REFERENCE MATERIALS – BOARD PAPER NO. 2019.01.16.2a

TITLE: Consideration of Reconsideration Request 18-10

Documents
The following attachments are relevant to the Board’s consideration of Reconsideration Request 18-10, which contain all the relevant information considered by the Board Accountability Mechanisms Committee.

Attachment A is Reconsideration Request 18-10 and Attachments 1 through 3, submitted on 5 November 2018.

Attachment B is the Ombudsman Action Regarding Request 18-10, dated 13 December 2018.

Attachment C is the BAMC Recommendation on Reconsideration Request 18-10, issued 21 December 2018.

Submitted By: Amy Stathos, Deputy General Counsel
Date Noted: 8 January 2019
Email: amy.stathos@icann.org
Reconsideration Request Form

1. Requestor Information

Name: Ambassador Maria Jacqueline Mendoza Ortega, Secretary General of the Amazon Cooperation Treaty Organization, on behalf of the member States Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

2. Request for Reconsideration of:

[X] Board action/inaction

[ ] Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

The undersigned, on behalf of the Amazon countries, requests that Board resolution 2018.10.25.18 be cancelled.

Board resolution 2018.10.25.18 ‘directs the President and CEO, or his designee(s), 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.’.

As explained below, Board resolution 2018.10.25.18 was adopted on 25 October 2018 based on inaccurate information, including the assumption that the Amazon countries would have agreed to a path forward for the delegation of the .AMAZON strings.

The resolution is available on [https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d](https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d)

4. Date of action/inaction:

Board resolution 2018.10.25.18 was adopted and published on 25 October 2018.
5. On what date did you become aware of the action or that action would not be taken?

The 29 October 2018 is the date on which all the eight Amazon countries, on whose behalf the undersigned submits the present reconsideration request, became aware of Board resolution 2018.10.25.18.

6. Describe how you believe you are materially and adversely affected by the action or inaction:

The Amazon Cooperation Treaty Organization (ACTO) has been constituted by the Republics of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela to further the objectives of the Amazon Cooperation Treaty, including the promotion of the harmonious development of the Amazon region, the equitable distribution of the benefits of this development, and the pursuit of the public interest on behalf of the Amazon peoples.

With respect to the .AMAZON applications, ICANN’s Governmental Advisory Committee (GAC) recognized, in its Abu Dhabi Communiqué of 1 November 2017, that the member States of the Amazon Cooperation Treaty Organization, on whose behalf the undersigned brings the present reconsideration request, are the legitimate parties whose consent must be previously obtained if the .AMAZON strings are to move forward.

Board resolution 2018.10.25.18, by removing the "Will Not Proceed" status of the .AMAZON applications and authorizing the continuation of their processing, however, has effectively freed the .AMAZON strings for delegation to the private company Amazon Inc. The processing includes the publication of Public Interest Commitments proposed by the applicant, whose content are not known to the Amazon countries, and which the Amazon countries never agreed would be a sufficient condition for the delegation of the AMAZON strings.

Furthermore, Board resolution 2018.10.25.18 materially and adversely affects:

(1) the right of the Amazon countries' to negotiate fundamental terms and conditions for that delegation; and

(2) the Amazon countries' right to oppose any delegation in case the parties cannot reach a mutually satisfactory agreement.

Finally, Board resolution 2018.10.25.18 authorized the .AMAZON applications to move forward without addressing the public policy concerns of the Amazon countries that continue to justify the status "Will Not Proceed" of the .AMAZON applications, including as detailed in the annexes to the 5 September 2018 letter.
sent to the ICANN Board on behalf of ACTO’s member States. It thereby materially and adversely affects the Amazon countries’ right and responsibility for public policy issues associated with the .AMAZON strings.

While the private company Amazon Inc. has proposed “public interest commitments” to be included in a hypothetical registry agreement with ICANN for the operation of the .AMAZON strings, these “public interest commitments” are not known to the Amazon countries, nor have the Amazon countries agreed to them. In fact, the Amazon countries have not even agreed that their public policy concerns as well as their rights, including to participate in the governance of the “.AMAZON” strings, would be satisfactorily addressed through a delegation to the private company subject to “public interest commitments”.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

For the reasons stated above, Board resolution 2018.10.25.18, if not cancelled, will adversely affect the public interest represented by ACTO’s member States, which act for the defense and promotion of the rights and interests of the Amazon region and peoples, including their right to participate in the management and use of the .AMAZON TLDs.

