

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 19-1
14 August 2019**

The Requestor, the Government of Colombia,¹ seeks reconsideration of ICANN Board Resolutions 2019.05.15.13–2019.05.15.15 (15 May 2019 Resolutions). The challenged Resolutions directed ICANN organization to continue processing the Amazon corporation’s applications for the .AMAZON generic top-level domain (TLD) and related internationalized domain names (IDNs) (collectively, the .AMAZON applications and .AMAZON TLDs) according to the policies and procedures of the New gTLD Program.²

Specifically, the Requestor claims that:

- (i) The Board “failed to consider the detailed legal concerns raised in a [7 April 2019] communication to Amazon the Company in which the ICANN CEO, ICANN Board Chair, and ICANN GAC [Governmental Advisory Committee] Chair were all copied.”³
- (ii) The Board relied on inaccurate information when it adopted the Resolutions, including “Amazon the Company’s representation that operating the contested string under a Specification 13 designation would be consistent with existing ICANN established best practice and would safeguard all parties’ best interests.”⁴

¹ The Request was filed on behalf of the Government of Colombia by Ivan Dario Castaño Perez of the Ministerio de Tecnologías de la Información y las Comunicaciones. Request 19-1, § 1, at Pg. 1. While the Government of Colombia is a member of the Amazon Cooperation Treaty Organization (ACTO), the Requestor states that it is filing Request 19-1 in its individual capacity and not on behalf of ACTO or any other ACTO member state. *Id.* at § 7, Pg. 5.

² Resolution 2019.05.15.15 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en>); Request 19-1, § 3, at Pg. 1.

³ Request 19-1, § 8, at Pg. 5.

⁴ Request 19-1, § 8, at Pg. 6.

- (iii) The Board failed to consider a potential governance structure for the .AMAZON TLD and IDNs offered by the Government of Colombia and modelled after the .SAS TLD.⁵
- (iv) The Board violated Article 3.4 of the ICANN Bylaws by posting the agenda for the 15 May 2019 meeting one day prior to the meeting.⁶
- (v) ICANN organization (also ICANN org) violated the ICANN Bylaws regarding transparency by scheduling a closed meeting during ICANN65 with the ICANN Registry Stakeholder Group to discuss a potential process for amending previously contracted-for Public Interest Commitments (PICs).⁷

The Requestor seeks the relief identified in Section III below.

I. Brief Summary.

Since October 2017, in accordance with GAC Advice in the Abu Dhabi Communiqué,⁸ ICANN org President and CEO had been facilitating discussions between ACTO and the Amazon corporation on the use of the .AMAZON TLDs. On 10 March 2019, in Resolutions 2019.03.10.01- 2019.03.10.07, the Board “call[ed] on the ACTO member states and the Amazon corporation to engage in a last effort that allows both parties over the next four (4) weeks to work in good faith toward a mutually acceptable solution.”⁹ The Board also directed that if no mutual agreement was reached, the Amazon corporation should “submit a proposal on how it will address the ACTO member states continuing concerns regarding the Amazon Applications.”¹⁰ Resolution 2019.03.10.05 explained that “if the Amazon corporation’s proposal is acceptable to

⁵ Request 19-1, § 8, at Pg. 7.

⁶ Request 19-1, § 9, at Pg. 9.

⁷ Request 19-1, § 9, at Pg. 9–10.

⁸ See: <https://gac.icann.org/advice/communiques/public/gac-60-abu-dhabi-communique.pdf>.

⁹ ICANN Board Resolutions 2019.03.10.01 – 2019.03.10.07 (<https://www.icann.org/resources/board-material/resolutions-2019-03-10-en#1.a>).

¹⁰ *Id.*

the Board [in accordance with policies and procedures governing the 2012 round of the New gTLD Program], and is not inconsistent with any outstanding formal advice received regarding the Amazon Applications, the Board will direct ICANN org to continue processing the Amazon Applications according to the policies and procedures governing the 2012 round of the New gTLD Program.”¹¹

ACTO and the Amazon corporation did not submit a joint proposal for a solution or a joint request for an extension within the timeline outlined by the Board.¹² On 17 April 2019, within the time designated in Resolutions 2019.03.10.01- 2019.03.10.07, the Amazon corporation submitted its proposal to the ICANN Board on how it will address the ACTO member states’ continuing concerns (the April 2019 Proposal). That proposal is embodied in a “modified proposal for PICs.”¹³ As detailed below, the April 2019 Proposal included, in addition to the creation of a joint Steering Committee, the following commitments:

- (1) Not use as domain names in each .AMAZON TLD those terms that have a primary and well-recognized significance to the culture and heritage of the Amazonia region;
- (2) Provide nine domain names in each .AMAZON TLD to be used for noncommercial purposes by ACTO and its member states to enhance the visibility of the region; and

¹¹ *Id.*

¹² ICANN Board Resolutions 2019.05.15.13 – 2019.05.15.15 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>).

¹³ *Id.*; *see also* Letter from Amazon to ICANN Board, 17 April 2019 (<https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-17apr19-en.pdf>). The April 2019 Proposal follows other proposals submitted by the Amazon corporation in the past several years, including proposals from October 2015, October 2017, February 2018, and November 2018.

