

**RECOMMENDATION OF THE BOARD ACCOUNTABILITY MECHANISMS
COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-10
21 DECEMBER 2018**

The Requestor, the Amazon Cooperation Treaty Organization (ACTO), represented by Ambassador María Jacqueline Mendoza Ortega, Secretary General of ACTO,¹ seeks reconsideration on behalf of the ACTO member states of ICANN Board Resolution 2018.10.25.18 (Resolution), which directed ICANN organization “to remove the ‘Will Not Proceed’ status and resume processing of the .AMAZON applications according to the policies and procedures governing the 2012 round of the New gTLD Program.”² Specifically, the Requestor claims that the Board relied on inaccurate information when it adopted the Resolution, “including the assumption that the Amazon countries would have agreed to a path forward for the delegation of the .AMAZON strings.”³ The Requestor also asserts that the Resolution contravenes ICANN org’s commitments and core values, which “recognize that . . . ICANN must duly take into account the public policy advice of governments and public authorities.”⁴ The Requestor asks the Board to cancel the Resolution and restore the “Will Not Proceed” status of the .AMAZON applications.⁵

I. Executive Summary.

In 2012, Amazon EU S.à r.l. (Amazon corporation) applied for the .AMAZON generic top-level domain (gTLD) and two Internationalized Domain Name (IDN) versions of the word

¹ The Requestor seeks reconsideration on behalf of the ACTO member States, which consist of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname, and Venezuela. Request 18-10, § 1, at Pg. 1.

² Request 18-10, § 3, at Pg. 1.

³ *Id.*

⁴ *Id.* § 8, at Pgs. 5-6.

⁵ *Id.* § 9, at Pg. 6.

‘Amazon’ (.AMAZON applications).⁶ The Requestor opposed the .AMAZON applications, and in its Durban Communiqué, the Governmental Advisory Committee (GAC) advised the ICANN Board that the GAC had reached consensus advice that the .AMAZON applications should not proceed.⁷ In May 2014, the Board, acting through the New gTLD Program Committee (NGPC), accepted the GAC advice in the Durban Communiqué and placed the .AMAZON applications on “Will Not Proceed” status.⁸ The NGPC’s decision was without prejudice to the continuing efforts by the Amazon corporation and members of the GAC to pursue dialogue on the relevant issues.⁹

The Amazon corporation initiated an Independent Review Process (IRP) of the NGPC’s action, and the IRP was resolved in favor of the Amazon corporation.¹⁰ Specifically, the IRP Panel recommended that the Board reevaluate the .AMAZON applications and “make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon’s applications.”¹¹

In light of this result, the Board asked the GAC if it had any new or additional information to provide the Board regarding its advice that the .AMAZON applications should not proceed.¹² On 29 October 2017, the GAC met with the Amazon corporation during the ICANN 60 meeting in Abu Dhabi to discuss possible solutions that could produce a mutually satisfactory

⁶ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁷ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b>; see also <https://gacweb.icann.org/display/GACADV/2013-07-18-Obj-Amazon>.

⁸ *Id.*

⁹ See <https://www.icann.org/resources/board-material/resolutions-2017-10-29-en>.

¹⁰ Amazon IRP Panel Declaration ¶¶ 124-26, at Pgs. 52-53 (<https://www.icann.org/en/system/files/files/irp-amazon-final-declaration-11jul17-en.pdf>).

¹¹ *Id.* at ¶ 125.

¹² Letter from S. Crocker to T. Schneider, 29 October 2017 (<https://www.icann.org/en/system/files/correspondence/crocker-to-schneider-29oct17-en.pdf>) (“29 Oct. Letter”).

resolution of the .AMAZON applications.¹³ In its Abu Dhabi Communiqué, the GAC advised the ICANN Board to “continue facilitating negotiations between the... ACTO[] member states and the Amazon corporation with a view to reaching a mutually acceptable solution to allow for the use of .amazon as a top level domain name.”¹⁴

The Amazon corporation proposed a potential resolution in October 2017, and updated and clarified its proposal in February 2018.¹⁵ The ACTO member states rejected the Amazon corporation’s proposal in September 2018.¹⁶ At the same time, the ACTO member states indicated a willingness to engage in discussions with ICANN org and the Amazon corporation to reach a mutually agreeable solution.¹⁷

On 16 September 2018, the Board adopted Resolution 2018.09.06.12 directing ICANN’s President and CEO to support the development of a solution for delegation of the .AMAZON applications “that includes sharing the use of those top-level domains with the ACTO member states to support the cultural heritage of the countries in the Amazonian region.”¹⁸ The Board also adopted Resolutions 2018.09.06.13 and 2018.09.06.14 directing the ICANN President and CEO “if possible, to provide a proposal to the Board, on the .AMAZON applications to allow the Board to take a decision on the delegation of the strings represented in the .AMAZON

¹³ https://sched.ws/hosted_files/icann60abudhabi2017/7b/I60_AUH-Sun29Oct2017_GAC%20Meet%20with%20Amazon.com-en.pdf.

¹⁴ Abu Dhabi Communiqué at Pg. 13 (<https://gac.icann.org/advice/communiques/public/gac-60-abu-dhabi-communicue.pdf>).

¹⁵ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

¹⁶ Letter from J. Mendoza to G. Marby and C. Chalaby, 5 September 2018 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-05sep18-en.pdf>) (“5 Sept. Letter”).

