to look at.

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11 If there's any justification to explain the
12 disparate treatment of Amazon and Ipiranga or Amazon and
13 all the other applications that don't get reviewed, it
14 can't be. The explanation can't be. We've decided to
15 single this out for GAC advice because it's a U.S.-based
16 company.

17 ARBITRATOR O'BRIEN: So let me ask this.
18 Clearly, Brazil rounded up Iran and Russia and China to
19 get these statements in the GAC, Thailand, which -- so
20 they round up this gallery of folks to support them in
21 the GAC.

22 And the U.S. and the U.K. and the other western
23 countries, with the exception of Australia, which kind
24 of says, hey, this isn't really working at all, we
25 should do something totally new, they get this GAC

1 advice.

2 Wouldn't it be perfectly acceptable from a
3 political standpoint for the U.S. and the U.K. to say,
4 to keep this whole thing together, we're going to stand
5 back. We're going to sacrifice Amazon for the greater
6 good of the international community, to keep the
7 Internet together, to keep these countries from signing
8 the ITR.

9 Politically, that's a perfectly -- it may not be
10 a fair decision for your individual client, but that's
11 something politically the governments could do. And so
12 there would be nothing wrong for the GAC making just a
13 nakedly political decision to do what they did.

14 But it's your argument, I think, that the board
15 has a different duty. But it's not a political
16 organization. That is a rule of law based organization,
17 and it has to do independent investigation. It has to
18 have legal reasoning for its decisions. It can't act in
19 a nakedly political fashion to save itself. It has to
20 do the right thing according to its bylaws, its
21 articles, and that sort of thing.

22 So the board is in a different position than the
23 governments, right, but it is just cutting political
24 deals.

25 MR. THORNE: Governments can do what governments

1 do. Now, the United States here -- Mr. LeVee brought up
2 this document yesterday. He quoted from pieces of it.
3 I'd like to let you see the whole document. This is
4 Exhibit C 34. It's already in the record. This is the
5 United States abstention statement.

6 You can see from the way this is written, the
7 author -- although they are not going to stand up to the
8 GAC, the author is very concerned about the principle
9 that's being -- so the author of this U.S. statement
10 describes the principle.

11 (As read):

12 "United States affirms our support
13 for free flow of information and freedom
14 of expression, does not use sovereignty
15 as a valid basis for objecting to the
16 terms. We have concerns about the
17 effect of such claims on the integrity
18 of the process."

19 They go on to say (as read):

20 "We thought the GAC had decided it
21 had a subordinate role."

22 Not -- the GAC wasn't in charge back in 2011.
23 And it agreed that other mechanisms would define the
24 relevant geographic names.

25 It goes on to say (as read):

1 "The United States is not aware of
2 an international consensus that
3 recognizes governmental rights and
4 geographic terms."

5 And it goes on to say, by the way, we might not
6 abstain next time, but here they did.

7 The United States was also trying to gracefully
8 exit from its partial control over ICANN at the time.
9 So the United States had other complications.

10 ARBITRATOR MATZ: May I just ask this. I really
11 salute Mr. O'Brien for positing the question in the
12 helpful way he did about the interests of nations and
13 the interests of a community of Internet users. I'm not
14 sure that you directly answered his question, but let me
15 ask you this:

16 The board whose conduct we are evaluating is the
17 board of ICANN, the board of directors.

18 And as a general proposition, do you agree that
19 members of the board of the entity in question, members
20 of the ICANN board, have a fiduciary duty to protect and
21 promote the interests of ICANN as a functioning body?
22 And just answer that question yes or no.

23 MR. THORNE: I agree that the board has a duty to
24 protect the entity on which they serve, and that would
25 include carrying out the commitments to the community

1 that this is a nonprofit organization. They are
2 chartered under the articles and bylaws to serve a
3 community rooted in the private sector.

4 ARBITRATOR MATZ: The board, no question, has a
5 duty to comply with its governing documents: the
6 articles, the bylaws, in this case the provision
7 relating to GAC. But does it also have the duty to
8 preserve itself in the face of potential dissolution
9 arising out of competition from an alternative network
10 of Internet users?

11 MR. THORNE: If the rationale -- I think the
12 answer is no, Judge Matz. But if the rationale that
13 ICANN adopted was to save ourselves, we're going to
14 sacrifice Amazon and Patagonia, if that was the
15 rationale, to be honest and transparent, they should
16 have written that down.

17 We feel threatened as an organization. And we
18 are so threatened, that we've agreed with Brazil in
19 private meetings we hadn't previously disclosed. We are
20 going to sacrifice these strings.

21 If that's the rationale, transparency would have
22 required disclosure. Instead, they said, we've got this
23 Early Warning that says these are geographic names or
24 sovereign rights. But this is not -- it's not -- if
25 that was a rationale, it's not transparent.

1 ARBITRATOR MATZ: But when you use the term
2 "political expediency," politics has become a dirty word
3 these days for regrettable reasons in a lot of quarters.

4 But the politics that you're asking us to
5 evaluate are not geopolitics about national borders,
6 trade agreements, and anything else. It's about the
7 politics of the Internet?

8 MR. THORNE:

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20 ARBITRATOR MATZ: It's not about ICANN's role.

21 MR. THORNE: That phrase came up in terms of why

22 did the United States not block the GAC consensus?

23 Because clearly if they had, as we saw in this period,

24 ICANN mechanically followed the GAC, and the application

25 would have gone through as the Persian Gulf went

1 through.

2 ARBITRATOR BONNER: Mr. LeVee, objection?

3 MR. LeVEE: I so apologize to interrupt, but
4 could we take a break? My client, who's had a double
5 hip replacement, is in pain. So if we could just take a
6 ten-minute break, she can decide how she wants to
7 proceed.

8 ARBITRATOR BONNER: Of course. We will recess
9 for ten minutes. We'll resume at around 10:50.

10 We're in recess.

11 (Recess.)

12 ARBITRATOR BONNER: All right. We're back on the
13 record.

14 Mr. Thorne?

15 MR. THORNE: Judge Bonner, because it's important
16 and I want to make sure we've done our very best job on
17 the question of whether the GAC needs to provide a
18 rationale, I thought I would mention something that I
19 brought up in the opening. I'm getting a copy made so
20 that you can see it.

21 But GAC -- ICANN's own summary of what happened
22 in DCA Trust, they issued a board resolution
23 describing -- a board resolution describing what
24 happened in DCA Trust. They said the panel in DCA Trust
25 cited two main concerns relating to the GAC's advice in

1 DCA's application.

2 Number one, the panel was concerned that the GAC
3 did not include and that ICANN did not request a
4 rationale of the GAC's advice. So that was ICANN's own
5 interpretation of that precedent.

6 Now, the next question --

7 ARBITRATOR MATZ: Are you reading from a
8 document? Because I missed the --

9 MR. THORNE: I'm quoting a document that I will
10 have a copy of for you momentarily.

11 ARBITRATOR MATZ: Okay. Thank you.

12 MR. THORNE: The point is that's how ICANN
13 understands the DCA Trust precedent. Now we go to Judge
14 Matz's question -- was it your question, Judge Matz?

15 If you have different precedents -- and I don't
16 know of a different precedent -- that says the GAC
17 doesn't need a rationale. But if you were evaluating
18 the soundness of DCA, I'd like to invite my colleague,
19 Greg Rapawy, briefly to -- with the panel's indulgence,
20 to walk through the bylaws that support the correctness
21 of the DCA precedent.

22 ARBITRATOR BONNER: All right.

23 MR. RAPAWY: I thank you, Judge Bonner, and
24 members of the panel. I was planning to work primarily
25 from the document that we handed out before that has key

1 provisions of the articles, bylaws, and Guidebook and
2 just to make sure that we had made our best case on the
3 question whether the text of the bylaws is consistent
4 with the reading that we think it was given in DCA
5 Trust, along with a number of other decisions.

6 I -- in doing this, I want to focus both on the
7 parts of the bylaws that apply directly, we think, by
8 their terms to the GAC itself, which the board, then,
9 has an obligation to enforce. And also to go through
10 the parts of it that apply to ICANN as a whole, which
11 the NGPC also has an obligation to comply with, although
12 they don't apply to the GAC directly.

13 So starting with the bylaws, Article I,
14 Section 2, that's the Core Values section. And a little
15 piece of text at the end there makes clear that this
16 section applies to any ICANN body making a
17 recommendation or decision.

18 And so I think that would, by its terms, include
19 the GAC.

20 And that any body doing so has the obligation to
21 exercise its judgment to determine which core values are
22 most relevant.

23 So we think that in itself is a requirement, to
24 have some agreement on which of the values are relevant,
25 but then it goes further, to determine if necessary an

1 appropriate and defensible balance among competing
2 values.

3 If you don't have agreed reasons for a decision,
4 we don't think that you could have complied with that
5 provision.

6 ARBITRATOR BONNER: Give me that provision again.
7 I'm looking at the handout you gave us, and I don't see
8 it. Which one is it?

9 MR. RAPAWY: On the first page, bylaws, Article
10 I, Section 2, that little paragraph down there at the
11 end after the numbered paragraphs, it's sort of a footer
12 to the section.

13 ARBITRATOR BONNER: I see it.

14 MR. RAPAWY: So any ICANN body shall exercise its
15 judgment, and then going further, must determine if
16 necessary and appropriate and defensible balance among
17 competing values.

18 And we would tie that back to two decisions that
19 have interpreted that to require a reasoned analysis.

20 And I would cite Vistaprint, which is in the
21 record as CLA 004, paragraph 190. And then the decision
22 we've cited as GCC -- I'm also going too fast -- GCC
23 Interim, which we cited as CLA 029, paragraph 76.

24 So that's where we get the idea that there has to
25 be a reasoned analysis. And if you agree with the

1 analysis in Vistaprint and GCC Interim, although neither
2 of those cases were directly discussing the GAC, we
3 think that plain language of that last footer paragraph
4 there takes you to the proposition the GAC itself has an
5 obligation to do what is described in those decisions to
6 provide a reasoned analysis.

7 ARBITRATOR BONNER: Because of the language "any
8 ICANN body"?

9 MR. RAPAWY: Yes.

10 ARBITRATOR BONNER: All right.

11 MR. RAPAWY: Now, going to the Article III, this,
12 I think, Mr. Thorne covered before. I wanted to provide
13 one additional cite in connection with it. So Article
14 III, Section 1, just a little bit further down on that
15 page applies by its terms to ICANN and its constituent
16 bodies. That would include the GAC, I think it's now
17 agreed. And they have both the transparency and the
18 fair procedures obligations, that you discussed the
19 distinction between those earlier. And the additional
20 cite I would give you there is the .sport decision,
21 which --

22 ARBITRATOR BONNER: Dot what?

23 MR. RAPAWY: .sport decision.

24 ARBITRATOR BONNER: Okay.

25 MR. RAPAWY: And in particular, paragraph 7.90,

1 the .sport decision.

2 And I apologize for not writing down the CLA
3 number when I was putting together the notes, but it is
4 cited in our brief.

5 So we think that that is something that the GAC
6 had to do and that the NGPC had an obligation to inquire
7 into whether the GAC did that.

8 We also draw, maybe less directly, I think still
9 a pretty strong inference from the text of Article II,
10 Section 3 and Article IV, Section 1. Those are the ones
11 above and below. I think we've made the point that we
12 believe that GAC advice is a type of singling out a
13 particular party for disparate treatment by ICANN as a
14 whole.

15 I understand ICANN's contrary position is that
16 when the GAC decides -- oh, I'm reminded that .sport is
17 CLA 032, just to complete that cite.

18 So Article II, Section 3, I think the main point
19 of dispute there is whether giving GAC advice counts as
20 singling out a party for disparate treatment.

21 We think that probably read in that provision is
22 singling out a party for disparate treatment, and the --
23 and if that is the case, then the requirement that it be
24 justified by substantial and reasonable cause is right
25 there in the text.

1 And then, finally, the accountability obligation.

2 ARBITRATOR BONNER: Are you saying that the fact
3 that GAC gives advice with respect to a particular
4 application by, let's say, a particular company --

5 MR. RAPAWY: Uh-huh.

6 ARBITRATOR BONNER: -- to essentially reject or
7 advising the rejection of the application, that that
8 itself is disparate treatment without warrant?

9 MR. RAPAWY: Yes. And that is totally something
10 they can do if there is substantial and reasonable
11 cause, which if the GAC has a good reason, there is.
12 But it has to have that reason.

13 ARBITRATOR BONNER: So a public policy interest
14 in the sensitivities of a name to people that are within
15 a country or multiple countries, wouldn't that be a
16 sufficient public policy reason for giving advice to
17 reject an application?

18 MR. RAPAWY: So we don't think -- so first -- I
19 mean, I think that at this stage of the argument where
20 I'm focusing on point that there is no agreed public
21 policy rationale by the GAC and the NGPC never
22 investigated to see whether there was on such, but if
23 you were to get to the question of whether the
24 sensitivities to a particular geographical name were for
25 a public policy reason, we think that it could not be.

1 Because we think the Guidebook process for
2 assigning geographic names is exclusive, and we think
3 that the -- to the extent that a sensitivity could be an
4 acceptable public policy reason, it would have to be at
5 least a public policy reason that was agreed upon by the
6 full GAC.

7 So in theory, you could have a lot of different
8 public policy reasons. You touched upon some of them
9 yesterday. The idea of certain types of conduct that
10 are criminal, such as child pornography, you might have
11 religious sensitivities as well.

12 Islam and halal are other types of strings that
13 have that, that we think would legitimately fall within
14 the concept of sensitivity. But merely saying we think
15 we own this name, which is what Brazil essentially said
16 here, would not be an admissible reason for the GAC.

17 ARBITRATOR O'BRIEN: Counsel, I have a question.
18 It may or may not be relevant.

19 MR. RAPAWY: Yes.

20 ARBITRATOR O'BRIEN: Is there any group,
21 indigenous group of people that call themselves Amazons?

22 My understanding is it came from Greek mythology.
23 But is there any indigenous people that call themselves
24 Amazons that you're aware of?

25 MR. RAPAWY: That I'm personally aware of, no.

1 I'm aware that was a disputed issue in question before
2 the ICC expert and that he found for a number of reasons
3 that no material harm had been shown to a identifiable
4 group, which is the test under the Guidebook.

5 I don't think -- I mean, you would have, I
6 suppose, people who called themselves the residents of
7 Amazonas, which is -- but as we've discussed, that's not
8 an exact match for the geographical name on the list.

9 Does that answer your question?

10 ARBITRATOR O'BRIEN: Thank you.

11 MR. RAPAWY: And then the accountability points
12 under Article IV. I think Mr. Thorne made, and I'm not
13 going to belabor it.

14 But I do think that to the extent that you agree
15 with the DCA Trust panel, that the accountability
16 requires accepting responsibility for decisions, I do
17 think there's a problem with the GAC on the one hand
18 giving no reasons whatsoever and then the board on the
19 other hand saying, we will presume, essentially, that
20 GAC consensus means --

21 ARBITRATOR MATZ: What?

22 THE WITNESS: Presume that GAC consensus, in and
23 of itself, means there were sufficient public policy
24 reasons, and we won't inquire further.

25 ARBITRATOR BONNER: You agree that the ITC (sic)

1 expert -- I mean, who found that there was no material
2 harm in the use of at least the English name Amazon,
3 that his decision was actually not available to the NGPC
4 because it was made after the NGPC actually rejected the
5 application?

6 MR. RAPAWY: With respect, I actually disagree
7 with that. I know there is some confusion on the
8 chronology in the briefs.

9 So the ICC expert's decision was made after the
10 GAC advice. And ICANN has forcefully argued that the
11 GAC advice came after and that -- sorry, that the IC
12 expert point came after the GAC advice. But it came
13 before the NGPC's decision. And it was cited in one of
14 our letters to the NGPC.

15 So it would have been possible for the NGPC to
16 consider it, although they did not do that.

17 ARBITRATOR BONNER: All right. So it's in,
18 actually, one of the documents referred to by the NGPC
19 in that it considered or that had been submitted to it?

20 MR. RAPAWY: Yes. In that long list at the end,
21 one of the letters has a reference to the ICC expert,
22 one of the letters from --

23 ARBITRATOR BONNER: Thank you for the
24 clarification.

25 MR. THORNE: This is a copy of ICANN 's press

1 release describing what they understood DCA Trust
2 (inaudible), which I read from.

3 ARBITRATOR BONNER: Let's mark this as hearing
4 exhibit next in order which I think is 4.

5 MS. BEYNON: I believe it should be Hearing
6 Exhibit 6.

7 ARBITRATOR O'BRIEN: What are Hearing 4 and 5,
8 then?

9 MS. BEYNON: I've got them right here. We've
10 marked 4 as the slide presentation that was the opening
11 statement. I'm happy to hand out a set of the marked
12 exhibits from yesterday.

13 (Hearing Exhibit 4 marked for
14 identification.)

15 MS. BEYNON: And 5 is our slide for today, is
16 what we were planning to mark that. But we can get the
17 exhibits straightened out.

18 (Hearing Exhibit 5 marked for
19 identification.)

20 ARBITRATOR BONNER: All right. So this will be
21 Hearing Exhibit 6. And Hearing Exhibit 6, for the
22 record, is a -- appears to be a release of some sort by
23 ICANN with respect to the DCA Trust decision.

24 I think that's a sufficient identification for
25 the record.

1 (Hearing Exhibit 6 marked for
2 identification.)

3 ARBITRATOR BONNER: Okay, Mr. Thorne.

4 MR. THORNE: Your Honor, just a few more points
5 to follow up what Mr. Rapawy talked about under the
6 bylaws. There was actual disparate treatment here
7 between two strings .ipiranga and .yamaxun on the one
8 hand and .amazon and the Chinese equivalence.

9 Mr. LeVee thinks that the .ipiranga is
10 particularly important because he had a slide on this
11 yesterday. And if you remember, his slide described the
12 Amazon River. It's a very large river. And he called
13 the Ipiranga -- I thought it was a river, but he calls
14 it a brook. It is in the Brazilian National Anthem. I
15 don't think that is of moment either, but he described a
16 rationale that the NGPC might have been thinking of
17 in -- if they were called upon to distinguish between
18 Amazon and Ipiranga.

19 It is clear that the NGPC has to avoid disparate
20 treatment including through its constituent advice.
21 It's not enough to say that the GAC objected here and
22 that's the reason we differentiate. That's not a
23 reason.

24 But the point I want to make on this is several
25 prior decisions, such as Vistapoint (sic), which is CLA

1 4 in paragraph 190, talk about the problem of ICANN's
2 decision-makers not giving justifications and the
3 counsel coming in later to fill it in. And the later
4 fill-in by counsel is not allowed to substitute for the
5 NGPC offering a rationale.

6 And in this particular situation, I don't think
7 the NGPC would have said size of river or body of water
8 as the determining factor because they had Persian Gulf
9 in front of them, which is an even bigger body of water.
10 The only things that correlate to the difference between
11 Ipiranga and Amazon are it was a Brazilian oil
12 company applying for Ipiranga and a U.S.-based -- an
13 inadmissible U.S.-based company applying for .amazon.
14 And the fact that the GAC advice, just the GAC advice it
15 issued against Amazon, those were the only differences.
16 That's what correlates to this disparity.

17 Switching gears, the panel had invited the GAC
18 chair at the time of .amazon, Heather Dryden, to provide
19 written testimony. We talked about this. She was the
20 same GAC chair in the DCA Trust case. She declined the
21 invitation.

22 It's quoted in some length in two different
23 documents that we've had. I'm not going to go through
24 the entirety of it, but I think a flavor of her
25 testimony in the .africa case might be helpful.

1 The two documents are CLA 5, which is the raw
2 transcript, and CLA 2, the .africa decision, DCA Trust
3 decision where the panel there thought it was important
4 to quote at length from Ms. Dryden. I just want to give
5 you a feeling for it.

6 Starting on -- I'm just going to walk through a
7 couple of the slides here. Arbitrator Kessedjian wanted
8 to understand -- like this panel has asked -- very
9 precisely, as concrete as you can be, what are these
10 concepts that were described in her written testimony?
11 How are they applied by the GAC in the DCA case?

12 So she's referring back to the witness statement
13 that Ms. Dryden had provided, and Ms. Dryden's answer
14 was (as read):

15 "That is what the witness
16 statement says, but the link to the GAC
17 and the role that I played in terms of
18 the GAC discussions did not involve me
19 interpreting those three things. In
20 fact, the GAC did not provide rationale
21 for the consensus objection."

22 Judge Cahill then jumps in and asks (as read):

23 "But you want to check if the
24 countries are following the right --
25 following the rules. If there are

1 reasons for rejecting this or if it
2 falls within the three things that my
3 colleague's talking about."

4 Ms. Dryden answers (as read):

5 "The practice among governments is
6 that governments can express their view,
7 whatever it may be, and so there's a
8 deference to that."

9 That's certainly the case here as well. If a
10 country tells -- tells the GAC it has a concern, that's
11 not really something that's evaluated in the sense you
12 mean by the government -- the other governments. That's
13 not how governments work with each other.

14 And then she goes on to say (as read):

15 "This is just politics. It's all
16 about politics."

17 She wants to be clear in saying the GAC did not
18 identify a rationale in that case, and that the Early
19 Warning that had been offered, an Early Warning would
20 not provide a rationale.

21 ARBITRATOR BONNER: Where does she say that?

22 MR. THORNE: This slide, line 20, we had some
23 discussion earlier about Early Warnings. So Early
24 Warnings were issued by individual countries and they
25 indicated their rationale, but again, that's not a GAC

1 view.

2 Arbitrator Kessedjian was apparently concerned
3 that the witness -- we're going off script, was not
4 following what the written testimony had indicated, and
5 so she said, I want to -- I just want to come back to
6 the point that I was making earlier to your paragraph 5,
7 referring to written testimony. You said -- you
8 answered to me saying, That is my declaration, but it
9 was not exactly what is going on. Now, we are here to
10 make sure the rules had been obeyed by -- I'm
11 synthesizing. I don't understand how as the chair of
12 the GAC you can tell us that basically the rules do not
13 matter.