8. Detail of Board or Staff Action/Inaction – Required Information

8.1. The Board adopted resolution 2018.10.25 based on inaccurate and incomplete information, and without consideration of relevant information

The rationale for Board resolution 2018.10.25.18 states that “the ICANN org has informed the Board that the parties have identified a path forward” that would allow the removal of the “Will Not Proceed” status of the .AMAZON applications as well as, consequently, their processing. This information is inaccurate; it is not supported by facts or any material available.

In letters sent on behalf of the Amazon countries to the ICANN President and CEO and to the Chairman of the ICANN Board, on 5 September 2018 and 19 October 2018, it was made clear, respectively, that “[t]he delegation of the .amazon TLD requires the consent of the Amazon countries”, and that “the Amazon countries trust ... the requirement of consent of the Amazon countries for the delegation of the .AMAZON strings will be duly acknowledged”.

By the 5 September 2018 letter, the Amazon countries further indicated that they
shall participate in the governance of the "AMAZON" top-level domains. However, they have not agreed that their participation in the governance of the "AMAZON" top-level domains would be satisfactorily guaranteed through delegation to the private company — as opposed to delegation to the Amazon countries, or to a joint-delegation —, or that it would be so guaranteed through "public interest commitments". These "public interest commitments" would have been proposed to ICANN by the private company Amazon Inc. at some later stage. They are not known to the Amazon countries. The Amazon countries have not agreed to them. Again, the Amazon countries have reiterated that the delegation of the "AMAZON" top-level domain, in any case, requires their consent.

Subsequently, by the 19 October 2018 letter, the Amazon countries 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" (as per the language of the 16 September 2018 Board resolution on the subject) for the delegation of the .AMAZON strings. They further reiterated that any solution must be "acceptable to the Amazon countries" if this is to result in the delegation of the "AMAZON" strings.

The 19 October 2018 invitation was a clear indication of the willingness of the Amazon countries to engage in a constructive dialogue with the ICANN President and CEO that could result in the delegation of the "AMAZON" strings. It indicated very clearly, also, 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.

The invitation was officially communicated to the ICANN President and CEO and to the Chairman of the ICANN Board a week ahead of the public meeting that resulted in the adoption of Board resolution 2018.10.25. It is noteworthy that this letter does not appear in the materials referenced in the 25 October 2018 Board resolution as "Items considered by the Board".

Finally, the Amazon countries have not been informed of any proposal for the delegation of the "AMAZON" strings subsequently to their decision to decline the private company's latest proposal. They have not been informed of any proposed solution developed by the ICANN President and CEO, nor have they been informed of the proposal made by the private company Amazon Inc. regarding "public interest commitments".

However, apparently having 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 (including on the specifics of "public interest commitments"), the Board adopted resolution 2018.10.25 authorizing the removal of the "Will Not Proceed" status of the "AMAZON" applications and clearing the way for
delegation to the private company Amazon Inc. Therefore, the action of the Board was taken as a result of the Board’s reliance on inaccurate relevant information, and without consideration of material information that was available.

8.2. The Board adopted resolution 2018.10.25 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 and public authorities.

The rationale for Board resolution 2018.10.25.18 states that ‘the Board considers that the GAC’s consensus advice of the Abu Dhabi Communiqué which advise the ICANN Board to “continue facilitating negotiations between the [ACTO] member states and the Amazon corporation” to supersede previous GAC advice provided in the Durban Communiqué that the applications should “not proceed beyond Initial Evaluation”. However, GAC Advice from Abu Dhabi on the .AMAZON applications could not have superseded GAC Advice from Durban on the matter.