¹⁷ *Id.*

¹⁸ Resolution 2018.09.16.12 (<https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>).

applications” and to provide regular updates to the Board (collectively, the 16 September 2018 Resolutions).¹⁹

After its proposal was rejected by ACTO, the Amazon corporation developed a new proposal to address the ACTO member states’ concerns.²⁰ In October 2018, ACTO extended a formal invitation to the ICANN President and CEO to discuss a potential solution.²¹

On 25 October 2018, the Board adopted the Resolution to empower the ICANN org to actively facilitate discussions between the Amazon corporation and the ACTO member states.²² The Resolution directed the ICANN org to resume processing of the .AMAZON applications, allowing it to facilitate negotiations regarding Public Interest Commitments (PICs) and Registry Agreement terms. Reflecting this intention, the Board instructed the ICANN President and CEO “provide regular updates to the Board on the status of the .AMAZON applications.”²³ The Board nevertheless retained the authority to take the final decision on the delegation of the strings represented in the .AMAZON applications as stated in Resolutions 2018.09.06.13 and 2018.09.06.14.

The Requestor filed Request 18-10, seeking reconsideration of the Resolution, on 5 November 2018.²⁴

The BAMC has considered Request 18-10 and all relevant materials. Based on its extensive review of all relevant materials, the BAMC finds that reconsideration is not warranted

¹⁹ Resolutions 2018.09.16.13 – 2018.09.16-13 (<https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>.)

²⁰ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

²¹ Letter from J. Mendoza to G. Marby and C. Chalaby, 19 October 2018 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-19oct18-en.pdf>) (“19 Oct. Letter”).

²² <https://www.icann.org/resources/board-material/prelim-report-2018-10-25-en>; Letter from C. Chalaby to J. Mendoza, 3 December 2018 (<https://www.icann.org/en/system/files/correspondence/chalaby-to-mendoza-03dec18-en.pdf>). (“3 Dec. Letter”).

²³ <https://www.icann.org/resources/board-material/prelim-report-2018-10-25-en>.

²⁴ Request 18-10, § 3, at Pg. 1.

because the Board adopted the Resolution based on accurate and complete information and because the Board's adoption of the Resolution was consistent with ICANN's commitments and core values. Nevertheless, the BAMC acknowledges that Request 18-10 reflects a difference in interpretation by the Requestor of the Resolution, and thus, the BAMC recommends that the Board reiterates that the Resolution was taken with the clear intention to grant the President and CEO the authority to progress the facilitation process between the ACTO member states and the Amazon corporation with the goal of helping the involved parties reach a mutually agreed solution, but in the event they are unable to do so the Board will make a decision at ICANN 64 on the next steps regarding the potential delegation of .AMAZON and related top-level domains. The BAMC encourages a high level of communication between the President and CEO and the relevant stakeholders, including the representatives of the Amazonian countries and the Amazon corporation, between now and ICANN 64.

The BAMC also recommends that the Board continues receiving updates on the facilitation process from the ICANN President and CEO in anticipation of revisiting the status of the .AMAZON applications at its meeting at ICANN64.

II. Facts.

A. Initial Decision to Stop Processing the .AMAZON Applications.

In 2012, the Amazon corporation submitted the .AMAZON applications.²⁵ The .AMAZON applications were the subject of GAC Early Warnings submitted by the governments of Brazil and Peru (with the endorsement of Bolivia, Ecuador, Guyana and Argentina), which put the Amazon corporation on notice that these governments had a public policy concern about the applied-for strings. Specifically, the GAC Early Warnings noted that “[g]ranting exclusive rights

²⁵ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

to this specific gTLD to a private company would prevent use of this domain for purposes of public interest related to the protection, promotion and awareness raising on issues related to the Amazon biome. It would also hinder the possibility of use of this domain to congregate web pages related to the population inhabiting that geographical region.”²⁶ The GAC Early Warnings also noted that the requested .AMAZON string “matches part of the name, in English, of the ‘Amazon Cooperation Treaty Organization,’ an international organization which coordinates initiatives in the framework of the Amazon Cooperation Treaty.”²⁷ Finally, the GAC Early Warnings explained that the .AMAZON applications “ha[d] not received support from the governments of the countries in which the Amazon region is located.”²⁸

The GAC considered the matter at its April 2013 meeting in Beijing. Consensus was not reached, but the GAC requested that ICANN org refrain from moving forward with the .AMAZON applications to allow the GAC time to consider the matter at its next meeting.²⁹ At its July 2013 meeting in Durban, the GAC reached consensus and advised ICANN that the .AMAZON applications should not proceed.³⁰

The Board—acting via the NGPC—approved a resolution on 14 May 2014 accepting the GAC’s advice and directing ICANN org not to proceed with the .AMAZON applications.³¹ In reaching this decision, the NGPC relied in part on an independent, third-party expert analysis that concluded there was “no rule of international, or even regional or national, law” which

²⁶ GAC Early Warning – Submittal Amazon-BR-PE-58086 at Pg. 1 (<https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197938/Amazon-BR-PE-58086.pdf>).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Beijing Communiqué at Pg. 3 (<https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>).

³⁰ Durban Communiqué at Pg. 3-4 (<https://gac.icann.org/advice/communiques/gac-47-durban-communique.pdf>).