14 Again, I'm rephrasing what she said.

15 I want to give you another opportunity to explain
16 to us why you were mentioning these criteria in your
17 written declaration, but now you are telling us this
18 doesn't matter.

19 And the arbitrator asks -- or offers the witness,
20 You want to read again what you wrote? It's -- or
21 supposedly wrote. It's paragraph 5.

22 She says, I don't need to read my declaration,
23 thank you.

24 The header for the GAC's discussion throughout
25 was to refer to strings or applications that were

1 controversial or sensitive. That's very broad.

2 The arbitrator interrupts, I'm sorry, you say the
3 rules? Say problematic -- these are the things she
4 listed. Problematic, potentially violate national law,
5 raise sensitivities. These are precise concepts.

6 The witness repeats those and says, Those are
7 quite broad.

8 The arbitrator asks, So what are we left with?
9 No rules?

10 And the answer, No rationale with the consensus
11 objections.

12 We have the same situation in this case as in
13 that case. I won't belabor it, but one finding,
14 paragraph 113 of the decision, is in light of the clear
15 transparency obligation provisions of the bylaws the
16 panel would have expected the ICANN board, at a minimum,
17 to investigate the matter further.

18 And then paragraph 109, which we went through
19 before.

20 And Mr. LeVee conceded that if the board actually
21 had knowledge that the GAC did something wrong --

22 ARBITRATOR MATZ: This is 23?

23 MR. THORNE: Yes. This is from the decision of
24 DCA Trust, paragraph 100.

25 (As read):

1 "If the board actually knew it,
2 then we are dealing with board conduct."

3 ARBITRATOR MATZ: This is Mr. LeVee speaking
4 when?

5 MR. THORNE: In the DCA Trust case about the
6 .africa application.

7 ARBITRATOR MATZ: This is a transcript of
8 something he said?

9 MR. THORNE: That is a transcript of what he said
10 to the panel that is quoted by the panel decision,
11 because the panel found it important.

12 So next-to-last point I make and then I will sit
13 down, Judge Matz, you asked about the balance of public
14 and private. We submit that the board here did not
15 evaluate Amazon's interest. Other than citing the
16 letters they received at the end, there's nothing in the
17 written rationale that strikes a balance between the
18 different core values.

19 Mr. Atallah, I think, would go on at great
20 length. Mr. Fadi Chehadé, we had a tape ready to play
21 yesterday if it had been useful.

22 They're marketing top-level domain names because
23 companies want these. These are important for the
24 development of the Internet. There are a lot of
25 advantages. This decision by the NGPC is nothing about

1 that as a balance to the GAC advice.

2 ARBITRATOR BONNER: Are you asserting that the
3 NGPC itself failed to give reasons or rationale for its
4 decision to deny or reject the Amazon applications?

5 MR. THORNE: Yes, Your Honor.

6 The reasons can't be we received GAC advice and
7 we followed it. The reasons have to be we've -- the
8 proper course in the bylaws is you identify the relevant
9 core values, you determine how they matter here, and you
10 balance them to reach a decision.

11 ARBITRATOR BONNER: Well, that's a fairly highly
12 nuanced reasoned decision you just described. But you
13 don't think that they gave a sufficient reasoned
14 decision for their action, in essence, denying or
15 rejecting the Amazon applications?

16 MR. THORNE: That's correct. And one reason is
17 there is no discussion of the countervailing Amazon
18 interests. There were private investment and innovation
19 opportunities affecting a very large number of
20 customers, and we're going to deny that because we think
21 the public interest identified by Brazil was greater.
22 There's no balancing of interest.

23 ARBITRATOR BONNER: There's no balancing --
24 that's a little different than arguing that there's not
25 a reasoned decision.

1 MR. THORNE: A reasoned decision, as decided by
2 the GCC in Vistaprint cases, requires -- let me pull up
3 the language.

4 ARBITRATOR BONNER: It stands for the proposition
5 there needs to be balancing, in other words, that the
6 decision of the NGPC needs to not just state why it's
7 rejecting the application, but it also had to do that in
8 the context of balancing that against the interest of
9 the applicant.

10 MR. THORNE: Article I, Section 2, which
11 Mr. Rapawy went through, said that footer language, any
12 ICANN body making a recommendation -- here we're talking
13 about the NGPC, not the GAC, the NGPC making a decision
14 as to determine the core values relevant, how they
15 apply, determine an appropriate defensible balance.
16 Vistaprint and GCC hold that defensible balance requires
17 a reasoned analysis. That's a familiar idea to courts
18 or administrative bodies subject to review like the
19 administrative procedure.

20 ARBITRATOR BONNER: Okay.

21 MR. THORNE: That didn't happen here. There's a
22 missing piece. Even if you credited public interest on
23 the one hand, the balance against Amazon's interest is
24 missing.

25 I am not going to go through all of the core

1 values favoring Amazon. Yesterday Mr. Atallah, I
2 thought, did testify, for example, there are benefits to
3 being the top-level domain owner controlling his own
4 destiny, giving users confidence, opportunities to
5 improve security -- this is in Mr. Hayden's testimony
6 and Mr. Atallah's testimony -- and procompetitive
7 benefits to owning the gTLD.

8 Let me shift to remedy. I'm hoping you get this
9 far.

10 We're asking the panel to instruct the NGPC to
11 award the strings to .amazon and the Chinese and
12 Japanese equivalents to Amazon.

13 DCA Trust is the most aggressive of the
14 precedents again, holding that because you're following
15 ICDR rules as a baseline, you have power to issue a
16 binding order.

17 The 2016 bylaws that have been adopted since by
18 ICANN confirm that our view confirms or codifies that
19 holding.

20 ICANN agrees that -- they disagree that your
21 power extends to binding orders, but they agree you'd
22 recommend a result here.

23 The only contrary precedent is Vistaprint, which
24 notes the force of DCA Trust reasoning. This might be
25 an example, Judge Matz, where you want to compare the

1 merits of the two decisions, the points that DCA Trust
2 relied on in saying that you should have the full
3 strength of ICDR binding relief involve the importance
4 of accountability. If you don't order this, there's
5 nobody else to order it. If they're enforceable, the
6 application contracts require waiver of all other
7 remedies by the applicants.

8 But whether you issue a remedy that is binding or
9 a recommendation, there are two things I want to
10 emphasize.

11 First, we've been doing this a long time.
12 Mr. Hayden's declaration talks about three years of
13 negotiating, trying to share the top-level domain with
14 Brazil. A long time without success.

15 We would urge you to set a deadline for board
16 action. If you recommend the board do something or if
17 you require them to do something, we think you should
18 set a deadline.

19 One thing that Mr. LeVee will say, let me just
20 anticipate, the process in the bylaws says if the board
21 is going to reject GAC advice, it's supposed to talk to
22 the GAC and then see if there's an accommodation. And
23 that's a lot. We talked about this yesterday.

24 If the board wants to follow that process here
25 and have further talks, it's important to have a

1 deadline. The bylaws that would require -- this is
2 outside the IRP context -- would require further
3 negotiation or discussions between the board and the GAC
4 have to occur in a timely and efficient manner. So
5 that's already in the bylaws, the concept if there's
6 going to be further discussion, it's got to be timely.

7 And then they go on, the bylaws go on in the next
8 paragraph, which is not cited here, to say that it's
9 possible no solution may be reached.

10 In other words, you may end up -- I guess that we
11 do cite it. It's Article XI, 2(k) (sic). It's possible
12 to award the application, never getting the GAC fully
13 onboard. You might try again, but if you fail, the
14 application goes forward.

15 And the other suggestion we have is if any
16 process between the board and the GAC is allowed, we
17 would urge you to retain jurisdiction so that if
18 ultimately this fails, we can come back to a panel that
19 has invested the time and understanding the case and the
20 facts. It would be more efficient for this panel to
21 consider Round 2 than a new panel starting fresh.

22 No other questions, Your Honor.

23 ARBITRATOR BONNER: Wait a minute. Before I let
24 you go, I'm not sure whether you argued 6, but I guess
25 your position is that the NPGC (sic) did abdicate its

1 duty or role with respect to making an independent
2 decision on the merits?

3 MR. THORNE: Absolutely, Your Honor. If that's
4 not clear, then I --

5 ARBITRATOR BONNER: Well, I just -- for some
6 reason, I thought maybe you skipped over 6, but maybe I
7 just -- my note-taking wasn't so good.

8 MR. THORNE: I may well have skipped a slide or
9 two, but we -- in the statement issues that we handed up
10 yesterday, we -- I think we have three ways of looking
11 at the case. There are three different ways you could
12 decide this.

13 Way 1 is the GAC failed to give advice or if you
14 credit the reasons of Brazil to the whole GAC, contrary
15 to what Ms. Dryden says would be proper, those reasons
16 are flawed. They are wrong. The real reasons may be
17 something else. But the NGPC should have investigated.
18 They did not have enough facts; they didn't. And they
19 certainly did not issue a reasoned decision evaluating
20 factors or doing anything in Amazon's interests.

21 ARBITRATOR BONNER: Okay. But I would assume --
22 yeah, those are three different possible grounds, I
23 suppose.

24 But if -- perhaps I don't know. I'm going to ask
25 this of Mr. LeVee as well, but if the record before us

1 is or if we think we would conclude as a matter of fact
2 that the NGPC essentially deferred to the GAC advice,
3 consensus GAC advice, without making any independent
4 determination as to whether there was a -- were valid
5 and legitimate public policy interests behind it, in
6 other words, just deferred to it, that would be granting
7 a conclusive presumption to the GAC consensus advice
8 that would not be consistent with the rules, which the
9 rules require do give rise to a strong presumption that
10 the GAC advice is well-founded and based upon valid
11 public policy interests.

12 I think that's what the presumption is. But if,
13 in fact, they abdicated their role and didn't make an
14 independent decision here, if that's what the record
15 shows or doesn't show --

16 MR. THORNE: That's exactly the argument. It's
17 the difference between a presumption and a veto,
18 delegating the authority that belongs to the NGPC as the
19 representative of the community in this area, delegating
20 it contrary to a bunch of things, like the new provision
21 that I added to the excerpts that say the advisory
22 committees don't make decisions for ICANN.

23 ARBITRATOR BONNER: Well, I thought that was part
24 of your argument, and I just wanted to make sure that
25 Mr. LeVee -- that there are probably a number of things

1 you respond to, but I would like to hear a response to
2 that, among the other issues that have been raised here.

3 All right. Any further questions of Mr. Thorne
4 before we take a lunch break?

5 ARBITRATOR O'BRIEN: I have one more question and
6 maybe Mr. LeVee as well.

7 If you take a look -- and I was trying to go back
8 through the early alerts. To the extent that the early
9 alerts form a basis which perhaps Mr. LeVee will argue
10 for the decision, the public interest decision that was
11 made by the board, you have got -- it's in the book.
12 It's a sovereign right of the country, sensitivity of
13 the people of Amazonia, and I asked your colleague about
14 that, whether there is an indigenous tribe called the
15 Amazons or something like.

16 And then the last one is reserving the .amazon
17 domain name for people in Amazon to use at some point in
18 the future when the Amazon is more fully developed.

19 With respect to that last issue of reserving the
20 domain name kind of as -- like patrimony that belongs to
21 those people for a future use, what is Amazon's response
22 to that concern? And would that be a valid public
23 interest concern for the GAC to base its decision on?

24 MR. THORNE: The answer is no, that would not be
25 a correct basis. That would be both legally and I think

1 factually incorrect.

2 The first legal answer to that is the applicant
3 Guidebook anticipated that there might be a current
4 applicant and a future applicant, somebody that --
5 Mr. Atallah's testimony was in response to one of Judge
6 Matz's questions was they missed the boat. They've got
7 a future idea. The people -- in the future, there may
8 be -- Mr. Atallah used the word "future" about four
9 times.

10 If that's the argument, the Guidebook anticipated
11 in a different -- different structure called a community
12 objection. The governments also could have used other
13 than the GAC process, the GAC advisement. The community
14 objection, the Guidebook says it shall not be a material
15 detriment causing the current applicant to lose, that
16 somebody in the future is going to apply for this.

17 If there were two applicants going head to head,
18 you've got to resolve, there's a contention.

19 But if there's a current applicant and the future
20 applicant says, Wait, no, I might want to use that in
21 the future, that's an invalid reason under the Guidebook
22 as written. And I would then look into text and
23 structure as a way to understand what the Guidebook
24 tells you, that that's a decision they made. The future
25 use does not supplant a current use.

1 ARBITRATOR O'BRIEN: Do you have a cite for that?

2 MR. THORNE: It's in our prehearing brief.

3 I've got two other related points. One is this
4 is a situation where future use by the Amazonians was
5 not precluded. Amazon offered -- and this -- the NGPC
6 acknowledged but I think counted as a detriment to
7 Amazon. Words, Amazonia, Amazonica, Amazonas -- all
8 these strings are available. Those are the terms that
9 that population actually uses. So reserving Amazon,
10 which they don't use, when these other names are
11 available is wrong. And finally, Amazon offered to
12 share .amazon on various terms under the cite to the
13 Guidebook provision on community objections is
14 Section 3.5.4.

15 ARBITRATOR O'BRIEN: Thank you.

16 MR. THORNE: I have one other request for the
17 panel. You may want to take this under consideration.
18 Mr. LeVee may agree or disagree.

19 We cited a fair number of documents in the record
20 in our prehearing brief and in the other briefs. We
21 didn't cite everything. I know that there's a
22 voluminous record here, but we cited a fairly small
23 number of things. And I hope my not mentioning every
24 single document we cited in our prehearing brief will
25 not preclude your considering the things we cited in

1 that brief also.

2 ARBITRATOR BONNER: I think I'm perfectly -- I'm
3 not sure -- let me just say that I think if it's cited
4 in either parties prehearing brief, you can consider
5 that we will consider those exhibits even if they
6 haven't been mentioned in the hearing.

7 ARBITRATOR MATZ: I agree.

8 ARBITRATOR O'BRIEN: I agree.

9 MR. THORNE: Thank you.

10 ARBITRATOR BONNER: Thank you, Mr. Thorne.

11 So I think we should take our lunch recess here.

12 MR. LeVEE: Lunch will not be served until noon.

13 We can certainly take the recess. The alternative is
14 I'm happy to start.

15 ARBITRATOR BONNER: Are you prepared to begin
16 argument?

17 MR. LeVEE: I am. As long or as short as you
18 want.

19 ARBITRATOR BONNER: Well, we'll at least go until
20 lunch is here.

21 MR. LeVEE: It would be a shame to take lunch and
22 not have it.

23 ARBITRATOR BONNER: All right. So, Mr. LeVee, if
24 you will.

25

1 ARGUMENT

2 BY MR. LeVEE:

3 So I'm going to provide, also, copies of my
4 slides. And I'm also going to provide the panel a
5 binder with some exhibits. I'm not going to reference
6 each, but I took Judge Matz's statement yesterday to
7 some heart that it would be useful in showing the
8 exhibits as opposed to asking to wade through
9 everything.

10 ARBITRATOR BONNER: Let's make this Hearing
11 Exhibit 7. What I'm referring to is the set of the
12 slide deck that has just been presented by ICANN's
13 counsel as part of its closing presentation.

14 (Hearing Exhibit 7 marked for
15 identification.)

16 MR. LeVEE: Yes, thank you.

17 Some of the exhibits you saw yesterday, but I
18 thought it would be helpful to have them in one
19 location.

20 So because I'm going to only have limited time
21 before the lunch arrives and distracts us all, I'm going
22 to go through now the summary of my argument.

23 And then I'm going to skip ahead to a slide or a
24 couple of slides that discuss the DCA case, because
25 Mr. Thorne spent a considerable amount of his time

1 addressing that.

2 But let me just give quickly the summary of my
3 argument because it is in many respects a direct
4 refutation of what you heard.

5 First, the GAC insisted on and received the right
6 to give advice on any application for any reason.
7 Mr. Atallah so testified yesterday. It's in his witness
8 statement. Mr. Thorne did not even ask him questions on
9 that topic.

10 Second, that the ICC's dismissal of the community
11 objection to Amazon did not in any way nullify the
12 GAC advice which predated the dismissal in all events,
13 but more importantly, the GAC had the right to object to
14 any string whether or not there was another objection
15 before the ICC.

16 Third, the GAC issued consensus advice on the
17 applications that were supported by numerous countries
18 across the world and to which no country objected.

19 Fourth, there really is no evidence before the
20 panel that the GAC advice -- we'll come to what the NGPC
21 did, but that the GAC advice was motivated by anything
22 other than legitimate public policy interests.

23 The NGPC thoroughly investigated over a ten-month
24 period. There's no evidence that the NGPC was concerned
25 about so-called threats from Brazil or Peru. I asked

1 Mr. Atallah if the subject ever came up at seven NGPC
2 meetings, and he said it did not. He attended all of
3 them.

4 Surely, if people were concerned in doing some
5 kind of tradeoff, there would have been at least some
6 discussion of the topic. Instead, Mr. Atallah confirmed
7 that there was none.

8 I'll explore later this afternoon the absence of
9 discrimination.

10 And I also want to emphasize that Mr. Atallah's
11 testimony supported ICANN's position on all of these
12 issues, and I'm going to go into his testimony at some
13 length.

14 The one thing that he also testified in his
15 witness statement that is very important is that the GAC
16 specifically bargained for the right not to submit a
17 rationale. This is in his witness statement, Atallah
18 Exhibit 1.

19 And he says in paragraph 20 on page 8 that in a
20 letter to the board, the GAC asked that ICANN remove
21 references indicating that future GAC Early Warnings and
22 advice must contain particular information or to take a
23 specific -- a specified form to provide flexibility.
24 And at the next meeting between the board and the GAC,
25 the board agreed that it was not -- it had no intention

1 to direct the GAC -- to direct to the GAC either its
2 processes or the wording it should use corresponding
3 into giving advice and to remove from the Guidebook any
4 requirement that advice must give specific information.

5 Now, why is that important? Well, first, we've
6 had this long dialogue as to whether the GAC had some
7 obligation to give a rationale. Mr. Atallah explained,
8 no, the GAC was not required to give a rationale. It
9 was something specifically negotiated between the GAC
10 and the board.

11 And candidly, in most of the paragraphs where he
12 described the relationship between the GAC and the
13 board -- he was here yesterday. He received zero
14 questions from Mr. Thorne on any of those topics. I
15 asked a few.

16 Mr. Thorne spent most of his time asking about
17 the other motivations of Brazil and Peru, but there were
18 no questions about this particular topic. And so the
19 result is that we have evidence that's undisputed that
20 the GAC specifically bargained for and received in the
21 Guidebook the ability to not provide the rationale.

22 ARBITRATOR BONNER: Mr. Thorne has argued,
23 though, that the -- that there is case precedent, either
24 DCA Trust or the like, that have essentially, if we
25 followed it, are precedent for the proposition that the

1 GAC advice must be accompanied by a statement of reasons
2 or rationale.

3 MR. LeVEE: Yes, and I'm going to skip to that on
4 the DCA decision. So I'll answer by saying I'm going to
5 skip to Slide 40 in a second, but I want to address one
6 other issue before that.

7 This is the first time that someone has argued in
8 this way that the GAC had an obligation to do something
9 under the Guidebook or should have had an obligation to
10 do something under the Guidebook even though it's not
11 there. So let's concede that there is no language in
12 the Guidebook that requires it.

13 The question, then, is do the bylaws through --
14 we looked at several provisions -- through some other
15 form, even though nothing that was read to you this
16 morning actually says the GAC must give a rationale, can
17 we infer from the Guidebook -- here's the first problem,
18 which is that Amazon is too late to bring this claim.

19 ARBITRATOR BONNER: From the bylaws or the
20 Guidebook?

21 MR. LeVEE: They are too late to bring the claim
22 that the Guidebook did not have a certain provision in
23 it. And there are multiple decisions, the booking.com
24 decision being the first one. But there are multiple
25 decisions that say -- the Guidebook is the Guidebook.

1 And if you had a problem with the Guidebook and you're
2 going to argue that the Guidebook was wrong, contrary to
3 the bylaws, you had an obligation to say something
4 during the course of the development of the Guidebook.

5 Amazon said nothing. And so we're left here,
6 five years after the final development or final issuance
7 of the Guidebook, with a challenge that essentially says
8 the Guidebook may not have language in it that says that
9 the GAC has to issue a rationale, but it should have had
10 such a provision. The board's decision not to impose
11 this obligation on the GAC was wrong.

12 And every single IRP panel that has addressed the
13 question, Merck, Booking.com -- there are others that I
14 will cite to you after the lunch break, every single
15 panel that has addressed that issue has said it is too
16 late years later to challenge the Guidebook by saying
17 that it violates the bylaws and that -- or that it has a
18 process that somehow is improper.

19 And so even before we get to the question of
20 whether there's precedent, I do think that the entire
21 argument, which really has sort of crystalized in the
22 closing, wasn't really set forth this way in the briefs,
23 but the entire argument that the GAC's failure to
24 provide a consensus rationale, it self-violates the
25 bylaws and, therefore, the Guidebook because the

1 Guidebook doesn't contain the language. I think it's
2 barred.

3 ARBITRATOR MATZ: Is there anything in the record
4 in this matter that demonstrates what information was
5 either provided to Amazon or obtained by Amazon about
6 all of the ongoing iterations of the Guidebook?

7 MR. LeVEE: Yes. Every single draft was posted
8 on the Internet for public comment. So the drafts that
9 we're referring to -- and I'm going to come to them in
10 the course of my argument. The drafts of the Guidebook
11 that we're referring to, the first draft that makes this
12 change is Draft 7, which I think is in 2010, was posted
13 for public comment.

14 Draft 8 makes a couple of tinkering changes.
15 It's posted for public comment in 2011. It's available
16 to the world, and ICANN receives hundreds and hundreds
17 of comments. I cannot tell you as I sit here today if
18 Amazon commented on a particular issue, but I know that
19 Amazon was involved in the Guidebook -- they say so, in
20 the process leading up to the Guidebook.

21 ARBITRATOR MATZ: You know it, but how can we
22 confirm it?

23 MR. LeVEE: Well, it's in the parties' respective
24 briefs where the parties talk about the fact that Amazon
25 was aware of the drafts being issued.