- (3) Block from all use up to 1500 domain names in each .AMAZON TLD that have a primary and well recognized significance to the culture and heritage of the Amazonia region.

The Amazon corporation also noted in its proposal that its TLDs would be “highly restricted .BRANDs” and that “Amazon would only register domain names that align with its global brand strategy so that the .AMAZON TLDs are strongly affiliated with the reputation of the Amazon brand, which should eliminate concerns of ACTO and its member states that third parties will abusively use the TLDs.” Finally, the Amazon corporation stated that it would host the nine domain names noted above and would make use of “proactive security controls paired with reactive and detective controls [to offer] the most comprehensive approach to security” related to the “provisioning and configuration of .AMAZON domains.”¹⁴

On 18 April 2019, ACTO submitted an alternative proposal regarding the governance and PICs for the .AMAZON TLDs.¹⁵ Shortly thereafter, ACTO responded to the Amazon corporation’s proposal.¹⁶ Specifically, ACTO stated that “the [Amazon] company’s proposal of April 17 cannot be said to accommodate the principles of shared responsibility and shared governance called for by ACTO members.”¹⁷ ACTO stated that the Amazon corporation’s Steering Committee would only be able to make suggestions and would not be subject to the obligations of the PIC. Further, ACTO held concerns with an “overly restrictive definition of the concept of ‘Culture and heritage specific to the Amazon region’, which would not even include

¹⁴ ICANN Board Resolutions 2019.05.15.13 – 2019.05.15.15 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>).

¹⁵ Letter of Ambassador Alexandra Moreira (<https://www.icann.org/en/system/files/correspondence/moreira-to-chalaby-18apr19-en.pdf>).

¹⁶ Letter of Ambassador Achilles Zaluar, 23 April 2019 (<https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-23apr19-en.pdf>).

¹⁷ *Id.*

the names of cities, towns, villages, rivers, culinary dishes, typical ingredients, animals and plants, touristic attractions, and travel related services, among others.”¹⁸

At its workshop in Istanbul, Turkey from 1-3 May 2019, the Board discussed the Amazon corporation’s proposal in light of all that has come before, including the rules and procedures of the New gTLD Program as set out in the Applicant Guidebook, previous GAC advice, the Amazon corporation Independent Review Process (IRP) Final Declaration, and all relevant correspondence, including, among others, a letter dated 7 April 2019 from the Colombian Government to the Amazon corporation in which the ICANN CEO, ICANN Board Chair, and ICANN GAC Chair were all copied.

On 15 May 2019, the Board again considered the Amazon corporation’s proposal and all other relevant materials, found the proposal acceptable, and adopted the 15 May 2019 Resolutions.¹⁹

On 15 June 2019, the Requestor filed Request 19-1, seeking reconsideration of the 15 May 2019 Resolutions.²⁰

The BAMC has considered Request 19-1 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 15 May 2019 Resolutions based on accurate and complete information and because the Board’s adoption of the 15 May 2019 Resolutions was consistent with ICANN’s Bylaws, policies and procedures.

¹⁸ *Id.*

¹⁹ ICANN Board Resolutions 2019.05.15.13 – 2019.05.15.15 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>).

²⁰ Request 19-1, § 3, at Pg. 1.

II. Facts.

A. Initial Decision on the .AMAZON Applications.

In 2012, the Amazon corporation submitted the .AMAZON applications.²¹ 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 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.”²² The GAC Early Warnings also noted that the requested .AMAZON TLD “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.”²³ 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.”²⁴

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.²⁵ At

²¹ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

²² 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>).

²³ *Id.*

²⁴ *Id.*

²⁵ Beijing Communiqué at Pg. 3 (<https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>).

its July 2013 meeting in Durban, the GAC reached consensus and advised ICANN org that the .AMAZON applications should not proceed.²⁶

The Board—acting via the New gTLD Program Committee (NGPC)—approved a resolution on 14 May 2014 accepting the GAC’s advice and directing ICANN org not to proceed with the .AMAZON applications.²⁷ 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 obligated ICANN to either reject or accept the .AMAZON applications.²⁸ 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.”²⁹

B. The IRP Initiated by the Amazon Corporation.

Following the Board’s acceptance of the GAC Durban Communiqué advice, according to ACTO, “representatives from both the Amazon countries and [the Amazon corporation] held several meetings, including at the ACTO headquarters in Brasília.”³⁰ 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.”³¹

²⁶ Durban Communiqué at Pg. 3-4 (<https://gac.icann.org/advice/communiques/gac-47-durban-communique.pdf>).

²⁷ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-05-14-en#/2.b>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Letter from ACTO to ICANN Board, 5 Sept. 2018, at Annex V, Pg. 5

(<https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-05sep18-en.pdf>).

³¹ *Id.*

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.³² The IRP Panel issued its Final Declaration on 11 July 2017, finding the Amazon corporation to be the prevailing party.³³ The Final Declaration concluded that “GAC consensus advice, standing alone, cannot supplant the Board’s independent and objective decision with a reasoned analysis.”³⁴ Moreover, the Final Declaration explained that neither the GAC Early Warnings, 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 sufficient to justify the Board’s action.³⁵ 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.”³⁶

On 23 September 2017, the Board accepted the IRP Panel Final Declaration recommendation that the Amazon corporation was the prevailing party in the IRP.³⁷ 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.”³⁸

³² See <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

³³ IRP Panel Declaration ¶¶ 124-26, at Pgs. 52-53.