³¹ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#/2.b>.

obligated ICANN to either reject or accept the .AMAZON applications.³² Additionally, the NGPC explained that the decision was made “without prejudice to the continuing efforts by Amazon EU S.à r.l. and members of the GAC to pursue dialogue on the relevant issues.”³³

B. The Independent Review Process (IRP) Initiated by the Amazon corporation.

Following the Board’s acceptance of the GAC Durban Communiqué advice, “representatives from both the Amazon countries and [the Amazon corporation] held several meetings, including at the ACTO headquarters in Brasília.”³⁴ The parties explored possibilities to establish an arrangement “in order to allow the commercial exploitation of the ‘.amazon’ TLDs by the company, while at the same time safeguarding the countries’ right to use the TLDs for the public interest, in line with national strategies and for the benefit of the local peoples. However, neither party could accept the different proposals presented by the other at that time.”³⁵

On 1 March 2016, the Amazon corporation initiated an IRP challenging the ICANN Board’s decision ([2014.05.14.NG03](#)) to stop proceeding with the .Amazon applications.³⁶

The IRP Panel issued its Final Declaration on 11 July 2017, finding in favor of the Amazon corporation.³⁷ The Final Declaration concluded that “GAC consensus advice, standing alone, cannot supplant the Board’s independent and objective decision with a reasoned analysis.”³⁸ Moreover, the Final Declaration explained that neither the Early Warning Notice, nor the GAC advice, nor the Board Resolution to stop proceeding with the .AMAZON applications contained an explanation of a “well-founded public policy interest” that was

³² *Id.*

³³ *Id.*

³⁴ 5 Sept. Letter, Annex V at Pg. 5.

³⁵ *Id.*

³⁶ See <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

³⁷ IRP Panel Declaration ¶¶ 124-26, at Pgs. 52-53.

³⁸ *Id.* ¶ 125, at Pgs. 52-53

sufficient to justify the Board’s action.³⁹ Based on these findings, the Final Declaration recommended that the Board “promptly re-evaluate Amazon’s applications” and “make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon’s applications.”⁴⁰

On 23 September 2017, the Board accepted the IRP Panel Final Declaration recommendation that the Amazon corporation was the prevailing party in the IRP.⁴¹ The Board also resolved that

further consideration is needed regarding the Panel’s non-binding recommendation that the Board “promptly re-evaluate Amazon’s applications” and “make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon’s applications.”⁴²

C. Negotiations between the Amazon Corporation and the ACTO Member States.

On 29 October 2017, the Board asked the GAC if it had any new or additional information to provide the Board regarding its advice that the .AMAZON applications should not proceed.⁴³

That same day, the GAC met with the Amazon corporation during the ICANN 60 meeting in Abu Dhabi to discuss possible solutions that could produce a mutually satisfactory

³⁹ *Id.* ¶¶ 118-19, at Pg. 50.

⁴⁰ *Id.* ¶ 125, at Pgs. 52-53. See also <https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>.

⁴¹ Board 23 September 2017 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.e>.)

⁴² *Id.* at Resolution 2017.09.23.17.

⁴³ 29 October Letter (<https://www.icann.org/en/system/files/correspondence/crocker-to-schneider-29oct17-en.pdf>).

resolution of the .AMAZON applications.⁴⁴ During the meeting, the Amazon corporation presented a new proposal to the GAC and the ACTO member states.⁴⁵

In its November 2017 Abu Dhabi Communiqué, the GAC acknowledged the Board’s request for new or additional information relating to the GAC’s consensus advice on the .AMAZON applications.⁴⁶ The GAC advised the ICANN Board to “continue facilitating negotiations between the...ACTO[] member states and the Amazon corporation with a view to reaching a mutually acceptable solution to allow for the use of .amazon as a top level domain name.”⁴⁷ The GAC acknowledged “the need to find a mutually acceptable solution for the countries affected and the Amazon corporation to allow for the use of .amazon as a top level domain name.”⁴⁸ On 4 February 2018, the ICANN Board accepted this advice and directed the ICANN President and CEO “to facilitate negotiations between the Amazon Cooperation Treaty Organization’s (ACTO) member states and the Amazon corporation.”⁴⁹

On 7 February 2018, following informal exchanges facilitated by ICANN org, the Amazon corporation issued a new proposal to ACTO, which was reviewed by the ACTO member states.⁵⁰ The ACTO member states also had an opportunity to pose clarifying questions to the Amazon corporation regarding their proposal.⁵¹ Following review of the proposal, on 5 September 2018, ACTO issued a letter to the Board stating that the Amazon corporation

⁴⁴ https://sched.ws/hosted_files/icann60abudhabi2017/7b/160_AUH-Sun29Oct2017_GAC%20Meet%20with%20Amazon.com-en.pdf.

⁴⁵ Transcript of GAC meeting with the Amazon corporation in Abu Dhabi, Pg. 5-8 (https://sched.ws/hosted_files/icann60abudhabi2017/7b/160_AUH-Sun29Oct2017_GAC%20Meet%20with%20Amazon.com-en.pdf); *see also* GAC Abu Dhabi Communiqué, Pgs. 6-7, 17 (<https://www.icann.org/en/system/files/correspondence/gac-to-icann-01nov17-en.pdf>.)

⁴⁶ GAC Abu Dhabi Communiqué, Pg. 7.

⁴⁷ *Id.* at Pg. 13.

⁴⁸ *Id.*

⁴⁹ <https://www.icann.org/resources/board-material/resolutions-2018-02-04-en#2.d>.

⁵⁰ Letter from ACTO to ICANN Board, 5 Sept. 2018, at Annex V, Pg. 2 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-05sep18-en.pdf>).

⁵¹ *Id.* *See also* <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

proposal does not constitute an adequate basis to safeguard [ACTO member states'] inherent rights relating to the delegation of the '.amazon' TLD."⁵² The ACTO member states also stated that delegation of .AMAZON "requires the consent of the Amazon countries...[which] have the right to participate in the governance of the '.amazon' TLD."⁵³ The ACTO member states further expressed "the willingness to engage with the ICANN Board, based on the aforementioned principles, with a view to safeguarding their rights as sovereign states with respect to the delegation of the '.amazon' TLD."⁵⁴

On 16 September 2018, the ICANN Board directed ICANN org "to support the development of a solution for delegation of the strings represented in the .AMAZON applications that includes sharing the use of those top-level domains with the ACTO member states to support the cultural heritage of the countries in the Amazonian region," and "if possible, to provide a proposal to the Board, on the .AMAZON applications to allow the Board to take a decision on the delegation of the strings represented in the .AMAZON applications."⁵⁵

The ACTO member states met on 16 October 2018 to discuss a response to the September Board Resolution.⁵⁶ On 19 October 2018, the ACTO member states "formally invited the ICANN President and CEO to meet with their representatives in Brasilia so that they could participate in the 'further work that could result in a solution' . . . for the delegation of the .AMAZON string," if the solution was "acceptable to the Amazon countries."⁵⁷

On 25 October 2018, the GAC published additional advice on the .AMAZON applications. Specifically, the GAC "welcome[d] the 16 September 2018 Board resolution," and

⁵² Letter from ACTO to ICANN Board, 5 Sept. 2018, at Pg. 1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ <https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>.