1 But I think Amazon's precise awareness would be
2 beside the point. So long as Amazon had the opportunity
3 to see the drafts and to comment on those drafts and to
4 do something about it if Amazon thought that something
5 was wrong, then I think that's all that was required.

6 Here there's clearly notes, no question about
7 that. I can't put myself into the shoes of the others
8 sitting in this room and say, did they actually see a
9 draft? But drafts were posted, and there was
10 considerable public comment on each of those drafts.

11 ARBITRATOR MATZ: And will you in your later
12 comments address the proposition that DCA Trust
13 basically, without perhaps using this language,
14 concludes that the bylaws trump the Guidebook?

15 MR. LeVEE: I'm going to. I'm going to do it
16 right now.

17 ARBITRATOR MATZ: Okay.

18 MR. LeVEE: I wasn't planning this sequence, but
19 because it has taken up so much of everybody's time this
20 morning, I wanted to skip to it. So I'm skipping to
21 Slide 40.

22 And then I'm going to read with you the specific
23 provisions of the DCA opinion that counsel drew your
24 attention to.

25 First, to be clear, in DCA, the GAC did issue

1 consensus advice, and it did so following a single
2 closed meeting where one country spoke in favor of the
3 advice. The chair then asked whether any other country
4 had any comments. The answer was no. And so consensus
5 advice was issued.

6 We do not have any information about what
7 happened at that meeting except to the extent Ms. Dryden
8 testified to in an IRP. But the GAC had no transcript.
9 It had no other information. It simply sent a
10 communique to the board that GAC advice -- consensus GAC
11 advice was being issued.

12 Here we have literally the exact opposite. We
13 have the GAC issuing consensus advice, but it does so
14 following two meetings. The first meeting where there
15 is no decision taken, and then there's a three-month gap
16 in the middle of 2013.

17 What happens during the three-month gap? A lot
18 of lobbying occurs. And so Amazon may not have been
19 permitted to speak at the GAC meetings. That is the
20 rule of the GAC.

21 But Amazon surely knew what was happening. Why
22 do we know? Because Amazon was lobbying governments.
23 I'm going to show you those slides, but there are a lot
24 of them out of sequence.

25 Amazon lobbied the United Kingdom, United States,

1 Luxembourg, Germany. I'm going to show you those
2 letters after lunch.

3 And so Amazon was very active. They were
4 politically engaged. I know somehow Judge Matz
5 referenced earlier the whole word "politics" seems to
6 have taken on a dirty meaning in society in 2017, but
7 the GAC is governments. It is political and there is
8 negotiating. And Amazon fully knew how to try to take
9 advantage of that process.

10 And so you are right, Amazon didn't speak at the
11 GAC meetings, but they were very aware of what was
12 happening. They were lobbying governments, begging them
13 to stand up and oppose the GAC advice, because Amazon
14 knew the result of consensus advice would be bad for
15 their applications.

16 All they were seeking was one government to block
17 it. That's all it would have taken. And they couldn't
18 get it.

19 Instead, what we have is a very open discussion.
20 I'm going to -- we're going to walk through that exhibit
21 later today. We walked through it with Mr. Atallah
22 earlier yesterday where roughly 20 countries approved
23 the issuance of GAC advice.

24 And those countries were not only countries of
25 South America or the Caribbean. They were countries

1 that included Russia and China and Turkey. This was a
2 global decision. There were 130 members of the GAC.
3 And yes, the United States said, We're not sure about
4 this, but we're not going to object.

5 And whatever the reason the United States had for
6 doing that, the bottom line is the United States knew
7 that if it didn't object, in all likelihood, no other
8 country would, and that there would be consensus advice.

9 So there's a lot that took place that Amazon was
10 directly involved in between the two GAC meetings. And
11 then when you have the second GAC meeting where the
12 advice is issued, you literally have nearly 20 countries
13 supporting the advice. And the NGPC members knew that.

14 ARBITRATOR BONNER: Do you agree that the meeting
15 before the Durban meeting was in Beijing?

16 MR. LeVEE: It was.

17 ARBITRATOR BONNER: Okay.

18 And do you agree that that was closed?

19 MR. LeVEE: I don't remember if it was closed. I
20 think it was closed; I believe it was.

21 ARBITRATOR BONNER: I'm going to accept that it
22 was unless you disabuse me of that before the end of the
23 hearing.

24 MR. LeVEE: That's fine.

25 ARBITRATOR BONNER: The meeting in Durban was

1 open, but I think you agree that the GAC is a
2 constituent body of ICANN, correct?

3 MR. LeVEE: Of course.

4 ARBITRATOR BONNER: And so Article III, Section 1
5 of the bylaws would require that the GAC had procedures
6 that are designed to ensure fairness, right? It should
7 have procedures under that article that are designed to
8 ensure fairness.

9 And by the way, I really agree that is including
10 procedural fairness. Disabuse me if it's something
11 other than inclusive of procedural fairness.

12 So the argument is that under the bylaw Article
13 III, Section 1, that procedural fairness would require
14 that an applicant whose -- I'm going to just say an ox
15 is being gored, would have a right to be heard before
16 the GAC and/or to submit materials that are relevant to
17 the debate as to whether or not GAC advice should be
18 given.

19 They were denied that I think clearly in this
20 case. Unless you disabuse me of that, that seems to be
21 the fact of the matter.

22 So why is it that that does not violate Article
23 III, Section 1 and some precedent, by the way, of other
24 decisions I think that have been made by other IRP
25 panels?

1 MR. LeVEE: Well, first, I don't think there's
2 any precedent that says that. I'm coming to it.

3 Second, I don't think that procedural fairness
4 for the GAC means that everybody has a right to be
5 heard.

6 ARBITRATOR BONNER: I didn't say everybody. I
7 said --

8 MR. LeVEE: Or even the applicant.

9 ARBITRATOR BONNER: The applicant who stands to
10 essentially get a strong presumption against their
11 application if the GAC takes that advice, so that
12 there's material harm to that particular party. And
13 they're not allowed to make any presentation or say
14 anything or submit any materials. Isn't that -- that
15 seems to me fundamentally unfair.

16 MR. LeVEE: No, I do disagree, respectfully
17 disagree.

18 The GAC, as a governmental agency -- made up of
19 governments, certainly is entitled to have rules, but as
20 to who can speak in an orderly threshold of its
21 proceedings. And I think they take their cue often from
22 the United Nations, and I think the decision by the
23 GAC -- and they do have rules that in this instance
24 allow people to attend but not to speak -- limiting who
25 can speak to governments is designed to allow only the

1 governments to speak.

2 And if there had been a government that Amazon
3 could have persuaded to make its presentation for it,
4 then that would have happened.

5 So Amazon tried. I'll be showing you letters.
6 Amazon asked, you know, Speak on our behalf. Oppose the
7 consensus advice.

8 So you have an applicant that knows what's
9 happening. They are fully clued in, and they had the
10 opportunity to try to persuade governments to their
11 position. The fact that they don't get to speak at the
12 meeting I don't think tells us that the GAC is
13 procedurally unfair.

14 What we have, then, is under the Guidebook, the
15 specific -- the fact that automatically, if the GAC
16 issues consensus advice, the applicant, in this instance
17 Amazon, is encouraged to respond. And so the response
18 is to the GAC advice under the Guidebook. And I think
19 that is extraordinarily fair and appropriate. And
20 Amazon took full advantage of that advice as we will see
21 in the papers.

22 And in this instance, the NGPC received multiple
23 additional letters and materials from Amazon in response
24 to the Passa report, in response to the predicted NGPC
25 meetings.

1 And the board doesn't invite Amazon to come into
2 the board meetings either. None of the constituent
3 groups do that. And so I don't think it's unfair to
4 say, I'm going to hold a meeting, and I'm going to
5 restrict who speaks at the meeting to people who are
6 actually part of my group.

7 ARBITRATOR MATZ: Mr. LeVee, is there any IRP
8 panel ruling that discusses the application of any of
9 the right to be heard as a reflection of a bylaw
10 reference to fairness, not necessarily before GAC, but
11 in any other constituent body?

12 MR. LeVEE: Not that I'm aware of.

13 ARBITRATOR MATZ: You're not aware of any
14 precedent --

15 MR. LeVEE: No. The DCA decision comes closest,
16 and I'm going to turn to it now. It's argued as a right
17 to be heard, but I think it's incredibly distinguishable
18 for the reasons I will explain. The DCA decision is the
19 only decision.

20 The other one that was argued this morning was
21 the GCC decision on Persian Gulf, and my next slide
22 after this is going to address that.

23 ARBITRATOR O'BRIEN: Mr. LeVee, when you address
24 DCA, can you address page -- paragraph 109 on page 46
25 where it says (as read):

1 "The above, combined with the fact
2 that DCA Trust was never given any
3 notice or an opportunity in Beijing or
4 elsewhere to make its position known or
5 defend its own interest before" -- focus
6 on that -- "before the GAC reached
7 consensus on the GAC objection advice
8 and that the board of ICANN does not
9 take any steps to address the issue."

10 MR. LeVEE: Let me do it now --

11 ARBITRATOR MATZ: What was the paragraph, please?

12 MR. LeVEE: Paragraph 109. So there are three
13 paragraphs in the DCA decision that, I think, we'll
14 reference and one in paragraph 109.

15 So I think the key is the words "the above."
16 Because what the panel discusses above is the fact that
17 because the meeting was closed and because there was --
18 there were e-mail exchanges that took place immediately
19 in advance of the meeting that then were, according to
20 Ms. Dryden, ignored and because DCA tried to have
21 some -- tried to have -- apparently tried to have one
22 country, Kenya, be able to register its opposition, some
23 question as to why their person, why their GAC advisor
24 couldn't make it to the meeting.

25 But he was not at the meeting, and so Ms. Dryden

1 explained, Look, it's only people who were at the
2 meeting that matter. We can't take somebody who doesn't
3 attend the meeting and whatever that person might be
4 saying as relevant.

5 So there were a lot of things that happened in
6 conjunction with the GAC advice, and that's referring to
7 the above, that the panel is identifying.

8 And then the panel does say, just as you know,
9 when you combine all of these things that happened --
10 the closed meeting, the e-mail thread leading up to the
11 meeting literally the night before, and a lot of other
12 things, when you combined that with the fact that DCA
13 wasn't given an opportunity to be heard or defend its
14 interest and that the board didn't take any steps to
15 address the issue, so the board knew, or according to
16 the panel should have known, that there was this
17 consensus advice. Nobody really understood how it had
18 happened.

19 And the testimony at the IRP proceeding was that
20 the NGPC did not ask questions about what had happened
21 at the GAC.

22 Ms. Dryden was in the room, and Ms. Dryden
23 testified, I don't remember whether anybody asked any
24 questions about what had happened at the GAC.

25 So I think the DCA panel was saying when you

1 combine all of those facts together, then we do conclude
2 that the actions and inactions of the board were not
3 designed to ensure fairness.

4 Here, and I'm probably going to wind up getting
5 into it more after lunch, there was so much process and
6 so many letters. Judge Bonner asked Mr. Thorne about it
7 earlier this morning.

8 What do you do with the fact that you got all of
9 this new information that gets communicated and
10 including, by the way, by the applicant, but also by
11 Peru and by Brazil, separate letters where they talk
12 about the fact that they had their governmental bodies
13 issuing votes on these things, and the NGPC digesting
14 all of it.

15 And then you have Mr. Atallah who said, We did
16 sit and we did evaluate all of those things. He
17 actually explained how the board is -- all these papers
18 are made available to the board on a Web site. The
19 board is supposed to pull them down and read them.

20 And when you read the two board meetings, the
21 April 2014 meeting and the May 2014 meeting -- these are
22 exhibits I gave you yesterday and they are also in your
23 binders today -- you can't come away with any other
24 interpretation, that the NGPC did a lot of thinking on
25 this, including thinking about the GAC advice, Amazon's

1 interests, and all of the other constituent interests
2 that might be appropriate, and ultimately balancing
3 whether Amazon's interests, which are important, but the
4 interest of one company outweigh the effect of the GAC
5 advice which is supposed to be given, the substantial
6 effect, and the GAC -- or I'm sorry, the NGPC reasonably
7 and appropriately concluded that it did not outweigh the
8 GAC advice.

9 ARBITRATOR BONNER: Is that expressed, though --
10 I mean, is that explicit in the minutes of the NGPC's
11 meetings? I mean, I just didn't see it in there.

12 MR. LeVEE: Well, in the words that Amazon --

13 ARBITRATOR BONNER: I mean, you said it quite
14 eloquently, but I missed it in the minutes.

15 MR. LeVEE: Well, first of all, the -- what it
16 says is -- and I'll quote you -- I'm going to take you
17 through the document after lunch, but it says these are
18 all the things we consider.

19 Now, does it say, I looked at this piece of paper
20 and I took this from it and I looked at this piece of
21 paper and I took this from it? Well, no, but the
22 rationale itself is multiple pages -- I should say the
23 board resolution itself is two or three pages.

24 And it -- does it say the words that if I were to
25 write it today, adding all the words of the argument on

1 it just may -- not every one, no. But it says a lot of
2 that. And I think it is absolutely appropriate to infer
3 given the amount of time that was spent on this issue.

4 According to Mr. Atallah, the Amazon issue took
5 the entirety of the April 2014 meeting. There were
6 other agenda items that they don't get to, and the
7 reason is, is because this is all they're discussing.

8 So you have a witness who said, We spent a lot of
9 time discussing all of these issues and balancing the
10 various concerns that had been expressed. I don't know
11 how much better I can --

12 ARBITRATOR O'BRIEN: So, Mr. LeVee, depending on
13 when we're going to take a lunch break, you can let us
14 know after lunch. So I'm trying to figure out -- I know
15 there's a list of all these letters and that sort of
16 thing, but can you tell us, what were the public policy
17 interests that the board considered in making its
18 evaluation of this case on the merits.

19 In other words, what were the -- Amazon's gone
20 through it -- from your view, what were the public
21 policy interests that were considered?

22 MR. LeVEE: I will address that right after the
23 lunch.

24 ARBITRATOR O'BRIEN: And where is that noted in
25 the record?

1 MR. LeVEE: I will do that.

2 ARBITRATOR O'BRIEN: And then, two, you mentioned
3 that there had been so much processed, a lot of letters
4 and everything that was appropriate, was considered by
5 the board were the e-mails and some of the things we
6 saw, for example, Exhibit 11, Exhibit 10, Exhibit 15,
7 Exhibit 5.

8 Were those communications, which I think were
9 just recently produced in this litigation to Amazon,
10 were those considered as part of this process or were
11 those outside of the process?

12 MR. LeVEE: According to Mr. Atallah, he had no
13 reason to believe that any of those e-mails that you
14 reviewed yesterday afternoon were considered as part of
15 the process. That would be my answer as to that.

16 If I may, let me just finish on the DCA issues,
17 and then we'll take our lunch break. Would that be
18 okay?

19 ARBITRATOR BONNER: That would be fine.

20 ARBITRATOR MATZ: Yes.

21 MR. LeVEE: So in DCA you've got the GAC advice
22 of a single meeting based on an abbreviated
23 investigation of the NGPC. That was the evidence before
24 the panel.

25 And here we have a ten-month investigation, seven

1 NGPC meetings, an expert report, extensive materials
2 from all of the relevant parties, and extensive debate,
3 debate that is -- well, we actually have transcripts and
4 a resolution, there's been two other meetings.

5 So the work here by the NGPC was heavily
6 documented.

7 We do have Ms. Dryden's testimony, but Ms. Dryden
8 does testify generally in the IRP, in DCA IRP what
9 happened at that meeting and how the process of the GAC
10 works. I had no objection with any of her testimony.

11 She said the GAC does not issue a consensus
12 rationale. It didn't do so on the DCA matter. It
13 didn't do so here.

14 But her testimony did not address what happened
15 vis-à-vis the GAC's advice on the Amazon applications.
16 It was a different meeting where the advice was given.
17 The issue of the Amazon applications was clearly not at
18 issue before the IRP panel in the DCA matter. She was
19 not asked any questions about the next meeting. It was
20 an open meeting, all these people spoke, and, of course,
21 you have the transcript.

22 So let me go to the specific IRP. There are two
23 other paragraphs that Mr. Thorne brought your attention
24 to.

25 In the DCA IRP decision, one of them is

1 paragraph 74. I think, actually, Judge O'Brien brought
2 our attention to that. It says (as read):

3 "As previously decided by this
4 panel, such accountability requires the
5 organization to explain or give reasons
6 for its activities, set responsibility
7 for them, and to disclose the results in
8 a transparent manner."

9 It is 100 percent clear from the context when you
10 look at the previous paragraphs, that the panel was not
11 referring to the GAC. The panel was referring to the
12 NGPC. There is no reference in any of this discussion
13 because it is talking about what the NGPC had an
14 obligation to do.

15 The other paragraph that you were -- drawn
16 attention to was paragraph 113, which says (as read):

17 "In light of the clear
18 transparency obligation provisions found
19 in ICANN's bylaws, the panel would have
20 expected the ICANN board to, at a
21 minimum, investigate the matter further
22 before rejecting DCA Trust and
23 application."

24 So again, not talking about GAC advice and what
25 the GAC should or should not be doing. This is talking

1 about what the panel does -- I'm sorry, the NGPC. And
2 what the DCA IRP panel found was that in the
3 circumstances of that case where there was GAC advice at
4 a closed meeting, no rationale, no ability to attend or
5 even know what was happening, that the board should have
6 done something more.

7 And what happened in that case, as I mentioned,
8 the testimony from that case was that the board did a
9 very modest investigation of the GAC advice. That
10 contrasts with the investigation that was done here.

11 You can agree or disagree as to the investigation
12 was suitably thorough, although I think the evidence is
13 clear that it was. But there's no doubt that the NGPC
14 considered the Amazon applications and the GAC advice
15 associated with them at so many meetings and with so
16 much activity that it truly is impossible to say that
17 they did not investigate what was going on.

18 And they say, they freely admit, We do not have a
19 GAC rationale, but we have a lot of other information on
20 which we can rely, and we'll talk about that later.

21 Finally, one last slide. Then we go to lunch. I
22 want to mention the GCC decision. There was also a lot
23 of discussion about that early this morning. Let me
24 tell you what happened in GCC.

25 The GAC was asked to issue consensus advice with

1 respect to the Persian -- .persiangulf application, and
2 it was not able to do that. There was an objection.

3 And so the GAC issued a communique that said, we,
4 quote, do not object to a Persian Gulf application
5 proceeding.

6 The IRP panel said, Well, do not object is not
7 one of the things you're allowed to do under the
8 Guidebook.

9 Under the Guidebook you're supposed to give
10 either consensus advice -- but if you can't give
11 consensus advice, Module 3 of the Guidebook says you're
12 supposed to convey the full range of views expressed by
13 the members to the ICANN board.

14 And so the IRP panel said when you said do not
15 object, it sounds to us as if you are saying that the
16 application should proceed, that you are actually
17 endorsing the application.

18 And so the panel said, look, the Guidebook says
19 that the GAC is supposed to convey a full range of views
20 if it cannot reach consensus, and you didn't do that.
21 And had you done that under the Guidebook and under the
22 bylaws, there would have been this obligation for the
23 board and the GAC to meet. And that's, as I said, both
24 under the bylaws and the GAC.

25 Mr. Atallah talked about it yesterday, that if

1 the board isn't going to follow GAC advice, they have to
2 go tell the GAC, we're not going to follow it, and now
3 we want to meet with you and see if there's some
4 resolution we can reach.

5 So what the IRP panel in that case said was,
6 we're going to fault you, Board, for not investigating
7 the GAC advice because the GAC advice took a form that
8 was illegitimate under the Guidebook.

9 It was not consistent with the range of options
10 offered by the Guidebook.

11 Didn't say that the GAC did anything procedurally
12 wrong in terms of the voting and the meeting and the
13 people who were present. It simply said that when the
14 GAC communicated a particular form of advice, it sounded
15 to the panel like that advice was tantamount to you
16 shall proceed forthwith and go proceed with the
17 .persiangulf application. And that's not what countries
18 had discussed because there was no consensus advice.
19 And so if you, the NGPC, had been following the rules,
20 you would have had a discussion with the GAC.

21 ARBITRATOR BONNER: The GAC could give consensus
22 advice for nonobjecting to an application, couldn't it?

23 MR. LeVEE: Under the Guidebook, it's a little
24 confusing. They -- oh, could they give consensus advice
25 that an application can proceed? Absolutely, yes. But

1 what they said was, we don't have consensus advice, and
2 therefore, we don't object. And it was almost like a
3 double negative.

4 So those are the two -- the DCA and the GCC
5 decisions were the two that you spent the most time on
6 this morning. I wanted to address them first.

7 When we come back after the lunch break, I'll
8 going through the rest of my presentation in the order I
9 had intended and I will take you through these issues
10 and I will certainly address Judge O'Brien's questions.

11 ARBITRATOR BONNER: I'm just going to ask a final
12 one around what you started talking about, and that is,
13 you've, of course, made the point that it's too late to
14 modify the Guidebook and insert that the GAC has to
15 state reasons or rationale.

16 And I think your point is that there really isn't
17 any precedent in IRP cases for the proposition that the
18 GAC is required to state a rationale or reasons for its
19 consensus advice. Am I right? In other words, you are
20 saying that neither the DCA case or any other IRP case
21 supports that proposition.

22 MR. LeVEE: Yes, I think you could argue that the
23 DCA decision has language supporting that, but as I
24 tried to point out to you, the language is cum- -- is
25 the cumulative effect of what happened in that case.

1 I don't think you could say that the DCA decision
2 stands for the proposition that no matter what process
3 occurs, no matter whether you have open meetings and so
4 forth, the GAC is -- it always must, you know, issue a
5 rationale and do various other things.

6 ARBITRATOR BONNER: I'm just looking at
7 paragraph 74. I just wanted to make sure I understood
8 what your argument is. So I thought your argument was
9 that that refers to and it only applies to the NGPC or
10 the board, not the GAC.

