

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-27

22 AUGUST 2014

The Requester, Amazon EU S.à.r.l., seeks reconsideration of an NGPC¹ Resolution directing that the Requester's applications for .AMAZON and related internationalized domain names in Japanese and Chinese, should not proceed.

I. Brief Summary.

The Requester applied for .AMAZON and related internationalized domain names ("IDNs") in Japanese and Chinese (collectively, the "Amazon Applications").

In its Durban Communiqué, the GAC² informed the Board that it had reached consensus GAC advice on .AMAZON and the related IDNs ("GAC Durban Advice"). After significant and careful consideration, on 14 May 2014, the NGPC passed Resolution 2014.05.14.NG03 ("Resolution") accepting the GAC Durban Advice and directed that the Amazon Applications should not proceed.

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

¹ New gTLD Program Committee.

² Governmental Advisory Committee.

The BGC³ concludes that there is no evidence that the NGPC's actions in adopting the Resolution support reconsideration. As discussed in further detail below, the Requester has not demonstrated that the NGPC failed to consider any material information in passing the Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution. As such, the Requester has not stated a proper basis for reconsideration. Further, the NGPC properly considered the GAC Durban Advice in accordance with ICANN's Bylaws and the procedures set forth in the gTLD Applicant Guidebook.

II. Facts.

A. Background Facts.

Amazon EU S.à.r.l. ("Requester") applied for the Amazon Applications.

On 17 June 2012 the GAC Chair sent a letter to ICANN's Board, advising that:

Given the delays in the gTLD application process, the timing of the upcoming ICANN meetings, and the amount of work involved, **the GAC advises the Board** that it will not be in a position to offer any new advice on the gTLD applications in 2012. For this reason, the GAC is considering the implications of providing any GAC advice on gTLD applications. These considerations are not expected to be finalized before the Asia-Pacific meeting in April 2013.

(17 June 2013 Letter, *available at*

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

On 20 November 2012, the GAC representatives for the governments of Brazil and Peru submitted an Early Warning with respect to the Amazon Applications. (*Available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en.>)

On 14 February 2013, the GAC declared that it would be posting a list of applications that the GAC would consider as a whole during the GAC meeting to be held in Beijing in April

³ Board Governance Committee.

2013. (See <https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee>.) On 25 February 2013, the GAC further stated that it was “still compiling and processing inputs received from GAC members” and would post further information as soon as possible. (See *id.*)

On 5 March 2013, the Requester sent the Board a letter regarding its Public Interest Commitments with respect to the Amazon Applications. (See <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-05mar13-en.pdf>.)

On 12 March 2013, ICANN’s Independent Objector (“IO”) filed a Community Objection to the Applications on behalf of the “Amazon Community,” i.e., the community of “South-American region with the same English name around the Amazon River” (“Community Objection”). (See Determination on Community Objection ¶¶ 40, 59, available at <http://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1315-58086-en.pdf>.)

On 13 March 2013, the objection period for new gTLDs closed. (See <http://newgtlds.icann.org/en/program-status/odr>.)

On 11 April 2013, in its Beijing Communiqué, the GAC identified the Amazon Applications as warranting further GAC consideration and advised the Board not to proceed with those applications beyond Initial Evaluation (“GAC Beijing Advice”). (Beijing Communiqué, available at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>.)

On 10 May 2013, the Requester responded to the GAC Beijing Advice. The Requester argued that the GAC had not reached consensus advice on the Applications, and that the New gTLD Applicant Guidebook (“Guidebook”) did not provide for ICANN to delay specific applications for further GAC consideration. (Response to GAC Beijing Advice at Pgs. 3-5, available at <http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1315-58086-en.pdf>.) The Requester also argued that it had relied on the Guidebook’s

provisions regarding geographic strings, which included a provision for Community Objections to geographic strings, and that the GAC Beijing Advice represented a “new attempt to isolate strings that raise geographic issues” and acted “as an effective veto on Community-driven policies.” (*Id.* at 2-3.)

In July 2013, prior to the GAC meeting in Durban, South Africa, the United States Government issued a statement on geographic names, in which it stated its intent to “remain neutral” with respect to the Amazon Applications, “thereby allowing [the] GAC to present consensus objections on these strings to the Board, if no other government objects.” (*See* http://www.ntia.doc.gov/files/ntia/publications/usg_nextsteps_07052013_0.pdf.)