⁵⁶ 19 Oct. Letter.

⁵⁷ Request 18-10, § 8, at Pg. 4.

the Board’s attempt “to further the possibility of delegation of the .AMAZON applications . . . while recognizing the public policy issues raised through GAC advice on these applications.”⁵⁸ The GAC concluded its discussion by “call[ing] upon the Board to continue facilitating work that could result in [a mutually acceptable] solution.”⁵⁹

D. The Board’s 25 October 2018 Resolution.

On 25 October 2018, the ICANN Board discussed the status of the .AMAZON applications. At the beginning of these discussions, the ICANN President and CEO noted that he had been invited by the ACTO member states to meet to discuss a potential resolution of the ongoing dispute and that he was formally accepting the invitation.⁶⁰

The Resolution adopted by the Board directs ICANN org to “remove the ‘Will Not Proceed’ status and resume processing of the .AMAZON applications according to the policies and procedures governing the 2012 round of the New gTLD Program. This includes the publication of the Public Interest Commitments, as proposed by the Amazon Corporation, according to the established procedures of the New gTLD program.”⁶¹ The Board also adopted a Resolution instructing the ICANN President and CEO “to provide regular updates to the Board on the status of the .AMAZON applications.”⁶²

The whereas clause preceding the Resolution reiterated the actions taken by the Board in the 16 September 2018 Resolutions, which clearly anticipates ICANN org coming back to the Board with a proposal on the .AMAZON applications following the facilitation process.⁶³

⁵⁸ Barcelona Communiqué at Pg. 10-11

(<https://gac.icann.org/advice/communiques/icann63%20gac%20communique%CC%81.pdf>).

⁵⁹ *Id.*

⁶⁰ Transcript of the Board 25 October 2018 Meeting, Pg. 15

(<https://static.ptbl.co/static/attachments/192259/1540518957.pdf?1540518957>); 3 Dec. Letter.

⁶¹ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁶² *Id.*

⁶³ *Id.*

The rationale for the Resolution explains that “the ICANN org has informed the Board that the parties have identified a path forward, [and] the Board takes this action today to allow the .AMAZON applications to move forward in a manner that would align with GAC advice and inputs on this topic.”⁶⁴ The rationale also described the history of the .AMAZON applications, including the positions of the ACTO member states, ACTO’s letter of 5 September 2018 rejecting the Amazon corporation’s prior proposal, and the existence of a new proposal by the Amazon corporation that sought to address the ACTO member states’ concerns.⁶⁵

E. Responses to the 25 October 2018 Resolution.

On 5 November 2018, the Requestor submitted the present Request for Reconsideration of the Resolution. The Requestor also wrote to the ICANN Board on behalf of the ACTO member states to express concern that the “positions held by the Amazon countries appear to have been erroneously interpreted.”⁶⁶ Specifically, the Requestor reiterated that while “[t]he Amazon countries maintain their willingness to dialogue with the ICANN President and CEO to develop a mutually acceptable solution for the delegation of the ‘.AMAZON’ top-level domains,” “such mutually acceptable solution has not yet been agreed upon.”⁶⁷

The ICANN President and CEO responded to ACTO’s letter on 20 November 2018. The letter outlined the history of the .AMAZON applications as well as the facilitation process by ICANN organization. This letter also specified that the Amazon corporation was “working on a new and enhanced proposal” that it would be “sending soon” to ACTO.⁶⁸ The ICANN President

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Letter from J. Mendoza to G. Marby and C. Chalaby, 5 November 2018 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-05nov18-en.pdf>) (“5 Nov. Letter”).

⁶⁷ *Id.*

⁶⁸ Letter from G. Marby to J. Mendoza, 20 November 2018 (<https://www.icann.org/en/system/files/correspondence/marby-to-mendoza-20nov18-en.pdf>) (“20 Nov. Letter”).

and CEO also affirmed that he would be meeting with representatives of the ACTO member states on 29 November 2018 “to discuss the facts related to the .AMAZON Top-Level Domain and address [the ACTO member states’] concerns.”⁶⁹

The Requestor responded to the ICANN President and CEO on 22 November 2018 and informed him that the scheduled meeting was postponed “in the interest of maintaining a constructive and positive dialogue.”⁷⁰ Additionally, the Requestor wrote to the Chair of the ICANN Board on 26 November 2018 to “assure [the Board] that the Amazon countries look forward to meeting with the ICANN President and CEO soon with a view to initiating discussions to find a mutually acceptable solution for the .AMAZON applications.”⁷¹ However, the Requestor explained that action on the Reconsideration Request was a “pre-requisite[] for such a meeting to take place in a way that clarifies the present state of play and provides transparency.”⁷²

Shortly after, both the ICANN President and CEO and the Chair of the ICANN Board attempted to clarify the status of the .AMAZON applications and the facilitation process. The ICANN President and CEO wrote to the Chair of the GAC on 28 November 2018, outlining the efforts that had been made to facilitate a resolution of the applications and explaining the intent to have “further discussion and dialogue with both the Amazon Corporation and the ACTO Member States” with the “goal [] to have the parties agree, before delegation.”⁷³ On 3 December 2018, the Chair of the ICANN Board wrote to the Requestor, explaining that the challenged

⁶⁹ *Id.*

⁷⁰ Letter from J. Mendoza to G. Marby, 22 November 2018 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-marby-22nov18-en.pdf>) (“22 Nov. Letter”).