³⁴ *Id.* ¶ 125, at Pgs. 52-53

³⁵ *Id.* ¶¶ 118-19, at Pg. 50.

³⁶ *Id.* ¶ 125, at Pgs. 52-53. See also <https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>.

³⁷ Board 23 September 2017 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2017-09-23-en#2.e>.)

³⁸ *Id.* at Resolution 2017.09.23.17.

C. Continued 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.³⁹

That same day, the GAC met with the Amazon corporation during the ICANN60 meeting in Abu Dhabi to discuss possible solutions that could produce a mutually satisfactory resolution of the .AMAZON applications.⁴⁰ During the meeting, the Amazon corporation presented a proposal to the GAC and the ACTO member states.⁴¹

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.⁴² 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."⁴³ 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."⁴⁴ On 4 February 2018, the ICANN Board accepted this advice and directed the

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

⁴⁰ https://schr.ws/hosted_files/icann60abudhabi2017/7b/I60_AUH-Sun29Oct2017_GAC%20Meet%20with%20Amazon.com-en.pdf.

⁴¹ Transcript of GAC meeting with the Amazon corporation in Abu Dhabi, Pg. 5-8

(https://schr.ws/hosted_files/icann60abudhabi2017/7b/I60_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>.)

⁴² GAC Abu Dhabi Communiqué, Pg. 7.

⁴³ *Id.* at Pg. 13.

⁴⁴ *Id.*

ICANN President and CEO “to facilitate negotiations between the Amazon Cooperation Treaty Organization’s (ACTO) member states and the Amazon corporation.”⁴⁵

On 7 February 2018, following informal exchanges facilitated by ICANN org, the Amazon corporation issued an updated proposal to ACTO, which was reviewed by the ACTO member states.⁴⁶ The ACTO member states also had an opportunity to pose clarifying questions to the Amazon corporation regarding their proposal.⁴⁷ Following review of the proposal, on 5 September 2018, ACTO sent a letter to the Board stating that the Amazon corporation proposal “does not constitute an adequate basis to safeguard [ACTO member states’] inherent rights relating to the delegation of the ‘.amazon’ TLD.”⁴⁸ 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.”⁴⁹ 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.”⁵⁰

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,

⁴⁵ <https://www.icann.org/resources/board-material/resolutions-2018-02-04-en#2.d>.

⁴⁶ 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>).

⁴⁷ *Id.* See also <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁴⁸ Letter from ACTO to ICANN Board, 5 Sept. 2018, at Pg. 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

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.”⁵¹

The ACTO member states met on 16 October 2018 to discuss a response to the September Board Resolution.⁵² 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.”⁵³

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 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.”⁵⁴ The GAC concluded its discussion by “call[ing] upon the Board to continue facilitating work that could result in [a mutually acceptable] solution.”⁵⁵

D. Resumption of Processing of the .AMAZON Applications to Facilitate Continued Negotiations.

On 25 October 2018, the ICANN Board discussed the status of the .AMAZON applications and directed 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

⁵¹ <https://www.icann.org/resources/board-material/resolutions-2018-09-16-en#2.d>.

⁵² Letter from Mendoza to ICANN org, 19 Oct. 2018, <https://www.icann.org/en/system/files/correspondence/mendoza-to-chalaby-marby-19oct18-en.pdf>.

⁵³ Request 18-10, § 8, at Pg. 4. On 22 November 2018, ACTO rescinded the invitation. ICANN Board Resolutions 2019.03.10.01 – 2019.03.10.07 (<https://www.icann.org/resources/board-material/resolutions-2019-03-10-en#1.a>).

⁵⁴ Barcelona Communiqué at Pg. 10-11 (<https://gac.icann.org/advice/communiques/icann63%20gac%20communique%CC%81.pdf>).

⁵⁵ *Id.*

Commitments, as proposed by the Amazon Corporation, according to the established procedures of the New gTLD program.”⁵⁶ The Board also instructed the ICANN President and CEO “to provide regular updates to the Board on the status of the .AMAZON applications.”⁵⁷

On 5 November 2018, ACTO submitted Request 18-10, seeking reconsideration of the Board’s 25 October 2018 actions. ACTO 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.”⁵⁸ 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.”⁵⁹

On 16 January 2019, the Board responded by “acknowledg[ing] that Request 18-10 reflects a difference in interpretation by the Requestor of the Resolution,” and thus “reiterate[d]” its “clear intention . . . 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.”⁶⁰ The Board further explained that “in the event [ACTO and the Amazon corporation] 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.”⁶¹

⁵⁶ <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en#2.d>.

⁵⁷ *Id.*

⁵⁸ 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”).

⁵⁹ *Id.*

⁶⁰ <https://www.icann.org/resources/board-material/resolutions-2019-01-16-en#2.a>.