Firstly, GAC Advice from Abu Dhabi called for the “continuation” of a process that had been effectively in place under the terms and authority of the GAC Advice from Durban on the “.AMAZON” applications. The GAC effectively welcomed and encouraged the continuation of that process, entirely compatible with GAC Advice from Durban, without calling into question the validity of that advice. Furthermore, the ICANN Board itself expressly recognized that “the decision [to adopt GAC Advice from Durban on the .AMAZON applications] is 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” (See Board resolution 2014.05.14.NG03). Hence, the call made by the GAC in Abu Dhabi for the continuation of dialogue between the parties cannot be said to be incompatible with, or supersede, the GAC Advice from Durban.

Secondly, the rationale of GAC Advice from Abu Dhabi on the “.AMAZON” applications expressly explain that the “GAC recognizes the need to find a mutually acceptable solution for the affected countries” for the delegation of the related strings. It does not state, nor even suggest, that the Advice for the Board to continue facilitating the dialogue between the parties supersede previous GAC Advice on the matter. Again, GAC Advice from Abu Dhabi called for the continuation of a process that was been carried out in accordance with GAC Advice from Durban – i.e. a process that was in fact prompted by GAC Advice from Durban. Hence, unless the GAC had otherwise indicated, GAC Advice from Abu Dhabi cannot be said to overrule the GAC Advice from Durban.

In any case, Board resolution 2018.10.25.18 overlooked GAC’s follow-up on previous advice about the .AMAZON applications, which the GAC adopted on 24 October 2018. Indeed, the GAC reiterated that the "possibility of delegation of
the .AMAZON applications" (as per the 16 September 2018 Board resolution on the subject) should take into account the public policy issues raised through GAC advice on these applications, particularly the need to find a mutually acceptable solution for the parties.

However, Board resolution 2018.10.25 authorized the removal of the "Will Not Proceed" status of the .AMAZON applications and cleared the way for delegation to the private company Amazon Inc., without the parties' having reached a mutually acceptable solution, as seen before.

Therefore, the action of the Board contradicted ICANN's Commitments and Core Values, which should have governed and guided the Board's actions, and 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 and public authorities.

9. **What are you asking ICANN to do now?**

In view of the facts stated above, the undersigned, on behalf of the Republics of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, considers that Board resolution 2018.10.25.18 is premature and that it prejudges the outcome of negotiations yet to be concluded. Therefore, it is requested that Board resolution 2018.10.25.18 be cancelled and that the "Will Not Proceed" status of the .AMAZON applications be restored.

10. **Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

ICANN's Governmental Advisory Committee (GAC) recognized, in its Abu Dhabi Communiqué of 1 November 2017, that the member States of the Amazon Cooperation Treaty Organization, on whose behalf as ACTO's Secretary-General the undersigned brings the present reconsideration request, are the legitimate parties of a possible mutually acceptable solution that is necessary for the .AMAZON applications to move forward.

The Amazon Cooperation Treaty Organization (ACTO) has been constituted by the Republics of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela to further the objectives of the Amazon Cooperation Treaty, including the promotion of the harmonious development of the Amazon region, the equitable distribution of the benefits of this development, and the pursuit of the public interest on behalf of the Amazon peoples.
Board resolution 2018.10.25.18, if not cancelled, will adversely affect the process recommended under GAC Advice, which could result in such a mutually acceptable solution that is necessary for delegation of the "AMAZON" strings. Further, Board resolution 2018.10.25.18, if not cancelled, will adversely affect the public interest represented by ACTO's member States, which act for the defense and promotion of the rights and interests of the Amazon region and peoples, including their right to participate in the management and use of the .AMAZON TLDs, as detailed in the 5 September 2018 letter and its annexes sent to the ICANN Board on behalf of the Amazon countries.
11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

[X] Yes

[ ] No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

The undersigned represents the Amazon Cooperation Treaty Organization and in the present instance is acting on behalf of that organization and its member States, the Republics of Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, in defense of the public policy interests recognized by previous Board resolutions and GAC Advice regarding the “.AMAZON” strings.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

[ ] Yes

[X] No

12a. If yes, please explain why the matter is urgent for reconsideration.