⁷¹ Letter from J. Mendoza to C. Chalaby, 26 November 2018 (<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-26nov18-en.pdf>) (“26 Nov. Letter”).

⁷² *Id.*

⁷³ Letter from G. Marby to M. Ismail, 28 November 2018 (<https://www.icann.org/en/system/files/correspondence/marby-to-ismail-28nov18-en.pdf>) (“28 Nov. Letter”).

Board action was taken with the clear intention that there was to be further discussion and dialogue with the parties prior to considering the delegation of the .AMAZON and related top-level domain names.⁷⁴ The 3 December letter also “echo[ed] the sentiment” of the ICANN President and CEO that “[i]f there has been any misunderstanding in our exchanges and communication I would like to express my sincere apologies and look to a constructive way forward.”⁷⁵

On 7 December 2018, the Requestor responded, acknowledging receipt of the prior communications and attaching a note from the ACTO member states.⁷⁶ The attached note confirmed that the ACTO member states had not yet agreed to any proposed solution to the .AMAZON applications.⁷⁷ The note explained that the 5 September 2018 and 19 October 2018 letters were intended to demonstrate that “the Amazon countries . . . were ready to initiate a dialogue with the ICANN Board or its designee, through the Amazon Cooperation Treaty Organization, in order to participate in the development of a potential solution for the .AMAZON applications.”⁷⁸ The note also referenced the instant Request for Reconsideration, and indicated that no further steps could be taken on this issue until the Request was resolved.⁷⁹

On 18 December 2018, the Chair of the ICANN Board responded to ACTO’s 7 December 2018 letter. The Chair advised ACTO that its Reconsideration Request is currently being processed according to ICANN’s published processes. The Chair re-emphasized his previous sentiment that the “Board believes that the recent turn of events is truly unfortunate and sincerely hopes that we can put any misunderstanding behind us and move forward together in a

⁷⁴ 3 Dec. Letter.

⁷⁵ *Id.*

⁷⁶ Letter from J. Mendoza to ICANN Board, 7 December 2018

(<https://www.icann.org/en/system/files/correspondence/mendoza-to-icann-board-07dec18-en.pdf>) (“7 Dec. Letter”).

⁷⁷ *Id.*

⁷⁸ *Id.* (emphasis omitted).

⁷⁹ *Id.*

constructive and positive manner.”⁸⁰

F. Relief Requested.

The Requestor asks the Board to cancel the Resolution and restore the “Will Not Proceed” status of the .AMAZON applications.⁸¹

III. Issues Presented.

The issues are as follows:

1. Whether the Board adopted the Resolution based on false or inaccurate relevant information, or without consideration of material information; and
2. Whether the Board adopted the Resolution contrary to ICANN’s commitments and core values, which recognize that ICANN must duly take into account the public policy advice of governments and public authorities.

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity “may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”⁸²

⁸⁰ Letter from Chair of ICANN Board to ACTO, 18 Dec. 2018

(<https://www.icann.org/en/system/files/correspondence/chalaby-to-mendoza-18dec18-en.pdf>.)

⁸¹ Request 18-10, § 9, at Pg. 6.

⁸² ICANN Bylaws, 18 June 2018, Art. 4 §§ 4.2(a) and (c).

Here, Request 18-10 seeks reconsideration of Board action on the grounds that the action was taken based on false and inaccurate information and in contradiction of ICANN’s core values. Accordingly, the BAMC has reviewed the Request and now provides a recommendation to the Board, consistent with the Bylaws.⁸³ Denial of a Request for Reconsideration of ICANN Board action is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁸⁴

V. Analysis and Rationale.

A. The Board Resolution Did Not Direct the Delegation of the .AMAZON TLD Without Further Consultation with the ACTO Member States.

Before turning to the grounds for reconsideration identified in Request 18-10, the BAMC thinks it is important to address what seems to be the premise of the Request. The Requestor appears to have interpreted the Resolution as directing ICANN’s President and CEO to delegate the .AMAZON gTLD without further consultation with the ACTO member states and without further consideration by the Board. This is perhaps the result of language that could have been clearer, but this interpretation was not the intent of the Resolution. The Requester’s interpretation regarding the effect of the Resolution is apparent throughout Request 18-10. For example, in the response to Question 6 on the Reconsideration Request Form, addressing how the Requestor is “materially and adversely affected by the action,” the Requestor states that the Board Resolution “has effectively freed the .AMAZON strings for delegation to the private company Amazon Inc.”⁸⁵ In response to the same question, the Requestor states that the Resolution “authorized the .AMAZON applications to move forward without addressing the public policy concerns of

⁸³ See *id.* at § 4.2(e).

⁸⁴ *Id.*

⁸⁵ Request 18-10, § 6, at Pg. 2.

the Amazon countries.”⁸⁶ The Requestor also objects to the Resolution on the grounds that “formal discussions between the ICANN President and CEO and the Amazon countries, as well as the acceptance by the Amazon countries of any proposed solution, were steps that should necessarily precede any further action that could result in the delegation of the .AMAZON strings.”⁸⁷ Similar examples permeate both Request 18-10 and the Requestor’s correspondence with ICANN org following the adoption of the Resolution.