⁶¹ *Id.*

E. The Board's 10 March 2019 Resolutions.

On 28 January 2019, ACTO invited the ICANN org President and CEO to meet with representatives from the ACTO member states regarding the .AMAZON applications.⁶² ICANN's President and CEO accepted the invitation, and a meeting was scheduled for 19 February 2019.⁶³ However, ACTO cancelled the meeting on 13 February 2019, and provided no dates for rescheduling.⁶⁴ On 15 February 2019, the ICANN org President and CEO acknowledged the cancellation and expressed his hope for continued dialogue, particularly in light of the upcoming ICANN Board meeting at ICANN64.⁶⁵

On 21 February 2019, the Director of the Department of Technological Promotion of the Ministry of Foreign Affairs of Brazil wrote to ICANN, requesting "that the ICANN Board postpone a final decision on the .Amazon applications to ICANN 65, with a view to allow the eight Amazon countries and Amazon Inc. to find a mutually acceptable solution."⁶⁶ On 27 February 2019, the Board of the Brazilian Internet Steering Committee (CGI.br) endorsed the request that the Board not take final action at ICANN64.⁶⁷

On 28 February 2019, ACTO requested that the Board not take final action on the .AMAZON applications at ICANN64, and welcomed further discussions, preferably before 9 March 2019.⁶⁸ On 2 March 2019, the ICANN org President and CEO invited the ACTO member

⁶²<https://www.icann.org/en/system/files/correspondence/lopez-to-ismail-28jan19-en.pdf>.

⁶³<https://www.icann.org/en/system/files/correspondence/moreira-to-marby-13feb19-en.pdf>.

⁶⁴ *Id.*

⁶⁵<https://www.icann.org/en/system/files/correspondence/marby-to-moreira-15feb19-en.pdf>.

⁶⁶<https://www.icann.org/en/system/files/correspondence/zaluar-to-icann-board-21feb19-en.pdf>.

⁶⁷<https://www.icann.org/en/system/files/correspondence/glaser-to-chalaby-ismail-27feb19-en.pdf>. CGI.br acknowledged "the intense exchange of correspondences between the Amazon Cooperation Treaty Organization (ACTO) and ICANN that ensued until February 2019," and explained "that there is still room for dialogue between ICANN, the Amazonian countries and Amazon Inc., with the goal of helping the involved parties reach a mutually agreeable solution." *Id.*

⁶⁸<https://www.icann.org/en/system/files/correspondence/moreira-to-marby-28feb19-en.pdf>.

countries to join him and the Amazon corporation on a conference call before 9 March 2019 to resume discussions.⁶⁹ ACTO responded that it was not available.⁷⁰

On 5 March, 2019, Ambassador Francisco Carrion Mena, writing “on behalf of” the ACTO member states, acknowledged that ACTO and the Amazon corporation had not been able to identify a mutually acceptable solution.⁷¹ However, he reiterated that the ACTO member states were “committed to working on a final solution” and “believe[d] this would be a win for all sides,” and therefore “propose[d] to set a strict and realistic timeline for the conclusion of talks between the Amazon countries and Amazon Inc.”⁷²

On 10 March 2019, at ICANN64, the Board considered the .AMAZON applications. The Board noted that “the President and CEO facilitated discussions with various ACTO member states over the period of a year,” and that “[d]espite repeated attempts, additional facilitation discussions were scheduled, but did not take place.”⁷³ In light of these facts, the Board concluded “that it ha[d] complied with the operative GAC advice on this matter” but that “no mutually agreed solution has been identified to date.”⁷⁴ However, the Board acknowledged requests by ACTO and various ACTO member states for further time to identify a mutually acceptable solution, “recognize[d] the need to balance concerns of all those involved,” and concluded “that allowing a further, short period of time before the Board makes a decision about whether to move toward delegation of the strings represented by the Amazon Applications could still lead to a mutually acceptable solution.”⁷⁵

⁶⁹ <https://www.icann.org/en/system/files/correspondence/marby-to-moreira-02mar19-en.pdf>.

⁷⁰ ICANN Board Resolutions 2019.03.10.01 – 2019.03.10.07 (<https://www.icann.org/resources/board-material/resolutions-2019-03-10-en#1.a>).

⁷¹ <https://www.icann.org/en/system/files/correspondence/mena-to-ismail-05mar19-en.pdf>.

⁷² *Id.*

⁷³ ICANN Board Resolutions 2019.03.10.01 – 2019.03.10.07 (<https://www.icann.org/resources/board-material/resolutions-2019-03-10-en#1.a>).

⁷⁴ *Id.*

⁷⁵ *Id.*

The Board therefore adopted Resolution 2019.03.10.01, “call[ing] on the ACTO member states and the Amazon corporation to engage in a last effort that allows both parties over the next four (4) weeks to work in good faith toward a mutually acceptable solution regarding the Amazon Applications, and if one is reached, to inform the Board of that solution by 7 April 2019.”⁷⁶ The Board noted that if “both ACTO member states and the Amazon corporation mutually agree to and request an extension” of the deadline, the Board would “honor that request.”⁷⁷ The Board also adopted Resolution 2019.03.10.04, which directed that if no mutual agreement was reached, the Amazon corporation should “submit a proposal [by 21 April 2019] on how it will address the ACTO member states continuing concerns regarding the Amazon Applications.”⁷⁸ Resolution 2019.03.10.05 explained that “if the Amazon corporation’s proposal is acceptable to the Board [in accordance with policies and procedures governing the 2012 round of the New gTLD Program], and is not inconsistent with any outstanding formal advice received regarding the Amazon Applications, the Board will direct ICANN org to continue processing the Amazon Applications according to the policies and procedures governing the 2012 round of the New gTLD Program.”⁷⁹

F. Negotiations after the 10 March 2019 Resolutions.

The ICANN org President and CEO wrote to both ACTO and the GAC Chair on 11 March 2019 to ensure they were promptly informed of the 10 March Resolutions.⁸⁰

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ <https://www.icann.org/en/system/files/correspondence/marby-to-moreira-11mar19-en.pdf>;
<https://www.icann.org/en/system/files/correspondence/marby-to-ismail-11mar19-en.pdf>.