11 MR. LeVEE: Exactly. Well, paragraph 74
12 specifically applies to the NGPC. There truly is not a
13 way you could read that paragraph in the context of the
14 flow and think that the IRP panel was referring to the
15 GAC.

16 The panel was clearly referring to the NGPC.

17 ARBITRATOR BONNER: So the organization that's
18 being referred to is the NGPC or the board, the NGPC on
19 behalf of the board, but not the GAC?

20 MR. LeVEE: Yes. And all of the previous
21 paragraphs leading up to that, starting, really, on
22 page 19, the question is: Did the board act or fail to
23 act in a manner consistent with the articles, bylaws, or
24 Guidebook? And then it states the parties' respective
25 positions on that, and then quotes from the bylaws.

1 ARBITRATOR BONNER: We'll look at it all. So put
2 in context, that's your argument, that it does not apply
3 to the GAC?

4 MR. LeVEE: Correct.

5 ARBITRATOR BONNER: Okay. Is the food here?

6 MR. LeVEE: I'm sure it is because it's 12:20,
7 12:25.

8 ARBITRATOR BONNER: Are you prepared to take a
9 recess at this point?

10 MR. LeVEE: I am.

11 ARBITRATOR BONNER: Any other thoughts or
12 questions?

13 All right. So let's recess for an hour. It's
14 roughly 12:23. We'll resume at, let's say, 1:25.

15 MR. LeVEE: Thank you.

16 ARBITRATOR BONNER: We're in recess.

17 (Whereupon, at the hour of 12:23 p.m., a
18 luncheon recess was taken, the
19 proceeding to be resumed at 1:33 p.m.)

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24

25

1 Los Angeles, California; Tuesday, May 2, 2017

2 1:33 p.m.

3
4 ARBITRATOR BONNER: We're back on the record.

5 Mr. LeVee?

6 MR. LeVEE: Thank you, Your Honor.

7 I am now going to proceed with the balance of my
8 closing. I'm aware that when we left at lunch, I had
9 some pending questions, and I promise that I will get to
10 them during the course of that discussion.

11 But I'm hoping that I can take you through a
12 sequence that might be useful to you. So I'm going to
13 spend a little bit of time on background because it
14 helps somewhat and then take you through the evidence as
15 I see it.

16 So just as a reminder, in 2000, the ICANN
17 board -- I'm on, by the way, Slide 4.

18 The board approved a very small number of new
19 gTLDs for the purpose of determining whether new
20 top-level domains would have an adverse effect. And
21 then it wasn't until 2005 and through '7 that the GNSO,
22 the Generic Names Supporting Organization, which was
23 responsible for policy in this area, developed the
24 principles that take us to where we are today.

25 The GNSO supported a large-scale expansion and

1 they provided specific implementation suggestions to the
2 board, but it was the board's obligation to adopt the
3 actual rules for the program which became the Guidebook.

4 So the board in 2008, after some back-and-forth,
5 went forward with the program and adopted the GNSO
6 policy recommendations, and they knew that they had to
7 develop the appropriate implementation provisions.

8 And that the way that that was done was through
9 what amounted to be about ten drafts of the new gTLD
10 applicant Guidebook issued between 2008 and 2012.

11 The important point to take away was that the
12 drafts were posted, every one of them, for public
13 comment. And ICANN would receive extensive public
14 comment, and then the staff of ICANN would try to
15 encapsulate all the comments that they had made. And they
16 would then debate what should be changed, and they would
17 go forward.

18 And from the beginning, there were concerns over
19 names that had a geographic meaning or might have a
20 geographic meaning, and that's not uncommon. And there
21 were lots of other concerns. I don't want to suggest
22 that names that had a geographic meaning might be
23 inappropriate.

24 There were concerns that people would have
25 strings -- we discussed this a little bit during the

1 opening yesterday -- that had a -- you know, an evil
2 meaning or that advocated terrorism or, you know, blow
3 up the United States.

4 ICANN wanted to make sure that there were lots of
5 rules in place, that there could be a process to prevent
6 those applications from proceeding in the event there
7 were concerns.

8 And so the Guidebook had these objection
9 procedures. Yesterday I kept referring to Module 2, and
10 my client reminded me that three of you probably aren't
11 as conversant in the Guidebook as I am, but Module 2 is
12 where the Guidebook has its objection procedures.

13 And there are lots of procedures; string
14 similarity is one. Judge Matz was involved in an IRP on
15 that. Community objection, objections involving
16 reality, and objections involving intellectual property.
17 There were a wide variety. And again, this was a
18 process that was vetted extensively with the public.

19 The GAC sort of let this process play out for a
20 while before it started to speak. And it did so
21 beginning in late 2010. And it had concerns that were
22 expressed in Exhibit 7. You have Respondent's
23 Exhibit 7. It's in the binder that I handed out to you.
24 And in Exhibit 7, the GAC explains that governments
25 should be allowed to raise concerns via the GAC that

1 were separate from the objection procedures.

2 And you'll find that -- well, candidly, it's sort
3 of throughout, but if you look at the recommendation on
4 page 2, the GAC wanted to have a Early Warning procedure
5 and they wanted to issue GAC advice and it wanted to
6 be -- I'm going to read to you from the recommendation.

7 (As read):

8 "GAC Early Warning and GAC advice
9 on new gTLDs can be applied to any
10 application, e.g., sensitive community
11 sector or geographic strings of any
12 type."

13 That's at the bottom of page 2.

14 And so the GAC said, we want to be able to issue
15 objections on any of these grounds and we want to have
16 this concept of consensus advice.

17 So then when you look at page 3 where it says the
18 GAC advice that is -- if it's consensus advice, then
19 that would create a strong presumption for the board
20 that the application should not be approved. That's
21 down toward the bottom of the page.

22 And then on page 4, that the GAC wanted these
23 Early Warning and GAC advice on new gTLD procedures to
24 be designed so that the GAC could provide input on any
25 application for any reason.

1 So Mr. Atallah yesterday, during examination when
2 I asked the questions, confirmed that he attended a --
3 what was a pretty significant meeting in Brussels where
4 a lot of these issues were hammered out. And in
5 paragraphs 11 through 23 of his witness statement, he
6 goes through in a fair amount of -- fair amount of
7 length why the GAC was asking for what it was asking for
8 and the fact that the GAC received it.

9 And as I said about an hour ago, what I thought
10 was notable yesterday was that Mr. Atallah didn't
11 receive any questions on any of that portion of his
12 declaration. And so we have what amounts to unrebutted
13 evidence with -- and there aren't any exhibits that say
14 that this advice -- that the recommendations from the
15 GAC were not adopted, because they were.

16 So the board then explained in the so-called
17 launch rationale. You have it as Exhibit R 76. If you
18 look at page 45 -- I only gave you portions of R 76
19 because it was so long.

20 If you look at page 45 at the very back, the
21 board explains that it has -- it had a dialogue with the
22 GAC and that the board has accepted the GAC advice to
23 require government approval in the case of applications
24 for certain geographic names.

25 And if you look at the one, two, three -- fourth

1 bullet (as read):

2 "The board also confirmed that the
3 GAC has the ability to provide GAC
4 advice on new gTLDs concerning any
5 application. Thus, governments would
6 not be required to file objections and
7 participate in the dispute resolution
8 process" -- that's what I was referring
9 to that's Module 2, all those dispute
10 resolution processes -- "but rather, may
11 raise their concerns via the GAC. This
12 process could be used, for example, for
13 governments to object to an application
14 for a string considered by a government
15 to be a geographic name."

16 And then the next bullet does explain the formal
17 objection and dispute process does remain available to
18 government. So a government could invoke the dispute
19 resolution provisions of -- that are -- were contained
20 there, but they weren't required to and that there would
21 be limited funding support from ICANN for filing fees
22 and dispute resolution costs.

23 And as I mentioned yesterday, governments did
24 have some concern that if they were required to foot the
25 bills for all of the dispute resolution mechanisms, that

1 they'd have to get authorized funding from their
2 legislatures, and they were worried about having to do
3 that.

4 So ICANN gave every government one free objection
5 to file without a fee, but also gave the government the
6 ability to object via the GAC.

7 ARBITRATOR MATZ: Mr. LeVee, this Exhibit 76, the
8 report that's in the binder you gave us -- I realize
9 it's only part of a larger exhibit.

10 MR. LeVEE: Yeah.

11 ARBITRATOR MATZ: -- is from the board rationale,
12 right.

13 MR. LeVEE: It is.

14 ARBITRATOR MATZ: And was the board rationale
15 posted online too?

16 MR. LeVEE: It was posted online, yes.

17 The distinction that was drawn yesterday is that
18 it was not made available for public comment. And I was
19 about to explain why.

20 The board rationale is posted online, fully
21 available for people to view prior to submitting their
22 application. So the rationale was posted in July of
23 2011.

24 ICANN was required under the then agreement with
25 the U.S. government, which was called the Affirmation of

1 Commitments, an odd-named document. ICANN was required
2 to have a rationale for important decisions. It was not
3 required to post the rationale for public comment.
4 There was nothing to comment on. This was the board
5 explaining to the world why it had done what it had done
6 following the board's receipt of a massive amount of
7 public comments.

8 So it is correct that there was no public comment
9 invited because there was no public comment needed or
10 none would have been logical because the board was
11 simply saying we made a decision and here's what we did.
12 It would be no different, I suppose, than the board
13 issuing a rationale that they were going to do something
14 else with respect to an application. They do what they
15 do. They don't ask public in advance for comments on an
16 approved board rationale.

17 Most importantly, the evidence is undisputed that
18 the Guidebook allows the GAC to object to any
19 application on any grounds, and you didn't really hear
20 in the last two days evidence to the contrary.

21 There is in the briefing considerable statements
22 by Amazon that governments through the GAC are not
23 permitted to address issues that were otherwise the
24 subject of dispute resolution procedures, and that's
25 just wrong.

1 It's based on Heather Forrest's legal
2 interpretation of her read of the Guidebook, and it's
3 absolutely contrary to what I'll refer to as the
4 drafting of the Guidebook makes it 100 percent clear.

5 And then as I mentioned earlier, the deadline for
6 Amazon to complain about what is in the Guidebook, in
7 our judgment, has long passed as confirmed by several
8 IRP panels.

9 Let me address briefly the independent objector
10 of the community objection. So we do have the March
11 2013 independent objector files a community objection.

12 Does the panel know what an independent objector
13 is?

14 ARBITRATOR BONNER: It wouldn't hurt to explain
15 it to me, anyway.

16 MR. LeVEE: Okay.

17 So ICANN was concerned that there might be
18 applications where people objected, but the public that
19 was objecting might not have sufficient resources or --
20 they might not be a community that was organized in such
21 a fashion that they would get together and say, we need
22 to pay the money to the ICC to file a objection.

23 And so ICANN said, we're going to have an
24 independent objector. We'll pay him or her. It was a
25 him. And we will ask him to take a look at, are there

1 public policy or other kinds of reasons why an objection
2 might be asserted against an application even though no
3 government or private entity have otherwise asserted an
4 objection?

5 So the independent objector in some ways was
6 playing center field, catching applications that might
7 hit the ground that might be objectionable. And he
8 filed a bunch of objections, and some he won and some he
9 lost.

10 In this instance --

11 ARBITRATOR BONNER: There's a person that's
12 appointed to be the independent objector?

13 MR. LeVEE: Yes, there was a human being who was
14 specifically appointed.

15 ARBITRATOR BONNER: And -- okay. It's not
16 just -- so appointed for a period of time?

17 MR. LeVEE: He was appointed for asserting
18 objections under the Guidebook round that took place.
19 It was initiated in the spring of 2012.

20 So in 1930 applications, he was the independent
21 objector for those applications.

22 ARBITRATOR MATZ: One person who carried out that
23 obligation with that title.

24 MR. LeVEE: Yes.

25 ARBITRATOR MATZ: And free rein to object about

1 any of these.

2 MR. LeVEE: He did.

3 ARBITRATOR MATZ: What was the person's name?

4 MR. LeVEE: Alain Pellet, P-e-l-l-e-t --

5 ARBITRATOR MATZ: Okay. Now I remember.

6 MR. LeVEE: -- which is escaping my mind.

7 So Mr. Pellet did assert objections. Now, he --
8 there was a sequence in time, if he saw that other
9 people were objecting, he would usually step back. But
10 he only asserted objections typically when someone else
11 did not.

12 So Amazon opposed the community objection in May
13 of 2013, and Amazon argued that Brazil and Peru weren't
14 objecting anymore. That's in your binder, Exhibit R 63.

15 But by that time, we know that the governments
16 had already put the matter of the Amazon applications in
17 front of the GAC, because in April of 2013, we know that
18 the GAC considered the Amazon applications. Didn't do
19 anything with them at that time, but they considered
20 them.

21 And then in July of -- I'm sorry, in June or
22 July, I can't remember now, 2014, we know the GAC passes
23 consensus advice. We had a lot of discussion on that.

24 And Amazon does not tell the ICC expert, Judge
25 Schwebel, about this. Brazil and Peru were not parties

1 to the proceeding, so as far as the judge, the ICC
2 expert, knew, Brazil and Peru were not opposing. And so
3 months after the GAC issued its consensus advice, in
4 January of 2014, the expert -- the ICC expert dismissed
5 the community objection, but he did so on the mistaken
6 belief that the governments had withdrawn their
7 objections.

8 Now, does any of this really matter? Probably
9 not because at the end of the day, so long as the ICC
10 determination doesn't nullify the GAC advice, what the
11 ICC did or didn't do is really not central to the panel,
12 I would submit.

13 But Amazon argues -- this is a direct quote from
14 their prehearing brief at page 36 (as read):

15 "That the procedures for
16 determining a geographic name set forth
17 in the Guidebook are the exclusive
18 procedures for protective geographic
19 names."

20 And that's just wrong.

21 We know that it's wrong because the Guidebook
22 created GAC advice as an alternative available to
23 governments to community objections. And the two
24 methods, GAC, objection by -- through the process of a
25 community objection, there were two independent methods

1 to objecting for an application, and neither one of them
2 had any precedential effect on the other.

3 Now, let's talk about the objections to the
4 Amazon applications.

5 As a reminder, Amazon submitted 76 applications.
6 73 of them drew no objection. Under the rules of the
7 Guidebook, Amazon benefited from those applications.
8 Their interests have been affirmed. And I can't tell
9 you the status of each and every one of those top-level
10 domains, but .amazon, of course, is not operating. It's
11 the subject of this proceeding.

12 And there's no doubt that the three Amazon
13 applications did pass the initial evaluation's
14 geographic names review because the strings are not on a
15 list. We don't contend that they are. We acknowledge
16 that they do not appear on any specific list.

17 But what also happened, and it happened very
18 quickly, was that strong opposition to the names was
19 raised in South America.

20 Not only do we have the Early Warnings, but we
21 have the Montevideo declaration, we have a resolution of
22 opposition in the Brazilian senate, we have statements
23 by other intergovernmental organizations. And so what
24 we wind up with are the GAC Early Warning notices.

25 I realize that I forgot to put the Early Warning

1 notices in your book, and so let me hand them out to you
2 separately. It already has Exhibit No. C 22. I don't
3 think it needs a separate hearing exhibit.

4 And the Early Warning notices are several pages,
5 and they talk about the Amazon region constituting an
6 important part of the territory of Bolivia and Brazil,
7 Colombia and Ecuador -- it goes on; and that granting
8 exclusive rights to the specific gTLD to a private
9 company would prevent the use of the domain for purposes
10 of the public interest related to the protection,
11 promotion, and awareness, raising on issues relating to
12 the Amazon biome. And, of course, it would hinder the
13 use of the name related to the population inhabiting the
14 region.

15 It matches the name in English of the Amazon
16 Cooperation Treaty Organization. And in the third
17 paragraph, it says (as read):

18 "It should be noted that the
19 application has not received support
20 from governments of the countries in
21 which the region is located."

22 And it lists all those governments.

23 I should note Bolivia, Ecuador, and Guyana were
24 not GAC members at the time. They were opposing the
25 application, but at the time, they were not GAC members.

1 But they were requesting that the application be
2 included as part of the Early Warning process.

3 Then at the bottom of the second page, there's
4 more notes from Peru talking about the history of the
5 Amazon region and the fact that the region comprises
6 61 percent of the territory of Peru. And on the next
7 page, there's a further notice from Brazil that the
8 protection of geographic names that refer to regions
9 whose public interest could be affected is important and
10 whether it's denominated in English or otherwise, it
11 shouldn't be limited -- it should be in the name of
12 public interest applied to future existing applications.

13 So the Early Warning gives a fair amount of
14 explanation as to the nature of the concern.

15 ARBITRATOR MATZ: This was included in the binder
16 you gave us.

17 MR. LeVEE: Oh, it was?

18 ARBITRATOR MATZ: Yeah.

19 MR. LeVEE: Okay. My fault.

20 ARBITRATOR MATZ: C 22 was included.

21 MR. LeVEE: Okay. I thought it was not.

22 So then in April, we know that the GAC takes up
23 the opposition in its first meeting.

24 And then something I spoke of earlier today,
25 which is that in the spring and summer of 2013, Amazon

1 lobbied several countries to block the GAC advice. So
2 if you look at Slide 13, I have one example. This is
3 for Germany. And it's in your binder, Exhibit R 67.

4 And very similar letters were sent to the United
5 Kingdom, Australia, and Luxembourg. And what Amazon
6 asks (as read):

7 "We respectfully ask you to oppose
8 any proposals that would give individual
9 GAC member countries the ability to veto
10 applications on the basis of sensitivity
11 without considerations of the laws of
12 other sovereign nations.

13 "Accordingly, we write to formally
14 request that you object to any objection
15 to the Amazon application in its IDM
16 variance. Alternatively, if you cannot
17 object, we ask that you remain neutral."

18 So Amazon had the ability and did, in fact,
19 communicate with governments.

20 Returning to a question I had before lunch, no,
21 they did not have the right to speak at a GAC meeting.
22 Nor, by the way, does the ICANN board give people the
23 right to speak at its meetings. It -- to me, it would
24 be no different, I suppose, than asking Congress, well,
25 I might be affected by something. I want to come speak.

1 Well, Congress has the ability to say yes and it has the
2 ability to say no.

3 The GAC's rules say that when we are having a
4 debate on the floor of the GAC, we're going to limit
5 that debate to GAC members.

6 ARBITRATOR O'BRIEN: What is the significance of
7 Amazon reaching out to the governments? Is it your
8 position that there was procedural due process because
9 Amazon could write letters to various governments and
10 that constitutes procedural due process?

11 MR. LeVEE: Yes, in part.

12 The -- Amazon had the ability -- Amazon knew what
13 was going on, took advantage of the time delay between
14 the two GAC meetings to do the same kind of lobbying
15 that it was not able to do by speaking at the GAC.

16 So yes, it had -- I'm not arguing that those --
17 that that alone was procedural due fairness. And I'm
18 going to return to your issue of procedural due fairness
19 when I get into the specifics of the bylaws, because I
20 don't think the procedural due fairness is actually
21 directed at the point you're making.

22 ARBITRATOR O'BRIEN: Were the governments that
23 they lobbied required to give them a hearing or to talk
24 to them?

25 MR. LeVEE: Of course not, no. I'm not

1 suggesting otherwise. These were governments that you
2 would have expected would be interested in hearing from
3 Amazon, including the United States.

4 ARBITRATOR O'BRIEN: The Iranians?

5 MR. LeVEE: I'm skeptical of them.

6 ARBITRATOR O'BRIEN: Representee and talk about
7 it?

8 MR. LeVEE: Probably not. But I would expect
9 Luxembourg, where they are incorporated. I would expect
10 the United States, where they sent letters to Congress,
11 asking Congress to look into the situation.

12 I would expect Amazon to do what it felt was in
13 its best interests, recognizing that there was a
14 political issue because governments were involved, and
15 Amazon engaged, as you would expect it as a for-profit
16 entity to try to engage, to get -- to lobby those
17 governments.

18 My point is simply that the option was available
19 to it, and it took advantage of that option. And I
20 think that it becomes relevant because what later
21 happens is that none of those countries is willing to
22 block the consensus advice, and that we know.

23 But we didn't know before these proceedings the
24 extent to which Amazon tried to prevent that result.
25 And Amazon had the right to do so. Had it been

1 successful with any of those countries, we would not be
2 here today.

3 So we also know that the United States issued its
4 statement on geographic names. It's Exhibit C 34.
5 Mr. Thorne also presented on it in his opening. And the
6 United States ultimately decided that it was in the best
7 interests of the United States to not object and to
8 allow the GAC to present consensus advice on these
9 issues if no other --

10 ARBITRATOR O'BRIEN: I'm sorry to interrupt you
11 one more time. I think that last answer was extremely
12 helpful, at least to me, in kind of clarifying things.

13 So it's your position that we wouldn't be here
14 today if one government had stood up and blocked the
15 consensus advice, correct?

16 MR. LeVEE: We would not have had consensus
17 advice. There's no way for me to know whether the GAC
18 would have then sent to the board what the GCC panel
19 said they should have done. We can't get to consensus
20 advice. Here's the range of views we need to talk to.

21 I can't predict how that would have worked out.
22 I think we are here today because of consensus advice.
23 I'm not disagreeing with the discussion you had with
24 Mr. Atallah yesterday.

25 It was because of the consensus advice that the

1 board ultimately did what it did.

2 ARBITRATOR O'BRIEN: Because otherwise, there
3 wasn't the basis for the gTLD, correct?

4 MR. LeVEE: I don't know that I would say that.
5 I would say that if the board had had non-consensus
6 advice from the GAC, the type of which the GCC panel had
7 encouraged, the board then would have had to engage in a
8 meet and confer, at least that's what I call it as a
9 litigator. And I can't predict what the outcome would
10 have been.

11 The outcome could have been that the board would
12 have said, you know what? We are persuaded. We are not
13 going to let that application proceed.

14 I would agree that if the GAC had not spoken at
15 all, then the board likely would not have had a reason
16 to evaluate the string just as it didn't evaluate
17 .ipiranga.

18 And when there's no objection and no GAC advice
19 of any kind, consensus or non-consensus, the
20 applications typically were not brought to the board's
21 attention.