Contrary to the Requestor’s apparent interpretation, however, the Resolution was passed with the intention that further discussions among the parties take place before the Board takes a final decision on the potential delegation of .AMAZON and related top-level domains. The language of the Resolution itself does not approve delegation of .AMAZON or support any particular solution. Rather, the Resolution simply “directs the President and CEO, or his designee(s), to remove the ‘Will Not Proceed’ status and resume processing of the .AMAZON applications.”⁸⁸ The Resolution goes on to explain that such processing would “include[] the publication of the Public Interest Commitments, as proposed by the Amazon Corporation.”⁸⁹ This text was not intended to suggest that the “proposed” Public Interest Commitments have been finalized or welcomed by the ACTO member states. Nor was the instruction to “resume processing” intended to suggest that the matter was fully resolved. The adoption of a concurrent Resolution “direct[ing] the President and CEO . . . to provide regular updates to the Board on the status of the .AMAZON applications” makes clear that the Board did not consider the matter concluded.⁹⁰

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁸⁹ *Id.*

⁹⁰ *Id.*

Rather than marking the end of a process, removal of the “Will Not Proceed” status was a necessary procedural prerequisite to ICANN org renewing formal consideration of the applications. The meaning and impact of a “Will Not Proceed” application status is explained on the [Applicant Advisory](#) page of the New gTLD microsite.

Will Not Proceed – The application has completed a Program process, *and based on the outcome will not continue*, as defined in the AGB. This could include process outcomes including but not limited to not passing evaluation, not prevailing a dispute resolution proceeding, not prevailing in contention resolution.⁹¹

For the .AMAZON applications, the program process that was completed was the acceptance of GAC advice and the direction of the Board that “the applications for .AMAZON (application number 1-1315-58086) and related IDNs in Japanese (application number 1-1318-83995) and Chinese (application number 1-1318-5581) filed by Amazon EU S.à r.l. should not proceed.”⁹² Accordingly, since that Board resolution was passed, the .AMAZON applications had been on “Will Not Proceed” status. ACTO’s own internal working group discussions recognize that the “Will Not Proceed” status assigned in 2014 was understood to mean that “the dispute had come to an end” because the Board had “reject[ed]” the applications.⁹³ Similarly, the IRP Final Declaration described the advice to assign “Will Not Proceed” status as “[i]n substance” advice to “reject the applications.”⁹⁴ Thus, the removal of the “Will Not Proceed” status is a necessary procedural prerequisite to ICANN org renewing formal consideration of the .AMAZON applications and the processing of the proposed PICs.

The rationale for the Resolution confirms this understanding. The rationale mentions the Amazon corporation’s new “proposed Public Interest Commitments (PICs)” and describes how

⁹¹ *Id.*

⁹² <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#2.b>.

⁹³ 5 Sept. Letter at Pg. 6.

⁹⁴ IRP Panel Declaration ¶¶ 42, at Pg. 18.

such PICs could be enforced by the ACTO member states.⁹⁵ However, it does not intend to state or imply that the Amazon corporation's proposal has been welcomed by the ACTO member states. Instead, the rationale describes the ACTO member states' 5 September 2018 letter, as well as the 12 October 2018 letter from the Ministry of Foreign Affairs of Colombia.⁹⁶ Each of these letters explained ACTO's view that the Amazon corporation's prior proposal was insufficient, but that the ACTO member states were open to discussing a way forward.⁹⁷

Further, as noted above, the whereas clause preceding the Resolution incorporates the Board's 16 September 2018 Resolutions, which directed the President and CEO "to support the development of a solution for delegation of the strings represented in the .AMAZON applications that includes sharing the use of those top-level domains with the ACTO member states to support the cultural heritage of the countries in the Amazonian region" and "if possible, to provide a proposal to the Board, on the .AMAZON applications to allow the Board to take a decision on the delegation of the strings represented in the .AMAZON applications".⁹⁸ Accordingly, the .AMAZON and related top-level domains will not be delegated without additional consideration and action by the Board.

Finally, the circumstances surrounding the Resolution confirm that further negotiations were expected and welcomed by the Board. Specifically, during the discussion by the Board of the Resolution, the ICANN President and CEO stated on the record that he planned to meet with ACTO representatives to discuss these issues.⁹⁹ He therefore requested that the matter be "forward[ed] to [him] to finalize [] discussions between the company and [the ACTO]

⁹⁵ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Transcript of the 25 October 2018 Board Meeting, Pg. 15; 3 Dec. Letter.

countries.”¹⁰⁰ The Board responded by adopting the Resolution, empowering the ICANN President and CEO to work with the ACTO member states and the Amazon corporation.

In the time since the Resolution was adopted, both the ICANN President and CEO and the Chair of the ICANN Board have confirmed the intent of the Resolution and have clarified that they maintained the intent to continue facilitating the discussion between the ACTO member states and the Amazon corporation in correspondence to the Chair of the GAC¹⁰¹ and ACTO.¹⁰² Until the meeting was postponed by ACTO, the ICANN President and CEO planned to travel to Bolivia to discuss possible solutions relating to the .AMAZON domains with the ACTO member states.¹⁰³ At this meeting, the parties would have been expected to review and discuss the Amazon corporation’s proposals and attempt to “address any issues of concern” with the ACTO member states in order to “take this matter forward in a constructive way.”¹⁰⁴ Thus, the ICANN President and CEO considered further negotiations fully consistent with the Resolution. Similarly, the Chair of the ICANN Board wrote to the Requestor in part to clarify the “status of the .AMAZON TLDs” after the Resolution.¹⁰⁵ The Chair explained that the “.AMAZON TLDs have not yet been delegated,” that the Resolution “granted the ICANN President and CEO the authority to progress the facilitation process,” and that the discussion surrounding the adoption of the Resolution “clearly highlight[ed] the intention for further discussion and dialogue.”¹⁰⁶ Accordingly, because Request 18-10 seems premised on a difference of interpretation by the Requestor, and the BAMC recommends that the Board clarify that the Resolution was taken with

¹⁰⁰ 3 Dec. Letter.