13. Do you have any documents you want to provide to ICANN?


19 October 2018 letter from Göran Marby to ACTO’s Secretary General, enclosed herewith.

November 05, 2018 letter from ACTO’s Secretary General to the ICANN Board, enclosed herewith.
Terms and Conditions for Submission of Reconsideration Requests

Reconsideration Requests from different Requestors may be considered in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC’s summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at https://www.icann.org/resources/pages/accountability/reconsideration-en.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC’s decision on any such request is final.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman’s evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at https://www.icann.org/resources/pages/accountability/reconsideration-en and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC’s recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC’s final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor’s original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.
The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board’s decision on the BAMC’s recommendation is final and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN Privacy Policy, and agree to abide by the website Terms of Service.

Signature

Date

05 November 2018

Maria Jacqueline Mendoza Ortega
Attachment 1
PS/ACTO/ 449/2018

Brasilia, October 19, 2018

To
Mr Göran Marby
President and CEO
Internet Corporation for Assigned Names and Numbers (ICANN)

Mr Cherine Chalaby
Chairman of the ICANN Board

Dear Mr Chalaby and Mr Marby,

On behalf of the Member States of the Amazon Cooperation Treaty Organization (ACTO), I wish to inform you that representatives from the eight Amazon countries met on 16 October 2018 to coordinate their follow-up action on the 16 September 2018 Board resolution on “Further Consideration of the .AMAZON Applications”.

I am pleased to inform you that the Amazon countries welcomed the Board’s acknowledgment of the “public policy issues raised through GAC (Governmental Advisory Committee) advice on these .AMAZON applications”.

While noting that in the most recent GAC advice on the matter “[t]he GAC recognizes the need to find a mutually acceptable solution” for themselves and for the applicant (GAC Communiqué, Abu Dhabi, 1 November 2017), the Amazon countries also welcomed the Board’s statement that the 16 September resolution is adopted

“to support further work that could result in a solution that would allow the .AMAZON applications to move forward in a manner that would align GAC (Governmental Advisory Committee) advice and inputs on this topic”.

In view of the Board’s directing the ICANN President and CEO “to support the development of a solution for the delegation of the strings represented in the .AMAZON applications that includes sharing the use of those top-level domains with the ACTO member states”, I have been asked to kindly invite Mr Marby to meet the Amazon countries representatives at the ACTO Headquarters in Brasilia to facilitate his work of developing such a solution that is acceptable to the Amazon countries.

Finally, I would like to express on behalf of the ACTO Member States our appreciation for Mr Marby’s personal engagement in this process, and to reiterate that the Amazon countries trust their “right to participate in the governance of the .AMAZON TLD (Top Level Domain)” as well as the “require[ment] of consent of the Amazon countries [for the delegation of the .AMAZON strings]” will be duly acknowledged.

Yours sincerely,

JACQUELINE MENDOZA
Secretary General

ACTO40

40 years of the signature of the Amazon Cooperation Treaty (1978-2018)

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Attachment 2
19 October 2018

RE: .Amazon

Ambassador Jaqueline Mendoza
Secretary General SP/OCTA

Dear Ambassador Mendoza,

I want to start my letter by thanking you for your letter dated 5 September 2018 and directed to the ICANN board and myself in relation to the latest proposal of Amazon Corp presented to the ACTO countries.

ICANN board worked intensely in the last 12 months since ICANN60 in Abu Dhabi on playing a facilitation role between ACTO and Amazon Corp. but without achieving the expected results from the facilitation process.

On September 16th, ICANN’s board reached a conclusion to mandate ICANN’s CEO to work on a new proposal that would take the .amazon delegation forward after five years of not moving forward since July 2013 in Durban.

In this context, you might be receiving in the coming period some related exchanges about this proposal.

I want to seize the opportunity to thank all ACTO countries for their engagements with ICANN during ICANN’s facilitation process in the last 12 months. We look forward that the new proposal will be of benefit to you and to all partners.

Sincerely yours,

Göran Marby
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers (ICANN)
Attachment 3
PS/ACTO/462/2018

Brasilia, November 5, 2018

To: ICANN Board of Directors

Cc: Mr Cherine Chalaby
Chairman of the ICANN Board

Mr Göran Marby
ICANN President and CEO

Dear ICANN Board,

On behalf of the member States of the Amazon Cooperation Treaty Organization, I would like to make the following statements regarding the 25 October 2018 Board resolution on the “AMAZON” applications, as the positions held by the Amazon countries appear to have been erroneously interpreted:

1) The 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 which allows for their shared management and use, and, in that context, received with appreciation the confirmation of Mr. Marby’s visit to the region in the near future with that purpose;

2) Notwithstanding, the Amazon countries must clarify that such mutually acceptable solution has not yet been agreed upon. The Amazon countries have not even received a written proposal.