On 4 July 2013, the Requester sent a letter to the Board regarding its ongoing efforts to negotiate with the governments of Brazil and Peru regarding the Amazon Applications. The Requester also submitted proposed Public Interest Commitments. (*See* <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-04jul13-en.pdf>.)

On 18 July 2013, in its Durban Communiqué, the GAC informed the Board that it had reached consensus on GAC Objection Advice on the Amazon Applications. (Durban Communiqué, *available at* <http://newgtlds.icann.org/en/applicants/gac-advice/durban47>.)

On 23 August 2013, the Requester responded to the GAC Durban Advice. It argued that the presumption created by that advice pursuant to Module 3.1 of the Guidebook was rebuttable, and had in fact been rebutted, because the advice: “(1) is inconsistent with international law; (2) would have discriminatory impacts that conflict directly with ICANN’s Governing Documents; and (3) contravenes policy recommendations implemented within the [Guidebook] achieved by international consensus over many years.” (Response to GAC Durban Advice at 2, *available at* <http://newgtlds.icann.org/sites/default/files/applicants/03sep13/gac-advice-response-1-1315->

58086-en.pdf.) As such, the Requester argued, the GAC Durban Advice should be rejected. Accompanying its response, the Requester attached a lengthy excerpt from a legal treatise on the protection of geographic names in international law, as well as information about Amazon's worldwide trademarks, communications between the GAC and ICANN regarding the protection of geographic names, and information about another gTLD application. (*Id.* at Appendices A-F.)

On 3 December 2013, the Requester sent another letter to the Board, providing further detail and clarification regarding the Requester's ongoing attempts to negotiate with the governments of Brazil and Peru regarding the Amazon Applications. (*See* <https://www.icann.org/en/system/files/correspondence/king-to-chehade-et-al-03dec13-en.pdf>.)

On 10 January 2014, the Requester wrote to the Board, contending that the Amazon Applications do not fall within any of the five Guidebook categories of "geographic names" requiring government of public authority support. (*See* <https://www.icann.org/en/system/files/correspondence/king-to-crocker-et-al-10jan14-en.pdf>.)

On 27 January 2014, an Expert Determination was rendered by the Panel appointed by the ICC⁴ to hear the IO's Community Objection to the Amazon Applications. The Panel found in favor of the Requester. Specifically, the Panel determined that the IO had "not shown that there is a substantial opposition to [the Applications] within [the Amazon Community] or that [the Applications] would lead to substantial detriment." (Expert Determination ¶ 107.)

On 7 April 2014, the NGPC provided the Requester and the GAC with an independent, third-party report it had commissioned from French Law Professor Jérôme Passa regarding specific issues of law raised by the Amazon Applications ("Expert Analysis"). (*See* <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-07apr14-en.pdf>.) In its

⁴ International Chamber of Commerce.

cover letter, the NGPC stated that it “welcomes any additional information that [the parties] believe is relevant to the NGPC in making its final decision on the GAC’s advice on [the Amazon Applications].” (*Id.*)

On 11 April 2014, the Peruvian Government sent a letter to the ICANN Board, urging it to reject the Amazon Applications. (*See* <https://www.icann.org/en/system/files/correspondence/samanez-to-crocker-11apr14-en.pdf>.) On 14 April 2014, the Brazilian Government sent a letter to the ICANN Board, reiterating its objections to the Amazon Applications. (*See* <https://www.icann.org/en/system/files/correspondence/filho-almeida-to-crocker-14apr14-en.pdf>.)

That same day, the Requester sent a letter to the Board responding to the Expert Analysis. The Requester stated that it agreed with the “core conclusions” of the Expert Analysis, but reiterated its objections to the GAC Durban Advice. (*See* <https://www.icann.org/en/system/files/correspondence/hayden-to-crocker-et-al-14apr14-en.pdf>.)

On 14 May 2014, the NGPC passed the Resolution, accepting the GAC Durban Advice and determining that the Amazon Applications should not proceed. The NGPC noted that “[its] decision is without prejudice to the continuing efforts by [the Requester] and members of the GAC to pursue dialogue on the relevant issues.” (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#/2.b>)

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

On 26 July 2014, the BGC requested clarification from the Requester regarding the Requester's allegation that the NGPC considered false or inaccurate material information in passing the Resolution. On 2 August 2014, Amazon responded to the BGC's request clarifying the allegedly false or inaccurate material information that Amazon claims the NGPC relied upon in passing the Resolution. ("2 August Letter"). (*See* <https://www.icann.org/en/system/files/files/petillion-to-ngpc-bgc-02aug14-en.pdf>.)