¹⁰¹ Letter from G. Marby to M. Ismail, 28 Nov. 2018 (<https://www.icann.org/en/system/files/correspondence/marby-to-ismail-28nov18-en.pdf>).

¹⁰² Letter from C. Chalaby to Ambassador Mendoza, 3 Dec. 2018 (<https://www.icann.org/en/system/files/correspondence/chalaby-to-mendoza-03dec18-en.pdf>).

¹⁰³ 20 Nov. Letter.

¹⁰⁴ *Id.*

¹⁰⁵ 3 Dec. Letter.

¹⁰⁶ *Id.*

the clear intention that there was to be further discussion and dialogue with the relevant parties, including the ACTO member states, prior to the Board’s further consideration of the potential delegation of .AMAZON and related top-level domains.

B. The Board Adopted the Resolution Based on Accurate and Complete Information, and Did Not Fail to Consider Any Material Information.

The Request suggests that the Resolution should be reconsidered because it was adopted (1) based on a misunderstanding by the Board of the position of the Amazon countries, (2) without consideration of the 19 October 2018 letter from the Requestor, and (3) without consideration of the GAC’s follow-up advice adopted on 24 October 2018. However, as explained below, the Board considered all available material information and had an accurate understanding of the facts.

The Requestor notes that the Rationale for the Resolution “states that ‘the ICANN org has informed the Board that the parties have identified a path forward.’”¹⁰⁷ The Requestor suggests that “[t]his information is inaccurate,” based on its conclusion that the Board “ha[d] considered that the Amazon countries had been informed of a proposal for the delegation of the ‘.AMAZON’, and that they would have agreed to that delegation pending only final discussions on a limited number of elements.”¹⁰⁸

The Requestor’s interpretation of the “path forward” language appears to have been based on a different interpretation than the Board’s regarding the effect of the Resolution. As discussed above, the Resolution was taken with the intent that further discussions with the relevant parties, including the ACTO member states would continue and that no decisions regarding delegation of the .AMAZON applications would be taken without further Board

¹⁰⁷ Request 18-10, § 8.1, at Pg. 3.

¹⁰⁸ *Id.*

consideration of the relevant outcome of the continued facilitation process. As such, the Board’s “path forward” language did not refer to a final agreement regarding delegation or a specific solution. As the Requestor explains, shortly before the Resolution was adopted, the ACTO member states had “formally invited the ICANN President and CEO to meet with their representatives” so that they could work together toward a solution.¹⁰⁹ This formal invitation put into effect the recent decision of the ACTO member states “that they were ready to initiate a dialogue . . . to participate in the development of a potential solution.”¹¹⁰ Around the same time that the ACTO member states issued their invitation, the Amazon corporation shared with the ICANN President and CEO its updated proposal that sought to address the concerns of the ACTO member countries.¹¹¹ The ICANN President and CEO also discussed the Amazon corporation’s updated proposal with a representative from Brazil, one of the ACTO member states.¹¹² At that time, the representative from Brazil suggested that the facilitation process seemed to be moving “in the right direction.”¹¹³ The parties were therefore prepared to have a constructive dialogue to identify a mutually beneficial solution to the .AMAZON delegation issues. The Board saw this as a path forward that justified a formal change in the status of the .AMAZON applications.

Further, the Request notes that the 19 October 2018 letter is not included in the list of “Items considered by the Board” in the Resolution.¹¹⁴ The Request suggests that this omission indicates that the Board did not consider all of the relevant information.¹¹⁵ However, the Board clearly considered the information contained in this letter: the ACTO member states had invited

¹⁰⁹ *Id.* at Pg. 4.

¹¹⁰ 7 Dec. Letter.

¹¹¹ 20 Nov. Letter.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Request 18-10, § 8.1, at Pg. 4.

¹¹⁵ See *id.*

the ICANN President and CEO to meet with their representatives to discuss a possible solution. As noted above, the ICANN President and CEO specifically mentioned the meeting invitation from the ACTO member states and his acceptance of the invitation in introducing the 25 October 2018 Resolution.¹¹⁶ Indeed, as described above, the existence of a path forward that would include an active dialogue with the ACTO member states was at the heart of the Board’s rationale for adopting the Resolution.

Finally, the Requestor suggests that the Board “overlooked GAC’s follow-up on previous advice about the .AMAZON applications, which the GAC adopted on 24 October 2018.”¹¹⁷ As an initial matter, it is not clear whether the Board could have considered the GAC’s follow-up advice, as it was contained in the Barcelona Communiqué, which was not published until 25 October 2018. The Board adopted the Resolution on the morning of 25 October 2018. In any event, the “follow-up” did not contain any new advice, but instead expressed approval of the 16 September Board resolution and restated advice from the Abu Dhabi Communiqué.¹¹⁸ Thus, even if the Barcelona Communiqué was available prior to the adoption of the Resolution, it did not contain any “material information” that the Board failed to consider because the Board had expressly considered the same information.

C. The Board’s Adoption of the Resolution Was Consistent with ICANN’s Commitments and Core Values.

The Requestor suggests that the Resolution was “contrary to ICANN’s commitments and core values, which recognize that ‘governments and public authorities are responsible for public policy’ and that ICANN must duly take into account the public policy advice of governments

¹¹⁶ Transcript of the 25 October 2018 Board Meeting, Pg. 15.

¹¹⁷ Request 18-10, § 8.2, at Pg. 5-6.