ACTO and the Amazon corporation did not submit a joint proposal for a solution within the timeline outlined by the Board.⁸¹ On 5 April 2019, a representative for the Government of Ecuador wrote to ICANN to explain that while the ACTO member countries had been participating in negotiations with the Amazon corporation since the 10 March Resolutions were adopted, the parties had not yet reached a mutually acceptable solution.⁸² Ecuador therefore requested “an extension of the agreed deadline by ICANN, if possible, until the next meeting of that agency, ICANN65, that will take place in Marrakech in June 2019.”⁸³ However, neither Amazon corporation nor the other ACTO member states joined Ecuador in this request.⁸⁴

On 7 April 2019, the Colombian government sent a letter to the Amazon corporation in which the ICANN CEO, ICANN Board Chair, and ICANN GAC Chair were all copied.⁸⁵ The Colombian government expressed “some key concerns that the Colombian government would like to formally enter into the record regarding the framework of these dialogues to date,” including concerns regarding ownership rights, Specification 13 eligibility, and dispute resolution procedures.⁸⁶ The Colombian government stated that “[w]hile it would be our preference for the ICANN board to grant an extension to the parties to continue a constructive dialog on the substantive points raised in this communication, we recognize that such an extension may not be granted.”⁸⁷

On 8 April 2019, the ICANN Board of Directors Chair wrote to ACTO, copying the Amazon corporation, to acknowledge that “the 7 April 2019 deadline has now passed, and the

⁸¹ ICANN Board Resolutions 2019.05.15.13 – 2019.05.15.15 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>).

⁸² <https://www.icann.org/en/system/files/correspondence/epinosa-to-marby-05apr19-en.pdf>.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Request 19-1, Attachment, at Pg. 17.

⁸⁶ *Id.*

⁸⁷ *Id.*, at Pgs. 17-23.

ICANN Board has not received either a mutually agreed-upon proposal for a solution or a joint request for an extension of the 7 April 2019 deadline.”⁸⁸ The letter further explained that the Board would proceed with the next steps described in the 10 March Resolutions.⁸⁹

On 9 April 2019, the Amazon corporation responded to the ICANN Chair’s letter, noting that it had received “various emails and proposals” from “the governments of Brazil, Peru, and Colombia” since the 10 March Resolutions.⁹⁰ The Amazon corporation also noted that it had been informed that the ACTO countries planned to meet later in the week, and that the Amazon corporation “sincerely hopes that the ACTO member states will be able to provide for Amazon’s consideration, before Amazon is required to file its proposal per the Board’s March 10 Resolutions, a single, unified proposal endorsed by all eight ACTO countries that meets Amazon’s commercial and security needs while protecting appropriately the cultural and heritage interests of the people living in the Amazonian region.”⁹¹

On 11 April 2019, ACTO wrote to the ICANN Board Chair to request that the ICANN Board “postpone any final decision on [the .AMAZON applications] until the ICANN 65 meeting” because “an agreement could still be reached if the parties were given more time to work together in good faith.”⁹² ACTO also noted that the ACTO member states “have presented many times in the past years . . . their joint and clear position about the baseline for an agreement, i.e., a shared governance of the TLD.”⁹³ The ICANN Board Chair responded on 15 April 2019, reiterating the timeline adopted by the Board in its 10 March Resolutions, and

⁸⁸ <https://www.icann.org/en/system/files/correspondence/chalaby-to-moreira-08apr19-en.pdf>.

⁸⁹ *Id.*

⁹⁰ <https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-09apr19-en.pdf>.

⁹¹ *Id.*

⁹² <https://www.icann.org/en/system/files/correspondence/moreira-to-chalaby-11apr19-en.pdf>.

⁹³ *Id.*

“respectfully ask[ing] ACTO to adhere to the process outlined in the Board Resolutions, and work with Amazon Corporation, to establish a new timeline if the parties believe that additional time will be useful to reaching an agreement.”⁹⁴