B. The Requester's Claims.

The Requester contends that reconsideration is warranted because the NGPC:

1. Accepted the GAC Durban Advice although it was filed after the close of the objection filing period (Request, § 8, Pgs. 6-7);
2. Individually considered the Amazon Applications, without articulating what "exceptional circumstances" justified such individualized consideration (*Id.*, § 8, Pgs. 7-8.);
3. Failed to adhere to appropriate GAC Governing Principles by applying a "strong presumption" to the GAC Durban Advice (*Id.*, § 8, Pgs. 8-9);
4. Improperly relied on the Early Warning as rationale for the GAC Durban Advice (*Id.*, § 8, Pgs. 10-11);
5. Improperly: (i) considered false and inaccurate material information contained in correspondence from representatives of the governments of Brazil and Peru; and (ii) failed to consider material correspondence and comments from the Requester and other parties, (*Id.*, § 8, Pgs. 11-14); and
6. Failed to consider material information with respect to:
 - i. The United States Government's July 2013 statement, (*Id.*, § 8, Pgs. 14-16);
 - ii. The Expert Determination rejecting the IO's Community Objection to the

Amazon Applications, (*Id.*, § 8, Pgs. 16-18);

- iii. The scope of the Expert Analysis (*Id.*, § 8, Pgs. 18-19);
- iv. The NGPC's obligations under ICANN's Bylaws and Articles of Incorporation, (*Id.*, § 8, Pgs. 19-21); and
- v. The fiscal implications of the Resolution (*Id.*, § 8, Pgs. 21-22).

C. Relief Requested.

The Requester asks the Board to reverse the Resolution, to direct the NGPC to reject the GAC Durban Advice, and to direct ICANN Staff to proceed with the Applications. (Request, § 9, Pg. 22.)

III. Issues.

In view of the claims set forth in Request 14-27, the issues for reconsideration are whether the NGPC failed to consider material information or relied on false or inaccurate material information in:

1. Accepting the GAC Durban Advice although it was filed after the close of the objection filing period, (Request, § 8, Pgs. 6-7);
2. Individually considering the Amazon Applications, although the NGPC should only do so "under exceptional circumstances," (*Id.*, § 8, Pgs. 7-8.);
3. Failing to adhere to appropriate GAC Governing Principles by applying a "strong presumption" to the GAC Durban Advice, (*Id.*, § 8, Pgs. 8-9);
4. Improperly relying on the Early Warning as rationale for the GAC Durban Advice, (*Id.*, § 8, Pgs. 10-11);
5. Improperly: (i) considering false or inaccurate material information in correspondence submitted from representatives of the governments of Brazil and Peru; and (ii) failing to consider material correspondence and comments from the Requester

- and other parties, (*Id.*, § 8, Pgs. 11-14);
6. Failing to consider material information provided by the United States Government in its July 2013 statement, (*Id.*, § 8, Pgs. 14-16);
 7. Failing to consider the Expert Determination rejecting the IO's Community Objection to the Amazon Applications, (*Id.*, § 8, Pgs. 16-18);
 8. Failing to consider the Expert Analysis and the Requester's request for additional studies, (*Id.*, § 8, Pgs. 18-19);
 9. Failing to consider its obligations under ICANN's Bylaws and Articles of Incorporation in accepting the GAC Durban Advice, (*Id.*, § 8, Pgs. 19-21); and
 10. Failing to consider the fiscal implications of its acceptance of the GAC Durban Advice, (*Id.*, § 8, Pgs. 21-22).

IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.⁵ (Bylaws, Art. IV, § 2.) Requester is challenging a Board action. Dismissal of a request for reconsideration is appropriate if the BGC recommends, and the Board or the NGPC agrees, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws for challenges of a Board or

⁵ Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
- (c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

staff action or inaction. (Bylaws, Art. IV, § 2.9.)