The letter sent to the ICANN President and CEO and to the Chairman of the ICANN Board on 5 September 2018 laid down parameters that could form the basis of an agreement from the Amazon countries’ perspective.

Furthermore, another letter sent on 19 October 2018 contained clear indication that, from the Amazon countries’ perspective, formal discussions between the ICANN President and CEO and the Amazon countries, as well as 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.
On the other hand, through a letter dated 19 October 2018, Mr. Marby acknowledged receipt of our 5 September correspondence and expressed his commitment to work towards developing a proposal that would address the Amazon countries and Amazon Inc.’s concerns simultaneously. That was the only official document received from ICANN prior to the 25 October Board resolution.

In that light, as the Amazon countries are not in a position to endorse or validate any proposed solution at this point in time, we look forward to the launching of a process mediated by the ICANN President and CEO, within the shortest possible delay, to discuss a mutually acceptable solution for the delegation of the “AMAZON” applications.

We would argue the importance of ensuring that the upcoming meeting between Mr. Marby and ACTO member States representatives will take place in its correct context and, therefore, we call for the annulment of the 25 October Board resolution. To that end, a formal reconsideration request, which is enclosed herewith, will be filed.

Yours sincerely,

AMBASSADOR JACQUELINE MENDOZA
Secretary General
Reconsideration Request 18-10

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-10.

Best regards,

Herb Waye
ICANN Ombudsman

https://www.icann.org/ombudsman [icann.org]
https://www.facebook.com/ICANNOmbudsman [facebook.com]

Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

Community Anti-Harassment Policy

Confidentiality
All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint.

From: Reconsideration <Reconsideration@icann.org>
Date: Wednesday, December 12, 2018 at 3:26 PM
To: ombudsman <ombudsman@icann.org>
Cc: Reconsideration <Reconsideration@icann.org>
Subject: Reconsideration Request 18-10

Dear Herb,

ICANN recently received the attached reconsideration request (Request 18-10), which was submitted on 5 November 2018, the Amazon Cooperation Treaty Organization (ACTO or Requestor), submitted the attached Reconsideration Request 18-10 (Request 18-10) seeking reconsideration of ICANN Board Resolution 2018.10.25.18 (the 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 Board Accountability Mechanisms Committee (BAMC) has determined that Request 18-10 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, Section 4.2(l) [icann.org] states:

(l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in Section 4.2(l)(iii) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.

(i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.

(ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.

(iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to Article 5 of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-10 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-10 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 18-10.

Best regards,

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094
The Requestor, the Amazon Cooperation Treaty Organization (ACTO), represented by Ambassador María Jacqueline Mendoza Ortega, Secretary General of ACTO, 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.” 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.” 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.” The Requestor asks the Board to cancel the Resolution and restore the “Will Not Proceed” status of the .AMAZON applications.

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

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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). 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. 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. 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.

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. 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.”

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. 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

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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.
11 Id. at ¶ 125.
resolution of the .AMAZON applications. 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.”

The Amazon corporation proposed a potential resolution in October 2017, and updated and clarified its proposal in February 2018. The ACTO member states rejected the Amazon corporation’s proposal in September 2018. 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.

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.” 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

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17 Id.
applications” and to provide regular updates to the Board (collectively, the 16 September 2018 Resolutions).\footnote{Resolutions 2018.09.16.13 – 2018.09.16-13 (https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d.)}

After its proposal was rejected by ACTO, the Amazon corporation developed a new proposal to address the ACTO member states’ concerns.\footnote{https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d.} In October 2018, ACTO extended a formal invitation to the ICANN President and CEO to discuss a potential solution.\footnote{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”).}

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.\footnote{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”).} 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.”\footnote{https://www.icann.org/resources/board-material/prelim-report-2018-10-25-en.} 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.\footnote{Request 18-10, § 3, at Pg. 1.}

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
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. 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

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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.”

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.”