22 ARBITRATOR O'BRIEN: Is that explanation a little
23 more nuanced than Mr. Atallah's testimony that we heard
24 yesterday?

25 MR. LeVEE: No. I think, actually, Mr. Atallah

1 spoke directly to you about the fact that the board had
2 this meet and confer obligation. I don't know if he did
3 it in the context of this question, but he did talk
4 about that.

5 And I don't think there's any way for people
6 sitting in this room to know what would have happened if
7 the GAC had issued non-consensus advice, because the
8 bylaws require the board to then meet and confer with
9 the GAC. And I don't see how any of us could have
10 predicted how that outcome would have played.

11 ARBITRATOR O'BRIEN: Thank you.

12 MR. LeVEE: So then in July of 2013, we have the
13 actual GAC meeting. We have two different exhibits that
14 relate to that meeting, C 38 and C 40.

15 C 38 -- so there were -- something that I was a
16 little confused about. There were actually two meetings
17 at the GAC that consider the advice.

18 In C 38 you will see that the GAC considers the
19 advice, but they do so beginning -- sorry. I didn't
20 have the tab. I'm going to have to come back to it.

21 The GAC considers the advice, but they agree that
22 they are going to talk about it more in a couple of
23 days.

24 And so if you look at C 40, this is the portion
25 that I took you through -- took Mr. Atallah through

1 yesterday where I pointed out all of the various things
2 that people said and all of the countries that supported
3 the advice.

4 And so I want to take you through in a little bit
5 more detail what Peru actually did. We know that Peru
6 said as one of the reasons for its objection that
7 .amazon appeared on a list, and we know through
8 Mr. Atallah that Peru was wrong.

9 But if you look at Slide 15 -- these are actually
10 direct quotations from Exhibit 38 -- Peru summarized its
11 basis for objecting, that the 2007 GAC principles state
12 that ICANN's core values indicate that the
13 organization -- that's ICANN -- while remaining rooted
14 in the public sector, recognizes that governments and
15 public authorities are responsible for public policies
16 and should take into account governments and other --
17 governance and public authority recommendations.

18 And on that topic --

19 ARBITRATOR BONNER: Stay with that topic for a
20 moment, but I'm going to -- the chair is going to need a
21 little convenience recess here. Five minutes.

22 MR. LeVEE: Of course.

23 Let's take a break as long as you need.

24 ARBITRATOR BONNER: Five-minute recess.

25 (Recess.)

1 ARBITRATOR BONNER: Okay. I think we can go back
2 on the record.

3 MR. LeVEE: Thank you.

4 ARBITRATOR BONNER: Mr. LeVee?

5 MR. LeVEE: I need to clarify something I said.
6 I kept referring to the rejection procedures being in
7 Module 2. They are actually in Module 3, which is where
8 the GAC advice is. I got carried away. Something else
9 that I've been working on is in Module 2, so I
10 apologize.

11 ARBITRATOR BONNER: You could have fooled us.

12 MR. LeVEE: Yes.

13 ARBITRATOR MATZ: You did fool us.

14 MR. LeVEE: I did fool you, and now I'm feeling
15 bad.

16 What I just handed out is a very short piece of
17 Exhibit C 64, which is the Guidebook.

18 Peru had mentioned on Slide 15 that they think,
19 you know, the governments and the members of GAC are the
20 people that should be speaking on public policy. What I
21 wanted to point out is this is straight out of the
22 bylaws.

23 ICANN's bylaws have what are called core values,
24 and they are all listed in Article I, Section 2. And
25 this is not one of the ones that Amazon had identified

1 in its sheet. And Core Value 11 states (as read):

2 "While remaining rooted in the
3 private sector, recognizing that
4 governments and public authorities are
5 responsible for public policy and duly
6 taking into account governments for
7 public authorities' recommendations."

8 So it's actually part of ICANN's mission, its
9 charter, as stated in its bylaws, that although ICANN is
10 a public -- is a private organization, it does need to
11 recognize the interests of governments and public
12 authorities and that they are the ones that are the
13 specialists in public policy.

14 And I think it's important because there have
15 been a lot of questions as to the extent to which ICANN
16 should be second-guessing the public policy decisions.

17 And what Mr. Atallah told you yesterday was that
18 the board was not comfortable putting itself in the
19 shoes of different governments. If the legislature of
20 Brazil speaks and acts and passes information that gets
21 passed along to ICANN about what is in the best
22 interests of the people of Brazil, it would -- ICANN's
23 board would be hard-pressed to know better or to know
24 the information that they received on public policy was
25 wrong.

1 And I think that that's a very -- it's a
2 difficult issue because, of course, you want the board
3 to be able to consider all the facts. But when it comes
4 to public policy issues, there's an appropriate
5 deference.

6 Returning to Slide 15, these are all of the
7 things that Peru said as recorded in Exhibit C 38, and
8 that, you know, the GAC principles add that ICANN should
9 abide by country, territory, or the descriptions unless
10 the relevant governments or authorities disagree, and in
11 the context of approved principles, there's a clear
12 basis that support our position as government.

13 And then Peru goes on. So there's the second
14 meeting, which is Exhibit C 40. And Peru goes on, and
15 it gives -- it gives three reasons for why it's
16 objecting to the .amazon.

17 The first is that they think that it's
18 appropriate. There are enough legal grounds in the
19 bylaws and in prior GAC advice, in the Guidebook. There
20 are legal grounds for the request. They don't say what
21 they are, but they think that they are appropriate.

22 The second is that they do say that Amazon is on
23 the ISO 3162-2 list, and they were wrong.

24 And then the third remark, and this is the one I
25 want to impress upon you. They say (as read):

1 "This is indeed a public interest
2 issue. That is why we are discussing
3 this in the GAC. There are several
4 populations that have been involved in
5 this, and I want stress the fact that
6 unanimously, all Amazon countries and
7 all Amazon provinces, departments, and
8 local governments have expressed in
9 writing their objection to .amazon."

10 So Amazon has argued throughout that because Peru
11 mentions the use of the list and because that's wrong,
12 that Peru's statement should be ignored. But while we
13 agree that Peru's statement should be ignored, there's
14 no indication that the board thought that .amazon was on
15 some list. And there's no indication that anybody else
16 thought that .amazon was on some list.

17 To the contrary, as I explored with Mr. Atallah
18 yesterday, Australia gave a long discussion about how it
19 looked like we had a situation where that was falling
20 through the cracks because it wasn't on the list, but
21 countries wanted to object and what do we do.

22 And so at the end, the GAC chair called for
23 formal objections to the advice and no one offered one.
24 So that is not in dispute any longer.

25 And this is the classic definition of consensus

1 advice, and I don't hear Amazon arguing any longer that
2 there's not consensus advice. They do argue it in their
3 briefs.

4 And so once the chair says, I've heard from all
5 of you countries, the time is now if you want to object,
6 and nobody does. And so the GAC has reached consensus.

7 So what happens after that? In July of 2013,
8 Amazon is invited to respond, and it does. And as we
9 know, they submitted a 316-page response, which is
10 Exhibit C 43. And they make three arguments.

11 Now, I want to note one thing. None of those
12 arguments made then was that the GAC didn't issue a
13 written rationale or a consensus rationale. Instead,
14 what they argue is that the GAC advice is contrary to
15 international law because they think that the advice is
16 rooted in the concept that Brazil and Peru think that
17 they have a legal right to the name.

18 Second, that there's been discrimination.

19 And third, that Amazon followed the rules, and so
20 Amazon should be approved because they had won the
21 community objection.

22 So in the fall of 2013, the NGPC, the first time
23 it considers the application says, well, we're going to
24 get Jerome Passa to actually look into this legal issue.

25 Amazon had attached -- one of the reasons that C

1 43, this Amazon response, is so long is that Amazon had
2 actually attached chapters of Heather Forrest's book --
3 there's two Heathers. And Amazon attached chapters of
4 Heather Forrest's book saying, you know, nobody -- no
5 government is lawfully entitled to a name.

6 And Mr. Passa agreed with that. And he also
7 said, Well, I don't think Amazon is automatically
8 entitled to the name either, so it's a draw.

9 So on Slide 19, we're now into the year 2014.
10 The NGPC gets additional submissions from Amazon and
11 Peru. In March of 2014, it gets additional Passa -- it
12 gets the Passa analysis and invites Amazon and Brazil
13 and Peru.

14 In April of 2014, the NGPC gets the responses.
15 And then we have the two meetings: April 29 and May 14
16 of 2014.

17 I took you through these meetings yesterday, so I
18 don't want to belabor the point, but it's a very
19 important point. And I want to run through the
20 rationale because there was a lot of questions about it
21 earlier.

22 Exhibit R 31 is the minutes of the board meeting
23 of April 29, 2014.

24 And as Mr. Atallah said yesterday, there were a
25 number of items on the agenda, and we only managed to

1 get to one of them, the GAC advice update. Which was
2 focused on .amazon.

3 At the bottom of page 2 (as read):

4 "Chris Disspain, an NGPC board
5 member, outlined potential alternatives
6 for the committee to discuss the GAC's
7 advice and what next steps we have to
8 do. Members of the committee weighed in
9 the relative merits and disadvantages of
10 various options to address the GAC
11 advice."

12 In the next paragraph (as read):

13 "The committee discussed whether
14 there were opportunities for the
15 relevant impacted parties to engage in
16 additional discussion."

17 And then in the next paragraph (as read):

18 "The committee considered
19 correspondence and comments submitted by
20 the impacted parties throughout the
21 process."

22 That there was -- some of the responses had been
23 prepared in particular in response to Jerome Passa's
24 information.

25 And Chris Disspain asked whether any additional

1 information would be helpful to the committee as it
2 continued its deliberations on the matter, and the
3 committee considered whether additional information was
4 needed. And then in the next paragraph, they talk about
5 what the GAC advice means and so forth.

6 And then if you turn to the next page --

7 ARBITRATOR MATZ: You are going pretty fast.

8 What page are you on now?

9 MR. LeVEE: I apologize. I'm on page 4.

10 The second paragraph (as read):

11 "The committee analyzed whether
12 the impacted parties would benefit from
13 having additional time. Some members
14 noted that a considerable of time
15 elapsed."

16 And basically, I think what the committee was
17 doing here was they were calling the question because
18 this had been going on for a while.

19 We do not have in these minutes every single item
20 that was discussed. We know from Mr. Atallah that the
21 Amazon applications took the entire meeting. I forgot
22 to ask him how long the meeting lasted.

23 But this is a board that is deliberating
24 thoroughly and carefully. And I think these minutes
25 make that clear. What makes it even more clear is when

1 you then go to Exhibit R 83.

2 So this is the meeting minutes from the May 14,
3 2013 ICANN/NGPC meeting. And when you look at the --
4 the board passes the resolution, and now I'm at the
5 bottom of page 7 -- actually, in the middle. The board
6 then issues the rationale for a decision.

7 And the board says, we've got these applications.
8 And in the next paragraph, the action being approved is
9 to accept the GAC advice. And the GAC advice is
10 entitled to a strong presumption; let's remind ourselves
11 of that.

12 And then if you carry over to page 8, there's a
13 discussion of process. The board posted the GAC advice,
14 and so it got a response from Amazon. It lists what the
15 response said. And then it indicated in the next
16 paragraph that the board decided to retain Mr. Passa to
17 give an expert analysis on the legal issues.

18 And then if you turn to page 9, it lists,
19 beginning on that page. It says (as read):

20 "In response to the 7 April 2014
21 communication to the GAC and Amazon,
22 ICANN received related correspondence."

23 And it notes it got a letter from the vice
24 minister of foreign affairs of Peru. It got a letter
25 from the director of the department of scientific and

1 technological themes and ministry of external relations
2 from Brazil. It got a letter from Scott Hayden of
3 Amazon.

4 And then I really want to emphasize the next
5 paragraph. It says (as read):

6 "The NGPC considered several
7 significant factors during its
8 deliberations about how to address the
9 GAC advice concerning Amazon and related
10 ITNs. The NGPC had to balance the
11 competing interest of each factor to
12 arrive at a decision.

13 "The concerns raised by the
14 relevant parties highlight the
15 difficulty of the issue. And then there
16 are a lot of factors that the NGPC found
17 to be significant."

18 And it goes on to list them. The first one is
19 that they had the GAC Early Warning which I just read
20 you a significant portion of.

21 In the second bullet, they note that they had
22 correspondence from Amazon, and Amazon explains why it
23 thinks the GAC got it wrong or shouldn't have taken the
24 advice that it gave.

25 And in the third bullet, the NGPC considered what

1 its job is here. Then it says very bottom of page 10
2 (as read):

3 "As part of its deliberations, the
4 NGPC's review of significant materials
5 included, but is not limited to the
6 following letters, materials, and
7 documents."

8 And it lists those letters and documents going on
9 for a page and a half, and it's small font. And as I
10 noted with Mr. Atallah yesterday, about four or five of
11 those pieces of correspondence are from Amazon.

12 Now, it does not tell us more, but it tells us a
13 lot. It tells us that the board was thorough, that it
14 had a ton of information in front of it. It doesn't
15 indicate any other information that anybody wished to
16 provide or could have been provided. It shows a board
17 doing what a board is supposed to do.

18 The board did not have, as we've already
19 discussed, a consensus rationale or any rationale from
20 the GAC, but it had through the Early Warnings, from
21 letters, and from statements by the governments and
22 their legislatures, it had a considerable amount of
23 information as to what the public policy concerns were
24 of those countries.

25 So I cannot say definitively what public policy

1 interests the board addressed, if any, but the board had
2 public policy concerns of Brazil, Argentina, Peru, and a
3 lot of other countries. And if it deferred to those
4 public policy interests, it was absolutely appropriate
5 for the board to do so.

6 The board would not know better than the
7 countries that were articulating public policy concerns
8 that affect their constituents.

9 ARBITRATOR BONNER: Doesn't that make the GAC,
10 then, the decision-maker as to whether or not an
11 application is going to be approved or rejected?

12 MR. LeVEE: No.

13 ARBITRATOR BONNER: If you say you are going to
14 defer to the GAC when its consensus advice as to whether
15 or not there is a valid legitimate public policy effort?

16 MR. LeVEE: No. And I think you and Mr. Atallah
17 had a colloquy on that yesterday that was enlightening.
18 You asked, Well, what if the only basis on which the GAC
19 had issued advice was Peru's statement that the name was
20 on the list and now we know that that's wrong? So
21 suppose that had happened.

22 Mr. Atallah said, Well, then we would have wound
23 up in a dialogue with the GAC because we would have
24 rejected the GAC advice and we would have had to meet
25 and confer with the GAC, which is obligated under the

1 bylaws, and I think in this instance under the
2 Guidebook.

3 So I think the line that you're having trouble
4 drawing is, well, it looks as if once the GAC says so,
5 it's not a strong presumption; it's a nonrebuttable
6 presumption. I think that's wrong.

7 It's a strong presumption, as it should be. And
8 at that point, the board has to balance all of the other
9 competing factors and interests that come into play.

10 Mr. Atallah couldn't -- it was very hypothetical,
11 some of the questions that he got as to what might have
12 tipped the balance the other way. But there certainly
13 could be situations where the balance does get tipped
14 and where the board says, I'm not comfortable with the
15 GAC advice. We need to talk to the GAC as to how we are
16 going to proceed because we have an obligation under our
17 governing documents to do so.

18 So no, I don't think the effect of GAC advice,
19 consensus GAC advice is to create anything other than
20 the strong presumption.

21 And what's odd here is that it -- somehow ICANN,
22 which is, in essence, the beneficiary of the strong
23 presumption because it followed the strong presumption,
24 seems to be asked to have the burden to defend the
25 strong presumption and the acceptance of a strong

1 presumption, which I think is backwards.

2 I think Amazon should have the burden to
3 demonstrate that there were -- that the NGPC should have
4 done something different given what it had received --
5 all it had was what it had received -- and given what
6 the actual facts are on the ground.

7 The arguments that had been made so far -- I'll
8 finish my sentence and then I'll -- the arguments that
9 have been made so far are basically, well, Peru got it
10 wrong -- but what I've just taken you through was that
11 there was lots to Peru's substance other than the one
12 piece -- and a laundry list of governments saying things
13 to ICANN.

14 And then the question becomes, well, what did
15 ICANN have in the balance to outweigh public policy
16 concerns of these governments? We do have Amazon's
17 interests and they were taken into account, but does the
18 private interest of Amazon outweigh the public interest
19 of the GAC? And the board said no, there's a strong
20 presumption we don't have enough.

21 ARBITRATOR BONNER: Okay. I follow you on that,
22 but let's say -- so I think Mr. Atallah either agreed or
23 he would agree, perhaps you would agree, that if the
24 only public policy reason that underlay or underlied the
25 GAC advice was that Peru's assertion that it was a

1 listed geographic name was wrong, then you would have
2 rejected the GAC advice even though there was a strong
3 presumption because the only reason given was not a
4 valid public interest reason, correct?

5 MR. LeVEE: I think that's what would have
6 happened.

7 ARBITRATOR BONNER: Okay. So I kind of scoured
8 the record here, and I'm trying to figure out what the
9 public policy reasons are.

10 There's another public policy reason that was
11 stated by Peru and I think by Brazil and that is that
12 neither one of them or both of them had a legal or
13 sovereign right to the name "Amazon," and that's not
14 right either, at least if we follow Dr. Passa's report
15 that there is no right under international law of a
16 government to the name.

17 So that wasn't right.

18 Then there's the assertion that the public policy
19 interest is that -- and I'm trying to imagine who this
20 would be, but an NGO or some other association would
21 want to use the name "Amazon" in the future for purposes
22 of perhaps protecting the Amazon biome or the Amazon
23 people's culture, and they are going to be deprived of
24 that because .amazon would be taken.

25 And that doesn't seem to be a reason alone,

1 standing alone to -- public policy reason to deny the
2 application.

3 Am I right or wrong?

4 MR. LeVEE: Well, first of all, the country of
5 Brazil thinks that you're wrong because they asserted
6 that exact objection.

7 ARBITRATOR BONNER: Doesn't the Guidebook say
8 that that's not a material reason for denying an
9 application, in essence, that in the future, somebody
10 who might decide they want it in the future is deprived
11 of the string?

12 MR. LeVEE: Well, I don't think that, no -- yes
13 and no. That was not the only thing that Brazil said on
14 that subject.

15 ARBITRATOR BONNER: No, I know that, but I'm
16 limiting it. I realize I'm parsing it out now, and you
17 might want to repackage it. But parsing it out under
18 the Guidebook, that does not appear to be a valid public
19 policy reason under the ICANN's own rules for denying
20 the application.

21 MR. LeVEE: So I guess because I'm not accepting
22 the question as you frame it, I'm having trouble with
23 it.

24 The question as you frame it is limited to the
25 possibility that someone might apply for .amazon out of

1 that region in the future. That's not the language
2 you're quoting at all.

3 There are people who live in those regions who
4 might be affected by the applications and might -- and
5 wouldn't be able in the future to be associated with
6 them in some way.

7 ARBITRATOR BONNER: Let me just read back on
8 page 10, R 83. This is the reasons given by -- this is
9 by the NGPC.

10 There are two reasons -- there are only two
11 reasons given that -- public policy reasons that I can
12 see here.

13 One is reference to the Early Warning, and the
14 reference to the -- it says, I'm quoting (as read):

15 "It would prevent the use of this
16 domain for purposes of public interest
17 related to the protection or promotion,
18 awareness, et cetera, of the Amazon
19 biome or hinder the ability of the
20 population or somebody acting on behalf
21 of the population from using that name."

22 So that's No. 1. And the other one is that --
23 the only other one that I see here -- and I want you to
24 point out if there's some additional public interest or
25 public policy reasons. Right below that it refers to

1 the Early Warning that -- in which either Peru or Brazil
2 or both of them indicated that the string, Amazon, would
3 match part of the name in English of the Amazon
4 Cooperation Treaty Organization.

5 Anyway, first of all -- I guess there are two
6 questions. One, are there any other public policy
7 reasons that the NPGC cites that would support the GAC
8 advice, other than those two things? And then in
9 whichever order, the very first one appears to be an
10 invalid assertion of a valid public policy reason in the
11 sense that if the only reason for denying the -- if the
12 only thing that underlines the GAC advice, that the only
13 reason were that it would prevent somebody in the future
14 from using that name, that appears to be an invalid
15 reason, and you're saying no. And go ahead. I want to
16 hear that.

17 MR. LeVEE: You are confusing -- probably because
18 I brought you there.

19 You are confusing the objection process for
20 community -- for geographic strings with the GAC
21 process.

22 So when Judge Schwebel, who adjudicated the
23 geographic objection, when he listed the factors for a
24 community objection under Module 3, one of the factors
25 that he listed was that it is not appropriate to block a

1 name because someone else might want to use the name in
2 the future.

3 Nothing about that applies to GAC advice. That's
4 part of a different portion of the Guidebook relating to
5 the factors that would be considered in conjunction with
6 a name that -- as to which there's a geographic
7 objection.

8 So when Judge Schwebel of the ICC adjudicated
9 .amazon, he said, Well, the fact that people might want
10 to apply for .amazon in the future, I'm not going to
11 credit that. They could have applied today and they
12 didn't so they are out.

13 But that same objection is not a basis to not
14 give -- I gave you a double -- let me start over.

15 The same basis would be appropriate for the GAC
16 to be able to say, we have a public policy concern
17 because this name is the name of a huge area of our
18 region that has -- takes up a huge part of our country.
19 And we have people who may wish to use the name.

20 And then when you look through the GAC Early
21 Warning, which we have walked through, you know, it's
22 saying we have these people, we have these resources,
23 and if you give the name exclusively to somebody else,
24 you are going to hinder the protection, promotion, and
25 awareness raising of issues related to the Amazon buyer.

1 That's a public policy concern.

2 ARBITRATOR BONNER: Because they will not be able
3 to use the name .amazon in the future. That's the clear
4 indication of it. And, look, it may be that, you know,
5 the rule applies not to -- the rule applies to community
6 objections, but it doesn't apply to GAC advice. I mean,
7 that's really what you're saying. It just doesn't apply
8 to GAC advice.