V. Analysis and Rationale.

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

The Requester argues that the NGPC should not have accepted the GAC Durban Advice because that advice was submitted on 18 July 2013, after the 13 March 2013 close of the objection filing period. In order to state a basis for reconsideration of a Board action, the Requester must demonstrate that the Board (or in this case the NGPC) considered false or inaccurate material information, or failed to consider material information, in accepting the allegedly untimely GAC Durban Advice, and that the Requester was materially affected by the NGPC's action or inaction. (Bylaws, Art. IV, § 2.2.) The Requester, however, neither argues nor provides any evidence demonstrating that the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the allegedly untimely GAC Durban Advice.

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

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

The Requester argues that the NGPC improperly individually considered the Amazon Applications failing to explain why the circumstances surrounding its Applications are

sufficiently “exceptional” to warrant individual consideration. (Request, § 8, Pg. 8.) Again, the Requester does not argue that the NGPC considered false or inaccurate material information, or failed to consider material information, in passing the Resolution and therefore has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

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

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

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

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

Requester appears to argue that the GAC Durban Advice should not have created a strong presumption for the ICANN Board that the Amazon Applications should not proceed. (Request, § 8, Pgs. 8-9.) In support, the Requester contends that because the GAC Durban Advice was provided following the close of the objection period, it was not provided pursuant to the Guidebook, and thus was not subject to the presumption standards set forth therein regarding GAC Advice. (Request, § 8, Pgs. 8-9.) Once again, because the Requester does not argue that

the NGPC considered false or inaccurate material information, or failed to consider material information, in accepting the GAC Durban Advice, it has not stated proper grounds for reconsideration. (Bylaws, Art. IV, § 2.2.)

D. The NGPC Properly Considered The Rationale Given In Brazil’s and Peru’s Early Warning.

The Requester argues that the NGPC improperly considered the rationale given in the Early Warning because, the Requester claims, that rationale “reflects only the concerns of two governments and cannot be used as the consensus rationale of the entire GAC.” (Request, § 8, Pg.10.) The Requester’s claims do not support reconsideration.

In its rationale for the Resolution, the NGPC stated that although it “*d[id] not have the benefit of the rationale relied upon by the GAC in issuing [the GAC Durban Advice]*, the NGPC considered the reason/rationale provided in the GAC Early Warning submitted on behalf of the governments of Brazil and Peru” (Resolution Rationale) (emphasis added). The NGPC did not state that it considered the rationale of the Early Warning to represent the rationale for the GAC Durban Advice—to the contrary, it explicitly stated that it “d[id] not have the benefit” of that rationale.

Because the NGPC recognized that the Early Warning rationale did not constitute the rationale for the GAC Durban Advice, there is no evidence that the NGPC relied on false or inaccurate material information in considering that advice. The Requester points to no policy or process that would prevent the Board from considering the rationale behind an Early Warning in considering GAC Advice. Further, insofar as the Requester argues that the NGPC failed to consider material information in failing to “conduct further inquiry of the GAC as to the basis and reason for the consensus advice,” (Request, § 8, Pg. 10), nothing in ICANN’s Bylaws, the

Guidebook, or the GAC's Operating Principles requires the GAC to provide a rationale for its consensus advice.

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

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

The Requester argues that the NGPC: (i) relied on false or inaccurate material information in considering correspondence sent to the Board by the governments of Brazil and Peru; and (ii) failed to consider material information in failing to consider other correspondence, including correspondence sent by the Requester. (Request, § 8, Pgs. 11-14.)

As to the Board's consideration of correspondence sent by the governments of Brazil and Peru, the Requester appears to argue that the "NGPC accepts the views of two governments and infers that these opinions represent consensus advice of all GAC members." (*Id.*, § 8, Pg. 11, *see also id.*, § 8, Pgs. 13-14.) The Requester's claim is unsupported. In its rationale for the Resolution, the NGPC stated only that it "considered as part of the NGPC's action" an 11 April 2014 letter from Fernando Rojas Samané, the Vice Minister of Foreign Affairs for Peru, and a 14 April 2014 letter from Benedicto Fonseca Filho, a Director in the Ministry of External Relations of Brazil. Nowhere in the rationale does the NGPC state, or even imply, that it understood the correspondence from the governments of Brazil and Peru to represent GAC consensus advice. Furthermore, the Requester cites to no Guidebook or Bylaws provision that prohibits the NGPC from taking into consideration correspondence duly submitted to ICANN.