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.”

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. At its July 2013 meeting in Durban, the GAC reached consensus and advised ICANN that the .AMAZON applications should not proceed.

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. 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

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27 Id.
28 Id.
obligated ICANN to either reject or accept the .AMAZON applications. 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.”

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 Brasilia.” 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.”

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.

The IRP Panel issued its Final Declaration on 11 July 2017, finding in favor of the Amazon corporation. The Final Declaration concluded that “GAC consensus advice, standing alone, cannot supplant the Board’s independent and objective decision with a reasoned analysis.” 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

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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. 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.”

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

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.

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

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. 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.” 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.” 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.”

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. The ACTO member states also had an opportunity to pose clarifying questions to the Amazon corporation regarding their proposal. Following review of the proposal, on 5 September 2018, ACTO issued a letter to the Board stating that the Amazon corporation

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46 GAC Abu Dhabi Communiqué, Pg. 7.
47 Id. at Pg. 13.
48 Id.
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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{55}

The ACTO member states met on 16 October 2018 to discuss a response to the September Board Resolution.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{52} Letter from ACTO to ICANN Board, 5 Sept. 2018, at Pg. 1.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \text{https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d.}
\textsuperscript{56} 19 Oct. Letter.
\textsuperscript{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.”

The GAC concluded its discussion by “call[ing] upon the Board to continue facilitating work that could result in [a mutually acceptable] solution.”

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.

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.”

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.”

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.

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58 Barcelona Communiqué at Pg. 10-11 (https://gac.icann.org/advice/communiques/icann63%20gac%20communique%CC%81.pdf).
59 Id.
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.” 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.

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.” 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.”

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. The ICANN President

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64 Id.
65 Id.
67 Id.
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.”

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.” 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.” 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.”

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.” On 3 December 2018, the Chair of the ICANN Board wrote to the Requestor, explaining that the challenged

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69 Id.
72 Id.
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
77 Id.
78 Id. (emphasis omitted).
79 Id.
constructive and positive manner.”

**F. Relief Requested.**

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

**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.”

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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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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

\textsuperscript{83} See id. at § 4.2(e).
\textsuperscript{84} Id.
\textsuperscript{85} Request 18-10, § 6, at Pg. 2.
the Amazon countries.” 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.” 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.” The Resolution goes on to explain that such processing would “include[] the publication of the Public Interest Commitments, as proposed by the Amazon Corporation.” 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.

86 Id.
87 Id.
88 Id.
89 https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d
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

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91 Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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".\textsuperscript{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.\textsuperscript{99} He therefore requested that the matter be “forward[ed] to [him] to finalize [] discussions between the company and [the ACTO]"

\textsuperscript{95} \url{https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d}.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} Transcript of the 25 October 2018 Board Meeting, Pg. 15; 3 Dec. Letter.
countries.” 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 GAC and ACTO. 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. 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.” 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. 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.” 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

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100 3 Dec. Letter.
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 Id. at Pg. 4.
111 7 Dec. Letter.
112 20 Nov. Letter.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{116} Transcript of the 25 October 2018 Board Meeting, Pg. 15.
\textsuperscript{117} Request 18-10, § 8.2, at Pg. 5-6.
\textsuperscript{118} Barcelona Communiqué at Pg. 10-11.
and public authorities.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{123} As explained

\textsuperscript{119} Request 18-10, § 8.2, at Pg. 5.
\textsuperscript{120} Id.
\textsuperscript{121} Durban Communiqué at Pgs. 3-4.
\textsuperscript{122} Abu Dhabi Communiqué at Pg. 13.
\textsuperscript{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.\textsuperscript{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.”\textsuperscript{125} When the ICANN Board previously accepted the GAC’s advice on this issue, the Amazon corporation prevailed in an IRP challenging that decision.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{124} \textit{Id.} § 6, at Pg. 2.
\textsuperscript{125} ICANN Bylaws, 18 June 2018, Art. 1 § 1.2(b).
\textsuperscript{126} IRP Panel Declaration ¶¶ 124-26, at Pgs. 52-53
\textsuperscript{127} \textit{Id.} ¶ 125, at Pgs. 52-53
\textsuperscript{128} \url{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.
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