9 MR. LeVEE: I understand.

10 ARBITRATOR O'BRIEN: Can I jump in, Judge?

11 I think we are going down a road here. I think
12 things got conflated here, and certainly I'm not
13 suggesting, Counsel, that you intended that. But I
14 think we all agree that the GAC did not have any
15 rationale for its decision, correct?

16 MR. LeVEE: The GAC as a GAC did not issue a
17 stated rationale.

18 ARBITRATOR O'BRIEN: Zero rationale from the GAC.

19 MR. LeVEE: Did not state one, correct.

20 ARBITRATOR O'BRIEN: Did not state one, zero
21 rationale.

22 The only rationale that we have -- and so when
23 you are talking about GAC advice and we're looking at
24 Exhibit R 83, you are simply talking about statements
25 from Peru and Brazil, correct?

1 THE WITNESS: I'm looking at what the NGPC looked
2 at.

3 ARBITRATOR O'BRIEN: And what they looked at
4 specifically was from Brazil and from Peru, not from the
5 GAC. This is not GAC advice, correct?

6 MR. LeVEE: They say in considering the GAC
7 advice, we don't have a rationale, and so we're going to
8 look at other things.

9 ARBITRATOR O'BRIEN: Right. And so when they're
10 looking at other things, that is not GAC advice.

11 MR. LeVEE: That's correct, because we don't know
12 what the GAC advice was based on because they didn't
13 issue a rationale.

14 ARBITRATOR O'BRIEN: So is a statement from a
15 country entitled to the same deference as GAC advice?

16 MR. LeVEE: Here's what you have, is a sequence.
17 We know three things. We know that Brazil and Peru were
18 the ones responsible for causing the GAC advice to be
19 put forward.

20 We know that the GAC did not issue a rationale.

21 We know that the GAC advice is entitled to a
22 strong presumption.

23 And fourth, we know that the GAC has no
24 obligation to issue a reason, and it fought against the
25 obligation to do so in the Guidebook.

1 In that scenario, I think the board was
2 100 percent reasonable in relying on statements from
3 Brazil and Peru that were not formal GAC advice, but
4 that the board could reasonably believe were matters
5 that the GAC considered.

6 ARBITRATOR O'BRIEN: That's very different.
7 Matters that the GAC considers is very different
8 because, for example, we've got the U.S. statement on
9 its abstention --

10 MR. LeVEE: Yes.

11 ARBITRATOR O'BRIEN: -- in which it specifically
12 disagreed with this very advice that's coming from
13 Brazil and from Peru. And I don't see any reference
14 here to the U.S. abstention.

15 Did the board consider the U.S. abstention which
16 directly contradicted the advice that you're elevating
17 in this argument to GAC advice? Because I don't see it
18 in the order. Maybe they considered it and just decided
19 not to include it in the order.

20 Is that anywhere in the record?

21 MR. LeVEE: I know that the board did, and I'll
22 explain why. When I met with Mr. Atallah on Friday as
23 part of our prep session, I asked him that question.

24 MR. THORNE: Your Honor, I'm going to object
25 to -- I'm sorry, Judge Bonner, I'm going to object to

1 hearsay. And if this goes on, I may have some questions
2 for Mr. LeVee about the other things he learned from
3 Mr. Atallah.

4 MR. LeVEE: Why don't I say it this way. I know
5 the answer to your question. It is hearsay. I further
6 acknowledge Mr. Atallah is not here. And it's not
7 listed.

8 There was a considerable amount of notoriety
9 associated with the fact that the United States issued
10 was it issued, the statement that it issued. And I
11 think we reference some of that in our brief, but I
12 don't -- I did not ask Mr. Atallah that question
13 yesterday, so I won't tell you what he --

14 ARBITRATOR O'BRIEN: And so the U.S. statement
15 would have as much weight as any statement from Brazil
16 or Peru, correct?

17 MR. LeVEE: It could, but the U.S. didn't object,
18 which is the ultimate.

19 ARBITRATOR O'BRIEN: So legislative history, in
20 trying to determine what the GAC consensus was, only is
21 valuable if it comes from the objector?

22 MR. LeVEE: No, I'm not saying that. I think
23 what the U.S. did was relevant, and I think people were
24 aware of it.

25 ARBITRATOR O'BRIEN: And it may be one of the

1 reasons that there was not advice that came with the GAC
2 objection, correct? Because the U.S. may not have
3 abstained if the GAC tried to adopt Peru or Brazil's
4 objection, correct?

5 MR. LeVEE: I think your speculation would be no
6 better or worse than mine, candidly.

7 ARBITRATOR O'BRIEN: And that speculation is the
8 same speculation that's here with respect to trying to
9 elevate Peru and Brazil's objections to the level of GAC
10 advice. Because it just isn't GAC advice, is it?

11 MR. LeVEE: It's not GAC advice nor do I think
12 it's speculation. As I said, the NGPC knew the
13 countries that were behind the GAC advice and received
14 information from those countries.

15 When the Passa report was issued, the NGPC sent
16 the report to Amazon, Brazil, and Peru. It wanted the
17 thoughts of those three: two governments and one
18 private entity. It knew who the players were, and it
19 sought considerable information from those players.

20 And Brazil and Peru were, just as Amazon was,
21 lobbying information to the board regularly. Every time
22 there was some event, Brazil, Peru, and Amazon would
23 send more thoughts to the board.

24 So I agree with you insofar as I cannot say what
25 the GAC's specific rationale was. Never been able to

1 say that. And Ms. Dryden was not interested in
2 testifying, apparently, because she didn't respond to my
3 e-mail. So I can't give you evidence of that.

4 But I disagree with you as to whether it's
5 reasonable for the board, knowing where the GAC advice
6 came from, to look to the two countries that clearly
7 were the spirit behind the advice and were communicating
8 with the board regularly for their thoughts. And that's
9 what the board had in front of them.

10 ARBITRATOR O'BRIEN: Let me ask you one final
11 question on that issue, and that is on this issue of
12 deference, because the GAC advice comes with a strong
13 presumption, correct?

14 MR. LeVEE: (Moves head.)

15 ARBITRATOR O'BRIEN: Does an individual member
16 state's objection in an alert or a statement in a letter
17 to ICANN or to the board, is that entitled to the same
18 level of deference, a strong presumption, that GAC
19 advice is?

20 MR. LeVEE: Not under the Guidebook, no.

21 ARBITRATOR MATZ: I'd like to follow up on the
22 very interesting and useful distinction that Mr. O'Brien
23 drew between a basis emanating from GAC that may or may
24 not be reflected in Exhibit 83 and one that comes
25 directly from these two governments of Brazil and Peru.

1 I'm a little puzzled by what I understand you to
2 have been saying in response to this useful colloquy,
3 because at the bottom of page 9 of Exhibit 83, there is
4 a flat-out recognition that the NGPC doesn't have the
5 benefit of the rationale relied upon by the GAC in
6 issuing its consensus advice, but there can be no doubt
7 that it understood what the consensus advice was.

8 And if you look at -- and it's repeated
9 elsewhere. If you look at the items listed on page 11
10 of this document, they heard from GAC. They got the GAC
11 Early Warning, the GAC Beijing communique, the GAC
12 Durban communique, the GAC Buenos Aires communique, the
13 GAC Singapore communique, and then they also listed
14 things they got from Amazon and maybe Peru, I'm not
15 sure.

16 So are you viewing Exhibit 83 as containing no
17 basis to know what GAC's position was and, therefore, no
18 basis to attach any possible presumption?

19 MR. LeVEE: No. What I'm -- I'm actually arguing
20 to the contrary but perhaps doing a poor job.

21 I think, particularly based on some of the
22 provisions you just cited, I cannot say to you that the
23 GAC issued a rationale.

24 That was the first subject in the colloquy.

25 Indeed, the GAC negotiated and insisted on its

1 ability not to do that. So we have that.

2 So a board, the ICANN board -- I think the NGPC
3 can't say, well, the GAC didn't issue a rationale.
4 We're going to throw it out. Because the board knew
5 that the GAC had no obligation to state a rationale.

6 Instead, the board had all of this other
7 information disseminated by the governments that were
8 behind the GAC advice.

9 ARBITRATOR MATZ: Let me put the question simply.
10 Is the presumption to which all three of us are trying
11 very hard to foc- -- on which we are all trying to
12 focus, does the presumption arise out of rationale or
13 does it arise out of the giving of a consensus or
14 consensus advice? Those two things may be the same.

15 MR. LeVEE: It arises out of the GAC advice,
16 period, end of story.

17 ARBITRATOR MATZ: And was the GAC advice as
18 contained in this Exhibit 83 before the board?

19 MR. LeVEE: Yes, it was.

20 ARBITRATOR MATZ: And so is it your position that
21 the presumption would be applicable --

22 MR. LeVEE: Absolutely.

23 ARBITRATOR MATZ: -- regardless of what weight we
24 give or not give to it?

25 MR. LeVEE: Absolutely. I don't think anybody is

1 really disagreeing. There was GAC advice. It is
2 entitled to the strong presumption. The question is:
3 What do you do with GAC advice that doesn't have lots of
4 additional things attached to it from the GAC?

5 And I think it's reasonable for the board to take
6 what all of the countries said, the countries that were
7 leading the charge at the GAC, to take what they said,
8 which they said multiple times over the course of a
9 nine-month period, spring of 2013 through -- really, an
10 11-month period through the -- April of 2014. Kept
11 sending letters, kept sending communiques. There was
12 the Early Warning. I think the board knew clearly what
13 was going on, what the rationale --

14 ARBITRATOR MATZ: So you see that there is a
15 relevant distinction between something that would be
16 deemed a rationale on one hand and something that is
17 classified as an advice consensus on the other?

18 MR. LeVEE: I'm not sure what you mean by advice
19 consensus.

20 ARBITRATOR MATZ: I mean whatever is referred to
21 in this document. On page 9, it says (as read):

22 "The NGPC considered several
23 significant factors during deliberations
24 about how to address the GAC advice
25 concerning Amazon."

1 MR. LeVEE: Correct.

2 ARBITRATOR MATZ: That's what I understood the
3 board was considering.

4 MR. LeVEE: It was considering the GAC advice.

5 ARBITRATOR MATZ: And it distinguished the GAC
6 advice from a rationale and found that there was no
7 rationale before it to consider.

8 MR. LeVEE: It says exactly that in first bullet.

9 ARBITRATOR MATZ: In fairness to Mr. Thorne, when
10 you have your opportunity to speak again to us, I would
11 welcome you addressing whether it's your client's view
12 that the claimed difference that Mr. LeVee is pointing
13 to between something deemed a rationale and something
14 that was referred to in the document as the advice has
15 any licks (verbatim) for purposes of the applicability
16 of the presumption.

17 ARBITRATOR BONNER: By the way, I think I
18 understand what you are saying, which is -- and, by the
19 way, I'm sure my colleagues do too.

20 ARBITRATOR MATZ: I'm not sure.

21 ARBITRATOR BONNER: It's when you don't have any
22 rationale given by the GAC. There is no -- there is
23 consensus advice, but there's no rationale or reason,
24 public policy or any other reason given by the GAC for
25 objecting to the string.

1 Then the board, the NGPC, is saying, well, we
2 should look for something that might be a public policy
3 interest that supports, because it's only a strong
4 presumption. It's not -- if you didn't have any public
5 policy reason in your record, I think you would be in a
6 lot of trouble right now because it's only a
7 presumption. It's not a conclusive presumption.

8 And so the board does refer to, and I think
9 logically, to whatever it had, and what it had was two
10 principal countries who had stated objections and, to
11 some degree, stated some reasons for their objections.

12 By the way -- a lot of their objections, by the
13 way, are, we object because we object. But there are
14 occasionally a glimmer of a public policy reason
15 suggested in the Early Warnings. And I understand that.

16 So it would give -- theoretically, it would give
17 at least some basis for -- and you might want to think
18 about this, Mr. Thorne, yourself because I think it
19 might be if there is a valid and legitimate public
20 policy interest that the NPGC was looking at, that would
21 go along with the presumption and might be enough to
22 carry the day, assuming -- you know, I'm not rejecting
23 every other argument that's been made here, but assuming
24 arguendo, that there doesn't have to be a statement of
25 policy reasons or rationale.

1 So there are a couple of things suggested, and to
2 me, one of the important issues is, is there one or more
3 valid public policy reasons stated such that the board
4 could rely on it and not simply defer to Brazil and
5 Peru?

6 MR. LeVEE: And I'm going to cover that in some
7 of the upcoming slides.

8 ARBITRATOR BONNER: And you're saying the denial
9 of the .amazon string in the future, to some un- -- yet
10 unknown entity, an NGO, that might want to assist in
11 protection of the environment of the Amazon or the
12 cultural issues with respect to the people that populate
13 the Amazon region is a sufficient public policy reason
14 for the denial of the application?

15 MR. LeVEE: Definitely.

16 I'm going to try to run through the rest of my
17 slides. Please continue to interrupt because it's
18 focusing on the issues, I think --

19 ARBITRATOR BONNER: We thought it was only fair,
20 you know, if you got a few questions yourself.

21 MR. LeVEE: And I'm going to skip a few because I
22 know I need to leave some extra time.

23 ARBITRATOR BONNER: No, go ahead. Go back to
24 your presentation.

25 MR. LeVEE: On Slide 21, I'm just noting what

1 comes out of the bylaws as to why we are here. We are
2 in an independent review process which applies to board
3 actions, any person materially affected by decision or
4 action by the board.

5 And my point is that -- in the second bullet,
6 which is that we are not here to decide whether the GAC
7 acted consistently with anything. We are simply here to
8 decide whether the board did not.

9 Certainly, the board had an obligation to look at
10 the GAC advice, to consider all of the issues. But IRPs
11 do not cover any of the other subsidiary organizations
12 other than .org and, in this instance, the NGPC.

13 So the role of this panel is to compare the board
14 actions with the articles and the bylaws.

15 I'm going to skip some of this because you've
16 already heard it.

17 There are multiple -- on Slide 23, there are
18 multiple IRP panels that have held that the panel is not
19 to substitute their judgment for that of the board.
20 That comes out of the booking.com decision, but you'll
21 also find it in Merck and you'll also find it in
22 Vistaprint. And I'm not sure there is any IRP
23 declaration that says anything different than that on
24 substance.

25 The bylaws do specify a three-part test, and so

1 as the Merck panel found, it informs the exercise of the
2 comparison. We are looking at, did the board act
3 without a conflict of interest? Did it exercise due
4 diligence and care? And having a reasonable amount of
5 facts, did it exercise independent judgment?

6 So this is the reason I keep saying -- I keep
7 talking about the fact that the board exercised
8 independent judgment, because I've taken you through the
9 thoroughness of what the board did, the multiple
10 meetings, the long agendas at these meetings, the long
11 colloquy, and the very thorough board resolution and the
12 accompanied rationale.

13 As we noted before, IRP proceedings have to be
14 filed within 30 days. And so challenges to Guidebook
15 procedures must be filed within 30 days of publication
16 of the procedure's adoption. So here we have a
17 Guidebook that does not require the GAC to issue a
18 rationale.

19 We have Mr. Thorne saying that failure violates
20 the bylaws.

21 But the board issued the Guidebook on which
22 Amazon submitted its application in January of 2012, and
23 Amazon initiated its IRP years later.

24 So we're well outside of the 30-day period. The
25 booking.com decision notes this. And this is really not

1 so much about a statute of limitations as much as the
2 orderly operation of the program.

3 If we have people coming in and saying, you know,
4 I know the Guidebook doesn't say this, but I think it
5 should, consistent with the bylaws, well, 1930
6 applications were submitted relying on what the
7 Guidebook said. And if the rule now is going to change
8 because an IRP panel said, gee, we think the GAC ought
9 to be issuing a written rationale, we know the Guidebook
10 doesn't say that, we know the GAC rejected that, we know
11 the board accepted the GAC's rejection, we are now going
12 to impose it, I just submit it's late in the process to
13 do that.

14 With respect to the issue of relief, there's no
15 doubt that an IRP panel can issue a binding declaration
16 that the board did or did not act consistent with the
17 articles, bylaws, or Guidebook. But it is clearly the
18 board and not the panel that's responsible for deciding
19 how to remedy that.

20 So this is the -- Mr. Thorne acknowledged that
21 the Vistaprint decision was very clear. And I suggest
22 to you that it has a very logical rationale.

23 When it comes to the question of whether or not
24 the IRP panel can require that ICANN's board implement
25 any form of redress based on finding a violation, here

1 the panel believes that it can only raise remedial
2 measures to be considered by the board in an advisory,
3 nonbinding manner.

4 And so the notion that the panel should say, we
5 want you to do this, we want you to do it within x
6 number of days, and if you consult with the GAC, we want
7 you to do that within an x number of days, I would urge
8 you on behalf of ICANN's board not to impose any of
9 those kinds of limitations.

10 ARBITRATOR BONNER: Well, if we made a
11 recommendation, though, and didn't -- I mean, it's just
12 arguendo, the decision of the panel was that there has
13 been the -- there was a violation of the bylaws and
14 articles, just arguendo, and we recommended something
15 to -- to ICANN, to the board, is it unreasonable to put
16 any timeline on that recommendation, that we recommend
17 that this be done within --

18 MR. LeVEE: As long as the timeline is itself a
19 recommended timeline, I would have no concern about
20 that.

21 Now, I actually did not hear it in the last two
22 days, but in Amazon's prehearing brief, they argue that
23 the GAC advice was not consensus advice. So I had a
24 slide in here that addressed that. I didn't hear that
25 argument.

1 ARBITRATOR BONNER: It sounds like it's been
2 conceded, the consensus advice.

3 MR. LeVEE: Yes, so I'm moving --

4 ARBITRATOR BONNER: Oh, excuse me, Mr. Thorne.

5 MR. THORNE: Your Honor, it was never made. I
6 think we must have been ships passing in the night. We
7 did not argue there was no --

8 ARBITRATOR BONNER: I think in the prehearing
9 briefs, I kind of understood that argument, that it
10 might have been made. But in any event, it's not --
11 that's just one issue that we don't have to have
12 argument on.

13 MR. LeVEE: But Amazon does argue on page 19 of
14 their prehearing brief -- I'm on Slide 30 -- that the
15 GAC was required to give a consensus reason. And this
16 is where I wanted to point out to you -- and these are,
17 again, to tell you the specific exhibit. Exhibit 9 is
18 Guidebook Version 6, which provided that the GAC should
19 identify which countries were objecting, the public
20 policy basis for the objection and the process by which
21 consensus was reached.

22 And the GAC said, we don't like Exhibit --
23 Version 6 of the Guidebook, and it's contrary to how we
24 like to do things.

25 And so there was a meeting -- and this is in

1 Exhibit R 13 -- where the chairman of the board says,
2 let me move on into another topic, which is removal of
3 references in the Guidebook that attempt to specify that
4 future GAC Early Warnings and advice must contain
5 particular information or take a specified form. And
6 I'm delighted to say that the board agrees completely
7 with the GAC in relation to this topic.

8 And so we're -- I think -- well, it's still an
9 issue, but to me, the issue should be resolved. The GAC
10 didn't have a rationale. You're struggling with, well,
11 what do we do now in the face of that?

12 But I want to be very clear, to me, the evidence
13 is undisputed that the GAC was not obligated to have a
14 rationale according to the Guidebook provision based on
15 negotiations between the GAC and ICANN.

16 ARBITRATOR BONNER: The only argument, really,
17 left would be that the underlying principles of the
18 bylaws perhaps as reflected in an IRP decision would
19 support a determination that reasons of rationale should
20 be given for GAC advice.

21 And I don't want to rehash all that. I think I
22 understand the arguments pretty well. And you've
23 certainly nailed the Guidebook development and the
24 historical evolution of that, that certainly that was
25 not intended and it was essentially read all over the

1 Guidebook that there would be a requirement that
2 rationale be stated.

3 It is -- I shouldn't do this. Your time is
4 limited, but it is interesting that the 2016 bylaws
5 apparently reinstate some requirement that the GAC
6 advice be accompanied with a -- reasons or rationale.

7 MR. LeVEE: And let me just comment on that
8 briefly since you raised it.

9 So what has happened over the last two years has
10 been that ICANN was able to wean itself off of its
11 relationship, contractual relationship with the
12 United States government. It was a supervisory
13 relationship.

14 And in order to do that, there were volunteers
15 that made up a so-called community. And there were
16 people who met and devoted an enormous amount of time
17 and effort to create what is, in essence, new ICANN.

18 It's the same California corporation, but it has
19 new bylaws. As long as the bylaws and the Guidebook
20 used to be, the next edition is twice as long.

21 And it was in conjunction with that process that
22 a lot more, for lack of better word, process was put
23 into place. But the bylaws that were passed many years
24 ago at ICANN and modified over time didn't address a lot
25 of these kinds of details.

1 So, for example, IRPs are going to be completely
2 different. And they tried to anticipate a lot of things
3 that had never come up and so forth. So one of the
4 things that they've now instructed, going to your
5 comment, is that all advisory committees, not only the
6 GAC -- and so this is not in response to the DCA case.
7 All of the advisory committees, when they issue advice
8 to ICANN's board, they have to provide a rationale for
9 that advice.

10 It's part of the new community process where the
11 community -- yesterday you asked Mr. Atallah, What does
12 bottom's up mean? Somebody asked him. He tried to
13 explain that ICANN has supporting organizations. It has
14 advisory committees. The future of the domain name
15 system is not supposed to emanate from the board, but
16 the ideas are supposed to emanate from these
17 organizations that are the constituents of ICANN.

18 And the result of this very extensive change,
19 which ultimately made its way through President Obama
20 but not without considerable Republican opposition, to
21 set ICANN free as more -- the result of that was more
22 community involvement, more requirements to explain a
23 lot of things that are happening.

24 ARBITRATOR BONNER: I think I got you a little
25 off track, and I didn't mean to do that.

1 You made the point that the new bylaws that are
2 not retroactive expressly, the argument on the other
3 side is that they codify, perhaps, a holding in the DCA
4 as precedent. Understand both the arguments. We are
5 going to look at the DCA Trust case as to whether or not
6 there actually is precedent or that proposition that the
7 GAC needs to state a reason or rationale, so I think
8 we've got that one.