The Requester also argues that, although the 11 April 2014 letter from the Peruvian Government contained false information regarding whether Amazon has an ISO 3166-2 code,⁶ the NGPC “failed to identify any false and inaccurate information contained in the letter.” (*Id.*, § 8, Pgs. 13-14.) However, the NGPC’s alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to the NGPC’s determination. The NGPC’s rationale does not state that it relied on the Peruvian Government’s representation regarding the ISO 3166-2 code in deciding to accept the GAC Durban Advice, and the Requester does not explain how the NGPC did so rely, or how the information is at all relevant.⁷ The Requester does not cite to a Guidebook or Bylaws provision that would require the NGPC to identify any and all false or inaccurate information contained in the correspondence it considers and explain that the NGPC did not rely on that specific information in reaching its determination, particularly when that information is not relevant or material to the decision being made.

Finally, in its 2 August Letter responding to the BGC’s request for clarification, the Requester argues that the 14 April 2014 letter from the Brazilian government inaccurately states that “all steps prescribed in the gTLD Applicant Guidebook in order to object to [the Amazon Applications] . . . have been timely taken by Brazil and Peru” (2 August Letter, Pg. 2.) The Requester claims that this statement is inaccurate because the GAC Durban Advice was not timely. Again, the NGPC’s alleged reliance on false or inaccurate information is a basis for reconsideration only if that information was material to the NGPC’s determination, and the

⁶ The ISO 3166-2 code is published by the International Organization for Standardization and assigns five-digit alphanumeric strings to countries’ administrative divisions and dependent territories. (*See* http://www.iso.org/iso/home/standards/country_codes/updates_on_iso_3166.htm?show=tab3.)

⁷ In its 2 August Letter responding to the BGC’s request for clarification, the Requester adds that this same representation was made by Peru’s GAC representative to the GAC prior to its vote on the GAC Durban Advice. (2 August Letter at 1-2.) However, the GAC is an independent advisory committee, and not part of ICANN’s Board. As such, the materials considered by the GAC in rendering its advice are not a proper basis for reconsideration.

Requester does not explain how the NGPC relied on the Brazilian Government's allegedly inaccurate representation in deciding to accept the GAC Durban Advice. Further, as is discussed above, the Requester's argument regarding the alleged untimeliness of the GAC Durban Advice is not a proper basis for reconsideration.⁸

In addition to arguing that the NGPC considered false or inaccurate information in the correspondence from the governments of Brazil and Peru, the Requester also argues that the NGPC failed to consider material public comments and correspondence. For instance, the Requester argues that, while the NGPC considered the responses of the governments of Brazil and Peru to the Expert Analysis, it did not consider the Requester's response. (Request, § 8, Pg. 12.) However, in its rationale the NGPC explicitly noted that it considered communications it received in response to the Expert Analysis, including the 14 April 2014 response from Scott Hayden, the Requester's Vice President, Intellectual Property, as well as letters from the Peruvian government and the Brazilian government. The Requester identifies no other specific public comment or piece of correspondence that it claims the NGPC failed to consider, and the NGPC's rationale for the Resolution clearly states that its "review of significant materials included, but [was] not limited to," the listed materials. In any event, the Requester does not identify any provision in the Bylaws or Guidebook that would require the NGPC to consider (much less comment upon) every comment and piece of correspondence received.⁹

⁸ In its 2 August Letter, the Requester also argues that following the issuance of the GAC Durban Advice but prior to the NGPC vote on the Resolution, it requested, and was denied, the opportunity to meet with the NGPC to present its position. The Requester does not challenge this staff and/or Board action and points to no Bylaw or ICANN policy or procedure that would require such a meeting.

⁹ The Requester also appears to argue that the NGPC should have solicited opinions from other governments. (Request, § 8, Pg. 12.) However, it cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

As such, the Requester has not demonstrated that the NGPC relied on false or inaccurate material information or failed to consider material relevant information with respect to public comments and correspondence regarding the GAC Durban Advice.

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

The Requester argues that the NGPC failed to consider material information in failing to consider the July 2013 statement from the United States Government on geographic indicators. (Request, § 8, Pgs. 14-15.) In its statement, the United States Government expressed its intent to “remain neutral” on the Applications, so as to “allow[] the GAC to present consensus objections on those strings to the Board, if no other government objects.” Nonetheless, the Requester argues that “[t]he statement from the U.S. Government calls into direct question the belief that the GAC Durban Advice is clearly representative of the consensus adoption of the entire GAC of the opinion set forth by Brazil and Peru in its Early Warning or follow-up correspondence.” (*Id.*, § 8, Pg. 15.)