G. Amazon Corporation’s Updated Proposal pursuant to the 10 March 2019 Resolutions.

On 17 April 2019, within the time designated in Resolutions 2019.03.10.01-2019.03.10.07, the Amazon corporation submitted the April 2019 Proposal to the ICANN Board on how it will address the ACTO member states’ continuing concerns. That proposal is embodied in a modified proposal for PICs and included “the creation of a joint Steering Committee,” as well as commitments to: (1) “Not use as domain names in each .AMAZON TLD those terms that have a primary and well-recognized significance to the culture and heritage of the Amazonia region;” (2) “Provide nine domain names in each .AMAZON TLD to be used for non-commercial purposes by ACTO and its member states to enhance the visibility of the region;” and (3) “Block from all use up to 1500 domain names in each .AMAZON TLD that have a primary and well recognized significance to the culture and heritage of the Amazonia region.”⁹⁵ The Amazon corporation also explained that its TLDs would be “highly-restricted .BRANDs” such that “Amazon would only register domain names that align with its global brand strategy” in order to “eliminate concerns of ACTO and its member states that third parties will abusively use the TLDs.”⁹⁶ In a 7-page letter, the Amazon corporation explained how it believed its proposal addressed the concerns of the ACTO member states, while also explaining its rationale for refusing certain restrictions sought by the member states.⁹⁷

⁹⁴ <https://www.icann.org/en/system/files/correspondence/chalaby-to-moreira-15apr19-en.pdf>.

⁹⁵ <https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-17apr19-en.pdf>.

⁹⁶ *Id.*

⁹⁷ *Id.*

On 18 April 2019, ACTO submitted an alternative proposal regarding the governance and PICs for the .AMAZON TLDs, and seeking an extension of the deadline to reach mutual agreement.⁹⁸ ACTO’s modified proposed for PICs required the Amazon corporation “to share the .AMAZON TLD with” ACTO and its member states, to “permanently reserve (block from all use) in the .AMAZON TLD up to 4,500 domain names, and their translations in English, Spanish, Portuguese and Dutch, that have major, international or well-recognized importance to the cultural or natural heritage of the Amazon Region,” and “to make available for ACTO and its member States a list of second level domain names in the .AMAZON TLD that have major, international or well-recognized importance to the cultural or natural heritage of the Amazon Region, including country names and two-letter and three-letter codes for allocation to the entity to which they correspond.”⁹⁹ Further, the ACTO proposal would require “a Steering Committee for [the Amazon corporation] and ACTO member states to exercise their shared responsibility with respect to the governance and use of the .AMAZON TLD,” including deciding on the list of permanently reserved domain names, “to discuss and decide on any concerns ACTO member States may have about domain names used” by the Amazon corporation, and to determine the domain names allocated to ACTO and its member states.¹⁰⁰ Further, ACTO’s proposal would require disputes “over terms with major, international or well-recognized importance to the cultural or natural heritage of the Amazon Region, or over terms that can cause confusion or mislead about matters that can be reasonably associated with the cultural or natural heritage of

⁹⁸ Letter of Ambassador Alexandra Moreira (<https://www.icann.org/en/system/files/correspondence/moreira-to-chalaby-18apr19-en.pdf>).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

the Amazon Region” to be submitted to third-party arbitration, potentially by the UNESCO World Heritage Center.¹⁰¹

On 19 April 2019, the Amazon corporation wrote to the ICANN Board to oppose ACTO’s requested extension, and to explain its views that “the proposed PIC submitted by ACTO fails to take into account the nature and character of a .brand” and that “core aspects of the proposed PIC are contrary to international property law, raise substantial security concerns, and are otherwise impractical and inappropriate.”¹⁰²

On 22 April 2019, the Board received a letter from two “Lecturers in Law and Human Rights at the University of Essex and Middlesex University London,” expressing their view that international human rights law “indicates that the Amazon corporation should have ensured that the concerned indigenous peoples were consulted in relation to its application, and their consent to agreements that ensure fair and equitable benefits obtained in advance of the application.”¹⁰³

On 23 April 2019, the Government of Brazil wrote to the ICANN Board to provide excerpts of the ACTO member states’ communications with the Amazon corporation over the preceding months, and to express Brazil’s view that the Amazon corporation’s proposal “cannot be said to accommodate the principles of shared responsibility and shared governance called for by ACTO members.”¹⁰⁴ Brazil further expressed its view that the Amazon corporation’s technical and legal objections to ACTO’s proposal were unfounded, and that the operation of the TLDs as .BRAND TLDs would not “foreclose the actual sharing of domains.”¹⁰⁵

¹⁰¹ *Id.*

¹⁰² <https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-19apr19-en.pdf>.

¹⁰³ <https://www.icann.org/en/system/files/correspondence/van-ho-doyle-to-chalaby-22apr19-en.pdf>.

¹⁰⁴ <https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-23apr19-en.pdf>.

¹⁰⁵ *Id.*

Responding to both the Government of Brazil’s letter and ACTO’s proposal, the Amazon corporation wrote to the ICANN Board on 23 April 2019.¹⁰⁶ The Amazon corporation explained its view that, “ACTO’s proposed PIC fails to take into account the nature and character of a .BRAND TLD, would create confusion and potentially dilute our brand recognition, and deprive Amazon of significant uses of its applied-for TLDs. Indeed, it seems that core aspects of ACTO’s proposed PIC are contrary to international intellectual property law, raise substantial security concerns, and are otherwise impractical and inappropriate.”¹⁰⁷ Specifically, the Amazon corporation stated that “ACTO’s proposal would foreclose Amazon’s ability to secure .BRAND status,” and that this status was “essential [to the corporation] for maintaining security and customer trust.”¹⁰⁸ The Amazon corporation also objected to ACTO’s proposal that member states’ country names be used as domain names, because the Amazon corporation “intends to withhold all country names from registration in accordance with the Registry Agreement.”¹⁰⁹ The Amazon corporation also stated, “[a]ny form of steering committee that is authorized to take a binding decision as to the administration or operation of the .AMAZON TLDs, or to how we use the .AMAZON TLDs, is not viable from a business perspective,” based in part on the requirements of international trademark law.¹¹⁰ The Amazon corporation also objected to the use of third-party arbitration, rather than established ICANN procedures, to resolve disputes.¹¹¹