9 MR. LeVEE: I will move on.

10 On Slide 31 -- and I got a little out of sequence
11 because of the questions. I wanted to give you the
12 exhibit numbers of all of these things that the NGPC had
13 before it, that helped it decipher what the GAC did.

14 So it had the statement from Argentina, Brazil,
15 Chile, Peru, and Uruguay; the Montevideo declaration.
16 It had the Brazilian Internet steering committee. It
17 had the federal senate of Brazil, which issued a
18 resolution; and it had all of these other things that
19 I've just listed on Slide 32, which I will not read
20 separately. A lot of letters, a lot of information from
21 a lot of countries.

22 So I do think the board had considerable amount
23 of information before it. These were the specific
24 countries on Slide 33 that specifically supported the
25 GAC advice. There were others, candidly, that I

1 couldn't completely tell. Their statements were a
2 little ambiguous, and so I didn't put them on there.
3 But these countries in particular were quite clear.

4 And then you've got the statement of Peru, the
5 statement of all these countries. You've got, of
6 course, the Early Warning, and you've got their
7 communique.

8 Just a reminder of what Mr. Atallah confirmed
9 yesterday. He told you that the board invited and
10 reviewed Amazon's responses and that it did take
11 Amazon's interests into account.

12 I asked him if they took Amazon's interests in
13 account. He said, Absolutely. We read Amazon's papers.
14 We, of course, took their position into account.

15 He was asked by Mr. Thorne if the NGPC took
16 Amazon's customers' interests into account. I think
17 Mr. Atallah dodged that question and I think
18 appropriately so. I don't know how you would take
19 customers' interests into account.

20 Amazon has millions of customers. They're a very
21 successful company. I don't know how you could define
22 who the customer base is, but you can define Amazon.
23 They're an important company and they're entitled to
24 have their interests considered and they were.

25 And then this slide just tells you -- and we

1 really already covered this -- all of the other things
2 that the NGPC did as part of its investigation.

3 So the bylaws required that the board had due
4 diligence and care in having reasonable amount of facts.

5 I think it's hard to argue that the board did not
6 have a reasonable amount of facts.

7 The strong presumption meant that the GAC advice
8 would be followed unless there was evidence sufficiently
9 strong to convince the NGPC that the underlying public
10 policy concerns were unfounded.

11 And that's where we've had a long colloquy, and
12 so I'm not going to dwell there other than to say that I
13 do think we have demonstrated easily that the concerns
14 have more and plausible foundations.

15 And it's clear that the GAC advice was related to
16 issues of public policy. They say it repeatedly. It's
17 not that the GAC was saying, oh, by the way, we have
18 some other concern we want to talk to you about. These
19 were issues of public policy.

20 So I think we are in a situation where the GAC's
21 advice was not manifestly wrong. I do not know the
22 standard of when you would reject a strong presumption,
23 but I would imagine, as Mr. Atallah said yesterday, that
24 if the advice was manifestly wrong, such as Peru being
25 in error, that the board would not have adopted the

1 advice. And that was his answer to the question.

2 ARBITRATOR BONNER: Assuming that the GAC -- the
3 underlying rationale for the GAC advice was we're
4 objecting because we don't want a U.S. company or
5 company -- a non-Brazilian company to have the name
6 .amazon, would that be a valid public policy position
7 for a country to take?

8 MR. LeVEE: Well, first, I don't think it was the
9 position.

10 ARBITRATOR BONNER: No, I'm not saying it was.
11 This is a hypothetical, I think.

12 Well, I don't want to prejudge, but all --

13 MR. LeVEE: I don't know. If the public interest
14 of Brazil or Peru or any of the other countries was that
15 they felt that the name should be operated by a South
16 American country because it was so close to the name of
17 their river, and they had concerns based on it, I don't
18 think I could say how the board would have felt about
19 that.

20 I think it could have been plausible advice.
21 It's not what happened. And I know that there is --
22 that the charge here of discrimination, but I don't see
23 that. What I see is that Amazon is a U.S. company. And
24 I see a couple of e-mails where Amazon is accused of
25 being a U.S. company. Well, they are.

1 I don't know that there would have been any
2 difference if they had said, well, you know what, they
3 are a Luxembourg company, because that's where they are
4 actually incorporated, and so we're going to
5 discriminate against Luxembourg or the U.K. or France.

6 Am I answering your question?

7 ARBITRATOR BONNER: You are -- I mean, you are
8 doing your best.

9 MR. LeVEE: I think it's a tough one. It's a
10 tough question. I hadn't thought about it. And I think
11 if -- if the government of Peru, as an example, says
12 that this name is extremely close to the name of the
13 river in our country that dominates a lot of the
14 geography in our country and we want it operated in a
15 certain way, we think that there might be problems if
16 somebody else operates it, the fact that it's a U.S.
17 company, I think, probably would have been beside the
18 point. It certainly would not have been a South
19 American country -- company.

20 So --

21 ARBITRATOR BONNER: Where are you in the --

22 MR. LeVEE: I'm getting close to done, but I'm
23 not done. Do you need a break?

24 ARBITRATOR BONNER: Yes, the reporter would like
25 a break. So we'll take our afternoon recess. We'll

1 take ten minutes. It's about 3:10. We'll resume at
2 3:20.

3 (Recess.)

4 ARBITRATOR BONNER: We are back on the record.

5 MR. LeVEE: We are. And we're now skipping ahead
6 to Slide 43 because I've determined that we've already
7 covered many of the internal slides in part because they
8 address the DCA and GCC matters, and that's where I had
9 started prior to lunch.

10 ARBITRATOR BONNER: Great.

11 MR. LeVEE: So we didn't hear much about
12 .ipiranga yesterday, but there was a little bit of
13 testimony on it. But Mr. Thorne raised it this morning,
14 so I want to address it.

15 So Amazon argues that rejecting .amazon but
16 allowing .ipiranga is discriminatory.

17 I want to be clear that the thrust of what Amazon
18 is arguing, I believe, is that the board actually did
19 something with respect to the .ipiranga application, and
20 it didn't. And that's what Mr. Atallah told you
21 yesterday.

22 When there was no objection of any kind asserted
23 against a string, gTLD application, the board would
24 never have a reason to be involved.

25 In order to discriminate, one has to treat one

1 party different from another party. But the board never
2 treated the .ipiranga application at all. You will find
3 no reference to the .ipiranga application in any board
4 meeting minutes.

5 There were several hundred applications that had
6 no community objection or any other objections such as
7 GAC advice. And so they go through, and they wind up
8 delegated.

9 Amazon was the subject of GAC advice. And as we
10 know, GAC advice is a reason that the NGPC is to
11 consider an application. They almost have to. If there
12 is consensus GAC advice, the board has to do something.
13 They have to adopt it, not adopt it. They have to act.

14 So I don't see any discrimination. And it would
15 be no different than arguing that any of the other
16 thousand or so applications that had no objection were
17 also somehow discriminated in favor of those
18 applications.

19 And likewise, I should note, Amazon had over 70
20 other applications that did not draw an objection and
21 that sailed through.

22 So I think that it's -- that the context of
23 nondiscrimination is not applicable here.

24 Now, here is the other point I wanted to make,
25 which is -- this is Article II, Section 3 of the bylaws,

1 which -- it's on Amazon's list.

2 And I think, by the way, I may have erred as to
3 whether the core value that I mentioned before was on
4 Amazon's list. I think actually it was. I just missed
5 it.

6 And let me read it in full because it's short (as
7 read):

8 "ICANN shall not apply its
9 standards, policies, procedures, or
10 practices inequitably or single out any
11 particular party for disparate treatment
12 unless justified by substantial and
13 reasonable cause such as the promotion
14 of effective competition."

15 The thrust of what this is saying is that ICANN
16 has to approach the world the same. They can't say, as
17 an example, you're in England and we don't like
18 something that you're doing and so we're going to --
19 we're going to treat you as if you have some -- as we
20 have a special reason for calling out people who operate
21 in England, and we're going to impose certain
22 requirements.

23 This does not mean that when somebody is the
24 subject of GAC advice and another application is not the
25 subject of GAC advice, that you somehow have to treat

1 those two applications the same. The purpose of the
2 nondiscriminatory treatment is simply say, you have to
3 have rules that apply to everyone the same.

4 The Guidebook does apply to everyone the same.

5 And if -- and to the extent there is GAC advice
6 with respect to applications -- and I think, actually,
7 it's something fewer than ten actually received GAC
8 advice -- the board is going to consider those
9 applications. But it doesn't mean -- this provision
10 does not mean that if somebody gets GAC advice and
11 somebody else does not get GAC advice, that we should
12 treat those applications exactly the same and consider
13 them both and figure out what to do about both. There
14 is nothing in the bylaws that even hints at that.

15 We want to treat everyone fairly with policies,
16 procedures, and practices that apply the same to
17 everyone. But not every application gets GAC advice.
18 If we were supposed to look at every application, we
19 would have had to look at Amazon's 73 other applications
20 and decide whether they should have proceeded.

21 ARBITRATOR BONNER: Is it relevant, though, that
22 Brazil did not object to a private company using the
23 .ipiranga string?

24 MR. LeVEE: No. If -- anybody could have
25 objected, and nobody did. That's what's relevant.

1 ARBITRATOR BONNER: Yeah, but is it relevant in
2 the sense that Brazil is the primary objector to -- and
3 one of the leaders with Peru of the -- essentially the
4 GAC advice objecting to the .amazon string? I mean, is
5 it relevant for us to consider that they did not
6 register a similar objection to a Brazilian company
7 using the name of a very well-known river in Brazil?

8 MR. LeVEE: Well, first, let me quarrel with the
9 second part.

10 ARBITRATOR BONNER: Well-known?

11 MR. LeVEE: The Ipiranga is 5 miles long. This
12 is on Slide 44. The facts that are on Slide 44, I want
13 to be clear, they -- these facts were not before the
14 board. The board never considered .ipiranga.

15 ARBITRATOR BONNER: But the board knew that
16 .ipiranga had been granted in a string, did it not?

17 MR. LeVEE: It knew in a passive way, because, as
18 I said, there are a thousand applications that drew no
19 objection of any kind, and the board would get periodic
20 reports. These have all gone forward.

21 ARBITRATOR BONNER: Didn't Amazon refer to it,
22 though, in some of the submissions it made that are
23 actually cited by the NPGC?

24 MR. LeVEE: It did. But the NGPC's -- the
25 process was the NGPC would consider -- would be told --

1 Mr. Atallah actually mentioned this to you yesterday.

2 The NGPC would get weekly lists. These are all
3 the applications to which objections had been lodged.
4 And then that list over the course of months would --
5 slowly but surely those objections would be adjudicated.
6 And then we'd be to where we are now, a small handful
7 that still were in dispute of some kind or another.

8 So the board would get that kind of information,
9 but nothing more. And with .ipiranga, it wouldn't have
10 been on the list.

11 Yes.

12 ARBITRATOR O'BRIEN: And Mr. Thorne probably
13 won't be happy with this characterization of it. But if
14 you are right and there's no -- because the different
15 type of applications, there is not a valid claim there
16 was discrimination by the board itself, wouldn't the
17 fact that Brazil didn't object to a Brazilian company
18 taking the name of a Brazilian river undercut their
19 purported public policy reason for objecting to Amazon,
20 a U.S. company, having the name of another river in
21 Brazil? Isn't that the argument, that it just kind of
22 undercuts -- further undercuts any claim that there was
23 a real public policy?

24 MR. LeVEE: I suppose that's the argument.

25 But -- well, two things: One, I can't tell you why

1 Brazil didn't object to .ipiranga.

2 What I can tell you is that the Amazon River
3 flows for 4300 miles and is the home to 10 million
4 people.

5 The Ipiranga brook, which is what we found when
6 we looked it up, is 5 1/2 miles long, flows through the
7 Ipiranga district of Brazil that has a population of
8 98,000. One could suppose that Brazil said, mother
9 river, Ipiranga brook, we're going to take two different
10 approaches.

11 I can't tell you what the reason is. The purpose
12 of this slide was to say that Brazil could easily have
13 had a rational reason, but I don't know what the reason
14 is.

15 My point is, the main point, is that if I'm going
16 to discriminate, I actually have to do something. And I
17 don't see how we could find discrimination where the
18 board and the NGPC literally were unaware that .ipiranga
19 was going forward and had no reason -- nobody brought to
20 their attention through an objection, Brazil or anybody
21 else, or the independent objector -- nobody filed an
22 objection, period.

23 Now, Mr. Thorne took you through the articles,
24 the bylaws, the Guidebook to tell you that he thinks
25 that there are ways that you can find that ICANN

1 violated them, and so I'm going to do the same.

2 And I'm not going to take as long, but I've
3 listed -- this is pretty much out of Amazon's sort of
4 list, and I did it in slides rather than doing it in a
5 separate handout.

6 When you look at the articles, Article IV
7 requires that we operate for the benefit of the Internet
8 community as a whole. I think the evidence is clear we
9 did it.

10 We conformed to applicable requirements of
11 international law, and we even got an expert to tell us
12 what the law is.

13 We followed open and transparent processes.
14 Everyone knew what was in front of the board when the
15 board was voting. There was a ton of information
16 provided to the board by the parties.

17 In the bylaws, we have the core values.

18 We introduced competition to the extent
19 practicable and beneficial in the public interest.
20 Let's be clear, we are introducing competition. There
21 is no doubt the board did that. We've got a thousand
22 new top-level domains that are in the Internet root, but
23 that's not to say that everybody who applies, simply
24 because they are competition, new competition
25 automatically get approved. We have objection

1 procedures.

2 And so here the public interest as expressed by
3 the GAC and the countries that support it, they felt
4 that this was an inappropriate use of a top-level
5 domain.

6 So you introducing competition does not mean that
7 you sacrifice all of the other competing interests that
8 are set forth in the Guidebook.

9 Bylaws Article I, Section 2.7. We did employ
10 open and transparent development mechanisms. We had
11 well-formed decisions based on expert advice that we had
12 obtained. And we ensured that the entities most
13 affected can assist in the policy development process.
14 Well, policy development process really, here, are the
15 people who decided to go forward with the program in the
16 first instance, the GNSO.

17 But if you want to apply that more broadly, we
18 made sure that those that were affected could speak.
19 Both Amazon and the governments, they spoke freely and
20 frequently.

21 Article I, Section 2.7. The NGPC made decisions
22 by applying documented policies neutrally and
23 objectively with integrity and fairness.

24 And Article I, Section 2.11 -- I already showed
25 you 2.9 -- I guess 2.11. I mentioned this before.

1 While rooted in the public -- private sector, the board
2 recognized that governments and public authorities are
3 responsible for public policy and duly took into account
4 their recommendations.

5 I want to stay with that for one second.

6 In the colloquy before the break, as I reflected
7 on it, it occurred to me that it seemed as if the panel
8 was struggling with where the burden of proof lies. And
9 here we have public policy that is behind the advice.

10 You may disagree with Brazil and Peru as to what
11 the public policy is, but they were expressing the
12 interests of the millions of people who live along the
13 Amazon River, concerns on their behalf.

14 Once the GAC adopts advice that seems rooted in
15 public policy because that's what the GAC is supposed to
16 be doing, a strong presumption applies. And I would
17 urge you to find that at that point, in effect, the
18 burden shifts to the applicant.

19 Once you have a strong presumption, that really
20 tells you if we were in some case authority situation,
21 let's say, under statute and the statute said there's a
22 strong presumption that if x happens, then y is true, I
23 think you would automatically as judges say, well, yeah,
24 then the burden of proof is on the party opposing the
25 consensus advice. And that's where I think the scales

1 easily tip here.

2 Amazon hasn't proven that the public policy
3 interests were manifestly wrong. Use whatever the --
4 whatever words you think are appropriate.

5 There has to be some hurdle to say, NGPC got it
6 wrong because it should have known that the GAC advice
7 was flawed.

8 The issue here is not really so much the GAC
9 advice. The issue is what did the NGPC do? That's what
10 we are here to assess. And when you have a strong
11 presumption, it puts the burden of proof on the
12 applicant that is the subject of that presumption to
13 come forward and say, NGPC, you need to disregard the
14 GAC advice, and here are the reasons why.

15 And I do think that it is not the board's
16 ordinary province to second-guess the public policy
17 interests of governments. This is Brazil and Peru
18 expressing the interests of literally millions of people
19 in their countries and the largest river that occupies
20 the territory and that has international perceptions one
21 way or the other -- everybody knows about the river.

22 So I think -- we are turning to Slide 46. The
23 board's job is to balance all of these values. And yes,
24 Amazon argues that when you look at some of these
25 words -- we're going to get to more of them -- that

1 somehow those words should equate to the GAC has to give
2 policy rationale to support its advice.

3 We know that those words aren't there that way.
4 And I don't think that any of the bylaws or articles
5 appropriately are read that way.

6 Now, shifting to the nondiscrimination and
7 transparency, in Article II of the bylaws, Section 3,
8 the question is: Did the NGPC apply its standards,
9 policies, procedures, and practices inequitably or
10 single out any party for disparate treatment?

11 That's really the .ipiranga issue, and we've
12 already covered it.

13 The second issue is: Did the NGPC operate to the
14 maximum extent feasible in an open and transparent
15 manner designed to ensure fairness?

16 Seven meetings, publicly posted agendas, publicly
17 posted meeting minutes, publicly posted rationale,
18 frequent requests to the parties.

19 Tell us more.

20 Respond to the GAC advice. Respond to the Passa
21 report.

22 I think candidly, it would be difficult to
23 suggest the NGPC could have done more in terms of being
24 open and transparent.

25 Finally, under the Guidebook.

1 The NGPC recognized that the Guidebook treats
2 strings with geographic connotations as sensitive. It
3 does it not only through the availability of GAC advice,
4 but through other objections that can be asserted. And
5 it respected the Guidebook's two-track approach to
6 geographic strings. Track 1, geographic names review.
7 Track 2, GAC advice. It's clear that both tracks were
8 available. Amazon passed one, and it did not pass the
9 other.

10 The NGPC conformed to the Guidebook principle
11 that governments had the option to use the GAC advice to
12 raise concerns as an alternative to community
13 objections, and that's what happened here.

14 And the NGPC adhered to the Guidebook procedure
15 that allowed the GAC to express its advice in a manner
16 it chooses with no requirement of an explicit statement
17 of consensus rationale.

18 Really already covered Slide 48, the standards
19 for independent review, so I'm going to skip that in the
20 interest of time.

21 I do want to note again that the GAC's actions on
22 its own are not reviewable in this IRP. What's
23 reviewable is the board's treatment of those actions.

24 We do think, even so, that the GAC's conduct
25 conformed to the articles, bylaws, and Guidebook. We

1 don't think any decision of an IRP panel has said that
2 the GAC must give in every circumstance a stated
3 rationale.

4 The one decision that I think hints at that is
5 the DCA decision which involved facts so incredibly
6 different from this case that I think the panel would
7 have issued a very different ruling if it had had the
8 debate of the GAC and the debate of the NGPC before it.

9 Instead, what that panel had was literally GAC
10 advice that came out from nowhere with no explanation
11 and no discussion, no transcript, and then an NGPC
12 meeting where the NGPC basically, you know, stated very
13 little of its rationale for why it accepted the GAC's
14 advice.

15 So let me conclude.

16 As I said from the outset, all geographic strings
17 are proper subject for GAC advice, period, end of story.

18 The ICC's dismissal of the community objection is
19 not relevant because the GAC had issued its advice and
20 is entitled to do so under a parallel track. The GAC's
21 advice was consensus, and therefore, it was entitled to
22 the strong presumption.

23 Your focus, then, is the next three -- next four
24 bullets. What did the NGPC do? It took care to gather
25 the pertinent facts. It took care to get additional

1 information. It asked for the Passa report. It asked
2 Amazon to submit a response to the GAC advice to the
3 Passa report, and Amazon submitted to the board,
4 literally.

5 You have no facts to suggest anything other than
6 that the NGPC exercised independent judgment.

7 You have a handful of e-mails saying that Brazil
8 had issues with ICANN.

9 As Mr. Atallah mentioned yesterday, lots of
10 countries had issues. ICANN had to work with each
11 country on its own to try to move forward. What ICANN
12 told Brazil, as I took Mr. Atallah through it yesterday,
13 was exactly what the Guidebook provided. These are the
14 things you can do with the ultimate being, well, you can
15 try to get the GAC to act.

16 There would have been no way for the ICANN
17 representative, much less the country of Brazil, to know
18 at the time whether the GAC would issue consensus
19 advice. That was up to the GAC.

20 And ICANN certainly wasn't plotting to achieve a
21 consensus advice. There would be no way for ICANN to do
22 that at all.

23 So there really is no evidence that the NGPC was
24 fearful or influenced by any kind of so-called threats
25 and no evidence that the NGPC discriminated against the

1 applications.

2 So I would submit to you that Amazon has not
3 demonstrated that the NGPC acted inconsistent with its
4 duties, NGPC acting on behalf of the board duties under
5 the articles, the bylaws, or the Guidebook.

6 Thank you for terrific questions.

7 On behalf of ICANN, I want you to know that
8 they've been terribly impressed by the panel's diligence
9 and attention. We haven't always had this level of
10 attention and interaction in every hearing, although
11 sometimes they are by phone and so it's hard to tell.
12 But it does seem every now and again that we've had a
13 panelist that was snoring, and so we're very, very, very
14 much appreciative for all the effort that the three of
15 you have put in, and we thank you for every question and
16 for all that you've done.

17 ARBITRATOR MATZ: Haven't you noticed Bonner
18 elbowing me to wake me up?

19 MR. LeVEE: That concludes --

20 ARBITRATOR BONNER: No, but I do have a question.
21 That is, one of these slides -- and I can't put my
22 finger on it right now, but it basically says that the
23 board, the NGPC thoroughly investigated the issues
24 surrounding whether or not it should deny, reject the
25 application, or allow it to proceed. And I'm

1 emphasizing the word "investigated" here.