Further, the United States Government’s statement does not negate the fact that the GAC Durban Advice represents consensus GAC Advice. Pursuant to GAC Operating Principle 47, “consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.” (GAC Operating Principle 47, *available at* <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>.) As the statement makes clear, the United States did not object to the GAC Durban Advice. The mere fact that the United States remained neutral with respect to the GAC Durban Advice was not material to the NGPC’s consideration of that advice.

As such, the Requester has not demonstrated that the NGPC failed to consider material information with respect to the United States Government’s statement.

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

The Requester argues that the NGPC improperly failed to consider the Expert Determination rejecting the Independent Objector’s Community Objection to the Amazon Applications. (Request, § 8, Pgs. 16-17.) The Requester appears to contend that the Expert Determination was material because: (1) the objections of the Brazilian and Peruvian governments would have been properly raised in the context of a Community Objection—which those governments did not bring; and (2) a Community Objection by those governments would have failed, as is evidenced by the Expert Determination. (*Id.* at 17.)

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

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

The Requester argues that ICANN instructed Professor Passa “to address only whether under intellectual property laws, governments could claim legally recognized sovereign or geographic rights in the term ‘Amazon’ or whether ICANN was ‘obliged’ to grant .AMAZON

based on pre-existing trademark registrations,” when “[t]he real question is whether, by accepting GAC advice, which is not rooted in any existing law, ICANN would be violating either national [or] international law.” (Request, § 8, Pgs. 18-19) (emphasis in original).

Module 3.1 of the Guidebook sets forth the parameters in which GAC Advice will be given under the New gTLD Program. Module 3.1 provides, in pertinent part:

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

(Guidebook, § 3.1) (emphasis added).

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

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

the Requester believed that additional legal analysis was required, it was free to commission that analysis and submit it to the NGPC.

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

The Requester alleges that the NGPC failed to take into account material information regarding its obligations under Articles I.2, II.3, and III.1 of ICANN’s Bylaws; Article 4 of its Articles of Incorporation; and Sections 4, 5, 7, and 9.3 of its Affirmations of Commitment. (Request, § 8, Pgs. 19-21.) The Requester’s disagreement with the Resolution does not, however, demonstrate that the NGPC failed to consider those obligations. And, as the rationale for the Resolution makes clear, the NGPC acted pursuant to its obligation under Article XI, Section 2.1 of the Bylaws, to duly address advice put to it by the GAC. As such, the Requester has not stated a proper basis for reconsideration with respect to the NGPC’s consideration of its obligations under ICANN’s Bylaws, Articles of Incorporation, and Affirmations of Commitment.¹⁰

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

The Requester argues that the Board failed to consider material information in failing to consider the potential fiscal implications of the Resolution, specifically the fact that “[s]hould it be determined that the [Resolution] in fact violates various national and international laws, the costs of defending an action (whether through the Independent Review Process or through U.S. courts) will have significant fiscal impacts on ICANN. . . .” (Request, § 8, Pgs. 21-22.)

¹⁰ The Requester also argues that the NGPC “should have sought comment from the [Generic Names Supporting Organization (“GNSO”)] as to whether [the GAC Durban Advice was] in violation of GNSO Policy.” (Request, § 8, Pg. 21.) However, the Requester cites to no Bylaws or Guidebook provision that would require the NGPC to do so.

The Requester has not demonstrated that the NGPC did not consider the potential for litigation arising out of the Resolution, including the potential fiscal impact of such litigation. In any event, the Requester does not identify any requirement that the NGPC consider such an impact—indeed, the Requester has not demonstrated how the speculative possibility of litigation is material to the NGPC’s determination here. As such, the Requester has not identified a proper ground for reconsideration.

VI. Recommendation.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore recommends that Reconsideration Request 14-27 be denied without further consideration. In terms of timing of the BGC’s Recommendation, the BGC notes that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (Bylaws, Art. IV, § 2.16.) The BGC required additional time to make its recommendation due to its request for clarification from the Requester, and due to the volume of Reconsideration Requests received within recent months. As such, the first practical opportunity for the BGC to take a decision on this Request was on 22 August 2014; it was impractical for the BGC to do so sooner.