¹⁰⁶ <https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-23apr19-en.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

On 29 April 2019, CGI.br wrote to the ICANN Board to “reiterate[] [its] support . . . for the rejection of the delegation of the top-level domain name ‘.AMAZON’ exclusively to a private interest, to be operated as a closed brand top-level domain.”¹¹²

On 7 May 2019, the Government of Brazil wrote to the ICANN Board to “correct” “some misunderstandings about the Amazon countries’ proposed solutions.”¹¹³ Specifically, according to Brazil, the “proposed Steering Committee for the .amazon strings should only have responsibilities over a limited number of issues,” “should allow equal representation of both sides,” and “would only act by consensus.”¹¹⁴ Further, “the purpose of any shared-use[] by the Amazon countries of the .amazon strings would be to safeguard the natural and cultural heritage of the Amazon region and its peoples, never to function as an e-commerce platform.”¹¹⁵ Finally, Brazil addressed the “definition of protected terms” to be precluded from use of domain names, suggesting that the Amazon corporation’s proposed definitions were too restrictive.¹¹⁶

H. The Board’s 15 May 2019 Resolutions.

On 14 May 2019, the ICANN Board published an agenda of a Special Meeting to be held the following day.¹¹⁷ The Special Meeting was scheduled, in significant part, to consider the Generic Names Supporting Organization’s (GNSO) Expedited Policy Development Process (EPDP) Recommendations on the Temporary Specification for gTLD Registration Data, which was a time sensitive matter because the Temporary Specification was set to expire.¹¹⁸

At the 15 May 2019 meeting, the Board also considered the Amazon corporation’s April 2019 Proposal and adopted the 15 May 2019 Resolutions, which stated, in relevant part,

¹¹² <https://www.icann.org/en/system/files/correspondence/glaser-to-chalaby-29apr19-en.pdf>.

¹¹³ <https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-07may19-en.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ <https://www.icann.org/resources/board-material/agenda-2019-05-15-en>.

¹¹⁸ Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.b>).

Resolved (2019.05.15.13), the Board finds the Amazon corporation proposal of 17 April 2019 acceptable, and therefore directs the ICANN org President and CEO, or his designee(s), to continue processing of the .AMAZON applications according to the policies and procedures of the New gTLD Program. This includes the publication of the Public Interest Commitments (PICs), as proposed by the Amazon corporation, for a 30-day public comment period, as per the established procedures of the New gTLD program.

Resolved (2019.05.15.14), the Board thanks ACTO, the ACTO member states, and the Amazon corporation for their time and efforts in attempting to reach a mutually acceptable solution on this matter.

Resolved (2019.05.15.15), the Board thanks the ICANN org President and CEO, along with his team within the ICANN organization, for their facilitation efforts.¹¹⁹

The Board acknowledged the long history of the .AMAZON applications, including ICANN org’s extensive efforts to facilitate agreement on a mutually acceptable solution between the ACTO member states and the Amazon corporation.¹²⁰ The Board further “recognize[d] the need to balance concerns of all those involved, and that it should act fairly and transparently at all times.”¹²¹ The ICANN Board then concluded “that it ha[d] complied with the operative GAC advice . . . as stated in the November 2017 Abu Dhabi Communique.” Finally, “the Board [] determined that the Amazon corporation proposal is not inconsistent with GAC advice and that there is no public policy reason for why the .AMAZON applications should not be allowed to proceed in the New gTLD Program.”¹²²

¹¹⁹ Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>); Request 19-1, § 3, at Pg. 1.

¹²⁰ Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>); Request 19-1, § 3, at Pg. 1.

¹²¹ Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>); Request 19-1, § 3, at Pg. 1.

¹²² Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>); Request 19-1, § 3, at Pg. 1.

III. Relief Requested.

The Requestor asks that the Board either confirm that the Amazon corporation's April 2019 Proposal is consistent with ICANN's policies and practices or, alternatively, reconsider the Resolutions if the plan is inconsistent with ICANN's policies and practices.¹²³ To inform such reconsideration, the Requestor asks that the ICANN Board "be provided with a confidential briefing document on the approximately thirty-seven Specification 13 requests that were either 'Not Approved or Withdrawn,'"¹²⁴ and also that ICANN org "direct [the Security and Stability Advisory Committee, (SSAC)] to prepare a report for the ICANN Board to address the security and stability concerns raised by Amazon the Company."¹²⁵ Further, the Requestor asks that processing of the .AMAZON applications be stayed pending the conclusion of "the current PIC modification process underway within the Registry Stakeholder Group [RySG]."¹²⁶ Additionally, the Requestor asks the Board to "permit the parties to continue to negotiate in good faith toward a mutual goal, absent an artificial deadline imposed by ICANN."¹²⁷ Finally, the Requestor asks that ICANN make publicly available the "Reference Materials Attachment A & B cited in the Resolution."¹²⁸

IV. Issues Presented.

The issues are as follows:

1. Whether the Board adopted the 15 May 2019 Resolutions based on false or inaccurate relevant information, or without consideration of material information.