2 It doesn't seem to me that there was any
3 investigation as to whether the public policy reasons
4 that were advanced not by the GAC, but by Brazil and
5 Peru and so forth were investigated to determine whether
6 they were valid, legitimate, plausible, credible public
7 policy reasons with the one exception and that is the
8 question under international law, whether Brazil or
9 other countries had a sovereign right to the name. That
10 was acted on. There was some diligence to investigate
11 that and at least try to come up with a determination.

12 But as to the other issues, there doesn't appear
13 to be an investigation. So two questions: One, would
14 you agree that without exception, the public policy
15 reasons to the extent that they are -- were expressed by
16 either Brazil or Peru or in other documents were not
17 investigated? And then I think that the answer to that
18 is yes, but -- and then if it is, whether or not under
19 the circumstances here there was a duty of the board or
20 the NPGC to investigate.

21 So there are two questions.

22 MR. LeVEE: Yes. So I guess you're going to be
23 surprised, but my answer to the first question is:
24 There was an investigation, but not the kind I think you
25 were contemplating. And I'm just going to rely on what

1 Mr. Atallah said yesterday.

2 You asked him or Judge Matz asked him, What do
3 you do when you have these statements from countries?

4 And Mr. Atallah said, So long as the advice seems
5 to us to be plausible, that is, the public policy
6 advice, we, the board, do not view ourselves to be in a
7 position to second-guess the advice.

8 If the advice is manifestly wrong -- you had a
9 colloquy on that -- that would be one thing. But advice
10 such as appears plausible otherwise, and he talked about
11 what that advice was, then we, the board, would not --
12 well, I don't think he said it this way, so let me
13 answer it how I would say it.

14 Once the advice appears to be plausible, that
15 these countries had concerns about the effect on their
16 citizens and the future ability of their citizens to
17 either use the name or somehow be affected by the fact
18 that someone would be operating the top-level domain
19 that wasn't necessarily taking their interests at heart
20 in doing things with it, once the board determines that
21 that's not manifestly incorrect, then the board's
22 obligation at that point ends because it doesn't have an
23 obligation to conduct some reasonable inquiry to make
24 sure the GAC is right.

25 It is ill-suited to do that when the GAC is

1 giving advice that relates to public policy concerns
2 that are unique to particular countries. So there's
3 one -- there's lots of different kinds of public policy.

4 Mr. Atallah went through that to some degree
5 yesterday.

6 There are kinds of public policy that we can all
7 debate. Should there be higher taxes or lower taxes, or
8 what is the best way of approaching North Korea? But
9 when a country has its own public policy issue and it's
10 not United States' issue as to whether Brazil cares
11 about it or is protecting in some way its citizens that
12 live near the river in that region, I think the board
13 does not have any obligation to move forward, and I
14 think that's what Mr. Atallah was telling you yesterday.

15 ARBITRATOR BONNER: I think that's probably a
16 fair summary. Thank you.

17 Any other questions from either of my
18 co-panelists?

19 Mr. Thorne, did you want to respond at all?

20 MR. THORNE: Your Honor, I've been making notes,
21 and I've got a very small number of questions that you
22 all have asked that I thought I had a different or
23 better answer to, and I'd like to just respond to
24 questions that you had. I don't want to make additional
25 argument.

1 Just I want to be responsive --

2 ARBITRATOR BONNER: The real question is -- and
3 I -- the court reporter might want a break here. The
4 question would be how long do you think your -- we'll
5 call it rebuttal argument would be?

6 MR. THORNE: If there were no questions, but
7 that's not what I'm hoping for. I think I have maybe
8 five minutes of prior questions that I'd like to respond
9 to. But realistically, if the reporter wants a break --

10 ARBITRATOR BONNER: There probably will be a few
11 questions.

12 Do you want to take a --

13 THE REPORTER: It's okay.

14 ARBITRATOR BONNER: Let's take a --

15 ARBITRATOR MATZ: Did she say it's okay?

16 THE REPORTER: I'm okay.

17 ARBITRATOR BONNER: You're okay? All right.

18 THE REPORTER: Thank you.

19 ARBITRATOR BONNER: Let's go.

20 MR. THORNE: All right. Let's go.

21

22 CLOSING ARGUMENT

23 BY MR. THORNE:

24 Let's start with the very last question.

25 You asked Mr. LeVee whether there had been an

1 independent investigation, and his answer was, if I've
2 got it right, I'm going to rely on Mr. Atallah.

3 When you get the hearing transcript on Monday --
4 I've got just the rough -- look at page 95, because this
5 is what the rough says Mr. Atallah testified to.

6 Judge Bonner, you asked (as read):

7 "So did the NGPC, did it make any
8 independent inquiry as to whether or not
9 there was a valid public interest
10 rationale for the GAC advice in this
11 matter.

12 "The Witness: No, it did not."

13 No independent investigation. In fact, that's
14 the -- that's how we started today with our opening
15 slide. That's where we started in our slide.

16 You asked a related question, which is, is there
17 any source of -- what is the requirement that the NGPC
18 investigate? We cited this in our prehearing brief, but
19 let me tell you it's DCA Trust, CLA 2, paragraph 113,
20 and the GCC final decision, CLA 31, paragraph 139.

21 So that's one.

22 ARBITRATOR MATZ: Mr. Thorne, you invited
23 questions. So just on the point you are raising now, if
24 the obligation -- or if the opportunity of the NGPC
25 board to go behind the assertion of public policy

1 interest relating to the interests of the residents of
2 this large Amazon region, if that opportunity had been
3 exercised by the NGPC board consistent with the way
4 ICANN operated, how did they go about figuring out
5 whether or not that was a valid assertion for Brazil and
6 Peru to have made?

7 MR. THORNE: Judge Matz, I think I have to take
8 the question apart a little bit.

9 ARBITRATOR MATZ: Fine. Go ahead.

10 MR. THORNE: In order to evaluate an assertion,
11 we have to understand what the assertion is. So one
12 part of the debate that I'll get back into if you like,
13 but I'll assume everyone understands, is we believe the
14 GAC should have provided a rationale.

15 ARBITRATOR MATZ: No, but I'm not asking about
16 that. We all know that it didn't.

17 MR. THORNE: But if there were a rationale, then
18 you could test it.

19 ARBITRATOR MATZ: But because there wasn't, we're
20 having this proceeding. That's one of the reasons why.
21 And so the question is whether the board carried out its
22 duties under the bylaws and the articles of
23 incorporation and the Guidebook. And if it had a duty
24 to go beyond the words that were used that were in the
25 record before, the words that came initially from Brazil

1 and Peru but that were reflected in various GAC meetings
2 and developments, how would it have gone beyond those
3 words only on the issue? Not of whether or not it was
4 recognized as a string or it was in violation or was
5 supported by international law. Judge Bonner put those
6 aside.

7 I'm only asking you now, just give me an honest
8 answer about how it would have looked into the assertion
9 that the interests that Brazil and Peru were asserting
10 on behalf of the residents of this large region
11 warranted denial of Amazon's application.

12 MR. THORNE: So again, I think you have to start
13 with what interests are we talking about? For example,
14 if the interest is we want to reserve this name for
15 future use, we want Amazon not to have it now because in
16 the future, we might want to use it for a special
17 purpose, that is something that could be investigated,
18 just like the international law question could be
19 investigated.

20 I think the answer that would come back is the
21 various organizations in the community objection process
22 already resolved that in favor of open entry,
23 encouraging competition, which means a current applicant
24 with a valid use gets it rather than reserving it, like
25 warehousing it for somebody who is not there. I think

1 that's how that would have been resolved.

2 But again, you have to start with what's the
3 asserted interest and then --

4 ARBITRATOR MATZ: I'm only asking about that
5 single interest.

6 So it's not your contention that the NGPC would
7 have had the duty to take a survey or invite expert
8 reports about the embrace of the word "Amazon" by people
9 in that region, even though they hadn't participated in
10 the process up till then? Nothing out in the field like
11 that, that wouldn't be necessary?

12 MR. THORNE: I'm not sure whether anything out in
13 the field would be appropriate. I think the test as
14 articulated by the case is making a reasoned decision.

15 In the case of the international law question,
16 does Brazil have sovereign rights? They commissioned an
17 expert on that. I assume the expert went to sources
18 outside the ICANN body. But again, I think it depends
19 on what the interest is. And here we know there was no
20 investigation.

21 So let me, if it's all right, go through a small
22 number of additional things that had come up. First
23 point -- and I'll try to be clear here. I thought I was
24 clear, but Mr. LeVee still seems to be making the
25 argument so I guess I wasn't clear in the briefs.

1 Our side is not arguing, so I don't think this is
2 one of the issues you need to decide, that the Guidebook
3 should have been amended to require the GAC to provide a
4 rationale. We are not arguing about whether the
5 Guidebook should have been amended. We're arguing that
6 the various texts, including the Guidebook, but
7 especially the bylaws, require GAC advice.

8 There is certainly nothing in the Guidebook that
9 Mr. LeVee has pointed to that forbids the GAC to give
10 advice, and of course now the bylaws do require it
11 expressly. But we're not making an argument about some
12 process that is time barred. That's not our point.

13 The second thing, Judge Bonner, you referred to a
14 fundamental right to be heard. I just want to mention
15 that in our prehearing brief, page 26, we cite sources.
16 We called it a universal, not a fundamental right under
17 international and national laws for notice and an
18 opportunity to be heard.

19 Mr. LeVee has a preference for United Nations.
20 The first thing we cited on page 26 is United Nations
21 commission on international trade law, of their modeled
22 law on international commercial arbitration, which
23 describes the notice and an opportunity to be heard or
24 required. He cited the -- I think, the leading Supreme
25 Court case of the United States. It is a fundamental

1 right, but it is well documented so it's just a source
2 of authority to point the board to.

3 A third small thing. There are two documents
4 that Mr. LeVee talked about. One he actually walked
5 through, R 7 and R 8. We thought Mr. LeVee and ICANN
6 were not relying on those documents anymore. But if you
7 look -- for example, he talked about R 7. These are
8 documents about how the GAC might behave.

9 Page 1 of R 7 at the bottom says (as read):

10 "Please note that this is a
11 discussion draft only. Potential
12 applicants should not rely on any of the
13 proposed details."

14 This was somebody's consideration. It wasn't
15 enacted as any of the documents that are relevant to
16 Amazon.

17 A fourth and similar point, Mr. LeVee talked
18 about The Launch Rationales, which was a new document he
19 brought up in his April 5 brief. That was the cause of
20 our asking for leave to file a reply. And I think we've
21 addressed that there.

22 But if you look at the text and structure of the
23 Guidebook itself, if you look at the part of the
24 Guidebook that says, if you want to know the complete
25 set of documents to look at, you look here. The Launch

1 Rationales are not there.

2 The fact that it wasn't -- The Launch Rationales
3 were not put out for notice and comment tells you that
4 they weren't meant to have an effect on third-party
5 rights. But again, I think we have covered that in our
6 reply brief.

7 Similarly, the sequence -- this is interesting.
8 The sequence of adoption of Guidebook drafts. Mr. LeVee
9 notes that in, I think, the first five, maybe the first
10 six -- probably first five drafts of the Guidebook,
11 there was a requirement in the Guidebook to give -- for
12 the GAC to give not just advice. This is in ICANN's
13 prehearing brief, page 32. The petitions are quoted.

14 (As read):

15 "Also provide sources of data and
16 information on which the GAC relied in
17 formulating its advice."

18 Not just its rationale, but what's the basis of
19 your rationale? A much more burdensome process, but
20 that was described in those early drafts of the
21 Guidebook as coming from ICANN's transparency
22 requirements. It is quoted in ICANN's brief, page 32.

23 ICANN's transparency requirements, which come out
24 of the articles and bylaws, required GAC rationale.
25 That was dropped. I'm not sure if it was dropped

1 because it was too burdensome at some point or because
2 it was already covered with the bylaws.

3 But I wouldn't draw much from the evolution of
4 the thing, especially given that it refers to
5 transparency requirements which continued throughout.

6 Judge Bonner, you asked if there is someplace in
7 the NGPC rationale a valid public interest, a valid
8 policy interest. So maybe there's a mistake by Peru.
9 Maybe there's a mistake by Brazil and sovereign rights.
10 Maybe there was some smoke or reality of a threat from
11 nations or an anti-U.S. bias.

12 But if there was a valid policy interest in there
13 someplace, could that save this? And again, I want to
14 refer to Mr. Atallah's testimony from yesterday.

15 I asked him -- this will be on page 118 of the
16 transcript.

17 (As read):

18 "If the GAC provides consensus
19 advice" --

20 I'm sorry (as read):

21 "If GAC consensus advice was based
22 on a fear of foreign exploitation of the
23 domain name or a plain anti-U.S. company
24 bias, if it was based on that, would it
25 still be your position that you would

1 defer to the GAC advice."

2 And Mr. Atallah's answer was (as read):

3 "I believe public interest of the
4 people of the region trumps anything,
5 yes."

6 Very strong statement.

7 Mr. LeVee made a statement toward the end that if
8 the underlying rationale, the GAC advice, or maybe for
9 some of countries that pushed for the GAC advice -- if
10 the underlying rationale was a pro-Brazil -- let's
11 reserve Brazilian things for Brazilian companies, if
12 there was anti-foreign or anti-U.S. bias, he wasn't sure
13 whether that would be consistent with how ICANN is
14 supposed to operate.

15 In the excerpts that we've passed around and one
16 of the provisions that Mr. LeVee talked about, in the
17 articles, the highest level and the hierarchy of
18 governing documents, the articles, paragraph 4, it
19 starts (as read):

20 "ICANN shall operate for the
21 benefit of the Internet community as a
22 whole in conformity with relevant
23 principles of international law that
24 enable competition and open entry and
25 Internet-related markets."

1 I didn't think this was going to be an issue in
2 the case, but I think it's plain from paragraph 4 of the
3 articles, ICANN cannot reserve domains for particular
4 countries or companies that are located in particular
5 countries.

6 This is a worldwide Internet. Amazon is
7 operating across the globe. It's got its trademarks and
8 its operations are global. It would be a very different
9 approach to include GAC advice that's based on
10 country-specific reservations.

11 So I think one more point to make, and that's
12 basically in a document that we cited in our brief. And
13 I'm going to hand out just for convenience an extra
14 copy. You already have this. We will mark it as
15 Hearing Exhibit No. --

16 MS. BEYNON: It's already an exhibit.

17 MR. THORNE: It's Exhibit C 92.

18 To give this a little bit of context, the board
19 chair at the time, for example, that The Launch
20 Rationales, Mr. LeVee's best new document for how to
21 think about geographic names, the board chair was Peter
22 Dengate Thrush.

23 Here the board has abdicated its duty to
24 investigate, but he anticipated that they should do
25 otherwise. This is Peter Dengate Thrush upon learning

1 of the GAC advice here (as read):

2 "If the GAC continues to give
3 half-baked inconsistent advice in the
4 face of the board's response today, the
5 board is not obliged to follow it."

6 There's not a shred of credibility to the
7 objection, which amounts to those countries, Brazil and
8 others, using an ICANN processing forum to obtain a
9 result they could not obtain under their own national
10 law or any principal of international law. It's a
11 breach of the legitimate expectations of TLD applicants.
12 It lies outside the hard, raw principles that he was
13 responsible for in The Launch Rationales. So another
14 important actor from this space, looking at what the GAC
15 did and shaking his head.

16 So it's up to the panel to hold ICANN to
17 accountability to the community.

18 And I would love to get further questions.
19 Otherwise, I'd very much like -- Mr. LeVee, I very much
20 appreciate your attention.

21 ARBITRATOR MATZ: Do you know offhand,
22 Mr. Thorne, whether this document you just handed out,
23 C 92, was before the NGPC in 2014 when the vote was
24 taken?

25 MR. THORNE: I assume, but don't know, Judge

1 Matz, that the ICANN alum Listserv is a broad Listserv
2 because ICANN had has a lot of people cycle in and out.
3 We've seen some of them. I assume that this was well
4 known to the community.

5 ARBITRATOR BONNER: Any other questions, Judge
6 O'Brien?

7 ARBITRATOR O'BRIEN: No.

8 ARBITRATOR BONNER: Judge Matz?

9 ARBITRATOR MATZ: No.

10 ARBITRATOR BONNER: Let me thank both counsel, by
11 the way. This has been, I think, an extraordinarily
12 well presented case. So thank you both. It has been
13 some reasonably difficult issues for us to grapple with,
14 but you have both been very, very helpful and done an
15 excellent job.

16 There's one little cleanup thing I want to
17 mention, and that's the exhibit list. I'm wondering
18 whether I might ask counsel just to prepare an exhibit
19 list of the hearing exhibits, so we know the names of
20 them by number and maybe e-mail that to the panel, I
21 mean, after both sides have conferred.

22 And then there's the C exhibits and R exhibits.
23 And I realize we have all of them either on the disk
24 drive and then I got a box of documents that's sitting
25 in my library at home, but it would be helpful, if

1 nothing else, just to make sure that there is a master
2 joint exhibit list. And I think there is one because I
3 looked in the boxes, but it didn't seem to track in a
4 way.

5 So it would just be helpful, I think, if we just
6 had a master exhibit -- whoever has the Word document on
7 this, a master exhibit list that has all of the C
8 exhibits and all of the R exhibits, especially those
9 that have been referred to here, just so we have one
10 document we can look at and if we needed to look up an
11 exhibit by number.

12 Does that make sense, Counsel?

13 MR. LeVEE: Of course.

14 MR. THORNE: We will work with ICANN to do that.

15 ARBITRATOR MATZ: May I make a suggestion? If
16 there's going to be a consolidated, jointly prepared
17 master exhibit list which contains entries from the
18 exhibits that were attached to the pleadings and binders
19 we got with the C and the R and then new ones for the
20 prehearing briefs as well as the ones that were used
21 here at the hearing, could you be good enough to place
22 an asterisk next to the ones that were actually called
23 out for discussion in the last two days?

24 MR. LeVEE: Yes.

25 MR. THORNE: Yes, Your Honor.

1 One clarification. There was a particular
2 document in Mr. LeVee's binder that if he had brought
3 up, I was going to object to because one of our
4 stipulations to limit discovery said there was a topic
5 we weren't going to get into. And I didn't know if
6 Mr. LeVee was going to use it or not, so I'm hoping --

7 ARBITRATOR MATZ: Work it out with him.

8 ARBITRATOR BONNER: Yeah, I think you can.

9 And if you could designate if it was an exhibit
10 that is referred to at the hearing or in the pretrial
11 briefs, maybe that's a double asterisk or something --
12 let me fine-tune this wordsmith.

13 But give us something that would help us if you
14 were having to write a decision and you wanted to refer
15 back to exhibits that had been referred to in the
16 testimony. And that would be a joint exhibit list that
17 is understandable and also has some way of more
18 identifying that a particular exhibit was referred to
19 either in argument or in the testimony of Mr. Atallah.

20 In fact, I guess we'll have a separate exhibit
21 list for Mr. Atallah's testimony. So we have at least
22 three separate exhibit lists here. And my only regret
23 in life right now is that as the chair presiding member
24 here, I did not require a joint exhibit list to begin
25 with, because we almost always do that, but I failed to

1 do it.

2 So we're going to make up for that by getting one
3 from counsel. And if you could, I don't think there's a
4 great rush, but we're going to get the hearing
5 transcript next Wednesday, I believe.

6 MR. THORNE: Monday.

7 ARBITRATOR BONNER: Next Monday. And so let's
8 say by next Monday, if you could get us this joint
9 exhibit list that captures all the C and the R exhibits,
10 captures all of the hearing exhibits, which is a
11 separate -- some of them are probably overlapping, and
12 all of the -- Mr. Atallah witness exhibits, that would
13 be helpful to us.

14 ARBITRATOR O'BRIEN: What would be helpful to me
15 is that, for example, Atallah, some of the exhibits were
16 probably new and some were prior or exhibits that were
17 already on the exhibit list. So if you can put a
18 cross-reference. And it may be that the exhibits were
19 done twice. I don't know if the respondents and
20 claimants had --

21 MR. THORNE: There were some.

22 ARBITRATOR O'BRIEN: -- some overlap, so any
23 point there's an overlap, so if the R 7 is the same as
24 C 13 and the same as Atallah --

25 MR. THORNE: We'll give you all the different

1 ways they were identified.

2 ARBITRATOR O'BRIEN: You can just put that so we
3 know it's the same document, that would be great.

4 MR. THORNE: Will do.

5 MR. LeVEE: Not a problem.

6 ARBITRATOR BONNER: All right. Other than that,
7 let me say that the panel will -- once we get the
8 transcript, we will work diligently to get a reasoned
9 decision or declaration in this case.

10 I've learned long ago not to make rash
11 predictions as to exactly when that's going to happen.
12 There's a lot for us, I think, to consider. And we're
13 going to have to confer among ourselves to come up with
14 the declaration or the reasoned decision.

15 So we'll get it out as promptly as we can. But I
16 just can't predict right now exactly when that will be.

17 Having said that, is there anything else that
18 counsel wants to take up with the panel before we
19 declare the proceedings closed?

20 MR. THORNE: No. Just a thank you again for
21 doing this.

22 MR. LeVEE: Nothing from ICANN. Thank you.

23 ARBITRATOR MATZ: Let me echo Judge Bonner's
24 plaudits for the lawyers and not just the advocates who
25 spoke to us directly, but for their teams and their

1 clients, who you've done a really commendable job in
2 carrying out your responsibilities.

3 ARBITRATOR BONNER: Concur.

4 ARBITRATOR O'BRIEN: It's a great hearing.

5 And also to Jones Day, thank you for hosting us,
6 the food, and the -- they got excellent staff here. The
7 receptionist, everyone's been super at Jones Day. So
8 thank you for hosting us and your opponents here with
9 style, so we appreciate that.

10 ARBITRATOR BONNER: With that, this hearing of
11 the IRP is closed.

12 Thank you all.

13 (Whereupon the proceedings was concluded
14 at 4:18 p.m.)

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I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am not financially interested in the action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: 5/9/17



MELISSA M. VILLAGRAN

CSR No. 12543 RPR