¹¹⁸ Barcelona Communiqué at Pg. 10-11.

and public authorities.”¹¹⁹ The Requestor grounds this claim in the conclusion that the Resolution was inconsistent with the relevant GAC advice. However, this conclusion again is premised on an apparent different interpretation of the Resolution by the Requestor.

First, the Requestor suggests that the Board was wrong to interpret the Abu Dhabi Communiqué’s advice to “supersede” the advice in the Durban Communiqué.¹²⁰ A review of the advice at issue reveals that this argument does not support reconsideration. The Durban Communiqué advised the Board of the GAC’s position that the .AMAZON applications should “not proceed beyond Initial Evaluation.”¹²¹ As explained above, the Board accepted this advice in 2014, but the Amazon corporation prevailed in an IRP challenging that 2014 decision. In light of the .AMAZON IRP Final Declaration, the Board asked the GAC for additional information on that advice. Rather than repeat its advice that the applications should not proceed, the Abu Dhabi Communiqué advised the Board to facilitate negotiations between the ACTO member states and the Amazon corporation.¹²² The Abu Dhabi Communiqué was more recent advice that took into account a change in circumstances and that was materially different from the advice contained in the Durban Communiqué. It could fairly be described as “superseding” the earlier advice.

Next, the Requestor suggests that the Resolution is inconsistent with the GAC’s advice, even as embodied in the Abu Dhabi and Barcelona Communiqués. The Requestor notes that GAC’s most recent consensus statement “reiterated” the “possibility of delegation of the .AMAZON applications” if the parties reach a “mutually acceptable solution.”¹²³ As explained

¹¹⁹ Request 18-10, § 8.2, at Pg. 5.

¹²⁰ *Id.*

¹²¹ Durban Communiqué at Pgs. 3-4.

¹²² Abu Dhabi Communiqué at Pg. 13.

¹²³ Request 18-10, § 8.2, at Pgs. 5-6 (emphasis omitted).

above, the Resolution is designed to allow the parties to try to reach such a solution through ICANN org facilitation. There is therefore no inconsistency between the GAC advice and the Resolution.

Finally, the Requestor's perspective on this issue is informed, in part, by its claim that the Amazon countries' "consent must be previously obtained if the .AMAZON strings are to" be delegated.¹²⁴ While the Requestor has consistently maintained this position throughout correspondence with ICANN representatives, nothing in ICANN's Bylaws or procedures provides a third party or the GAC with authority to stop the Board from making its decision. Instead, the Bylaws require that the Board "recogniz[e] that governments and public authorities are responsible for public policy and duly tak[e] into account the public policy advice of governments and public authorities."¹²⁵ When the ICANN Board previously accepted the GAC's advice on this issue, the Amazon corporation prevailed in an IRP challenging that decision.¹²⁶ The Final Declaration recommended that "the Board should make an objective and independent judgment regarding whether there are, in fact, well-founded, merits-based public policy reasons for denying Amazon's application."¹²⁷ Further, the Board has previously received independent, third-party expert analysis that concluded there was "no rule of international, or even regional or national, law" which obligated ICANN to either reject or accept the .AMAZON applications.¹²⁸ Thus, while the Resolution does not indicate that the .AMAZON domains will be delegated without further discussion and negotiation, as noted above, nothing in ICANN's

¹²⁴ *Id.* § 6, at Pg. 2.

¹²⁵ ICANN Bylaws, 18 June 2018, Art. 1 § 1.2(b).

¹²⁶ IRP Panel Declaration ¶¶ 124-26, at Pgs. 52-53

¹²⁷ *Id.* ¶ 125, at Pgs. 52-53

¹²⁸ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#/2.b>.

Bylaws or procedures provides a third party or the GAC with authority to stop the Board from making its decision.

As the Requestor noted, ICANN's commitments and core values "recognize that 'governments and public authorities are responsible for public policy' and that ICANN must duly take into account the public policy advice of governments and public authorities."¹²⁹ The history of the .AMAZON applications demonstrates that the Board has consistently done just that. In adopting the Resolution, the Board followed the advice of the GAC to "continue facilitating negotiations between the...ACTO[] member states and the Amazon corporation with a view to reaching a mutually acceptable solution to allow for the use of .amazon as a top level domain name."¹³⁰ This approach acknowledges the public policy interests of the ACTO member states and ensures that the ICANN org will continue to take those interests into account, and is therefore fully consistent with ICANN's commitments and core values.

For all of the reasons discussed above, reconsideration is not warranted.

VI. Recommendation

The BAMC has considered the merits of Request 18-10 and, based on the foregoing, concludes that the Board did not fail to consider material information, rely on false or inaccurate information or violate applicable policies or procedures when it adopted the challenged Resolution. Accordingly, the BAMC recommends that the Board deny Request 18-10.

Nevertheless, the BAMC acknowledges that Request 18-10 reflects a difference in interpretation by the Requestor of the Resolution, and thus, the BAMC recommends that the Board reiterates that the Resolution was taken with the clear intention to grant the President and CEO the authority to progress the facilitation process between the ACTO member states and the Amazon

¹²⁹ Request 18-10, § 8.2, at Pg. 5.

¹³⁰ Abu Dhabi Communiqué at Pg. 13

corporation with the goal of helping the involved parties reach a mutually agreed solution, but in the event they are unable to do so the Board will make a decision on the next steps at ICANN 64 regarding the potential delegation of .AMAZON and related top-level domains. The BAMC encourages a high level of communication between the President and CEO and the relevant stakeholders, including the representatives of the Amazonian countries and the Amazon corporation, between now and ICANN 64.

The BAMC also recommends that the Board continue receiving updates on the facilitation process from the ICANN President and CEO in anticipation of revisiting the status of the .AMAZON applications during its meeting at ICANN64.