¹²³ *Id.* §§ 8–9, at Pg. 7, 11.

¹²⁴ *Id.* § 9, at Pg. 11. These Specification 13 requests were made by applicants for other gTLDs and do not involve the .AMAZON applications.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* § 8, at Pg. 8.

¹²⁸ *Id.* § 8, at Pg. 5.

2. Whether the Board adopted the 15 May 2019 Resolutions contrary to ICANN’s Bylaws, which require that “[a]t least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.”¹²⁹
3. Whether ICANN org or the ICANN Board violated ICANN’s Bylaws, which require that ICANN “operate to the maximum extent feasible in an open and transparent manner,”¹³⁰ by holding a closed meeting with the RySG to discuss a potential process to modify PICs.

V. 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.”¹³¹

Request 19-1 seeks reconsideration of Board and staff action on the grounds that the action was taken without consideration of material information, based on false and inaccurate information, and in contradiction of ICANN’s Bylaws. The BAMC has reviewed the Request

¹²⁹ ICANN Bylaws, 18 June 2018, Art. 3 § 3.4.

¹³⁰ *Id.* at § 3.1.

¹³¹ *Id.* at §§ 4.2(a) and (c).

and now provides a recommendation to the Board.¹³² 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.¹³³

VI. Analysis and Rationale.

A. The Board Did Not Fail to Consider Material Information Before Adopting the Resolutions.¹³⁴

The Requestor suggests that in adopting the 15 May 2019 Resolutions, “ICANN Staff and Board . . . failed to consider the detailed legal concerns raised in a [7 April 2019] communication to Amazon the Company in which the ICANN CEO, ICANN Board Chair, and ICANN GAC Chair were all copied.”¹³⁵ Relatedly, the Requestor notes that “the Colombian government offered other governance structures” in its 7 April 2019 communication to the Amazon corporation, but that it “does not appear that the ICANN Board even consider[ed] this potential option in seeking to achieve a mutually agreeable resolution between the parties.”¹³⁶ The BAMC concludes that the Requestor’s claims do not support reconsideration.

The BAMC confirms that the Board considered the issues set forth in the Requestor’s 7 April 2019 Letter as part of its discussion on the Amazon corporation’s April 2019 Proposal at the Board workshop from 1-3 May 2019.

¹³² *See id.* at § 4.2(e).

¹³³ *Id.*

¹³⁴ In addition to asserting that the Board failed to consider relevant information and relied on inaccurate information in adopting the Resolutions, the Request also asked that “ICANN provide the community with a public link” to the “Reference Materials Attachment A & B cited in the Resolution.” Request 19-1, § 8, at Pg. 5. In keeping with ICANN’s standard practice, those materials (with confidential material redacted) were posted alongside the approved Minutes of the 15 May 2019 meeting. They are available at <https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-15may19-en.pdf>.

¹³⁵ Request 19-1, § 8, at Pg. 5.

¹³⁶ *Id.* at Pg. 7.

1. The Board considered the “legal concerns” raised in the Requestor’s 7 April 2019 Letter.

The Requestor’s conclusion that the Board did not consider the Requestor’s “legal concerns” is based solely on the Requestor’s assertion that “the Colombia government has been unable to find [the 7 April 2019] communication listed on the ICANN public correspondence website or in any of the cited references in the Resolution[s].”¹³⁷ However, the Requestor’s 7 April 2019 Letter was addressed to the Amazon corporation, not to the ICANN Board, the ICANN organization, or any individual associated with ICANN.¹³⁸ ICANN org’s CEO and President, as well as the Chair of the Board, were only copied on the communication.¹³⁹ It is not ICANN’s policy or practice to publicly post communications between third parties on which it is only copied.

While the BAMC acknowledges that the Requestor’s 7 April 2019 Letter was not specifically identified in the 15 May 2019 Resolutions under the “What materials did the Board review” section of the Rationale, the legal concerns and the proposed joint governance structure for the .AMAZON TLDs set forth in the Requestor’s 7 April 2019 Letter were also discussed in other correspondence from the ACTO member states that the Board considered and listed in adopting the 15 May 2019 Resolutions.¹⁴⁰ Specifically, the legal concerns and proposed joint governance structure were included in the 11 April 2019 letter from the Secretary General of ACTO to the ICANN Board Chair,¹⁴¹ and the letters from Ambassador Zaluar of Brazil to the

¹³⁷ See *id.* at Pg.5.

¹³⁸ See *id.* at Attachment, Pg. 17.

¹³⁹ See *id.*

¹⁴⁰ The Requestor’s 7 April 2019 Letter cited several models of joint governance, including the .SAS TLD governance model.

¹⁴¹ See <https://www.icann.org/en/system/files/correspondence/moreira-to-chalaby-11apr19-en.pdf>.

ICANN Board of 23 April 2019¹⁴² and 7 May 2019.¹⁴³ Indeed, ACTO noted in its 11 April 2019 letter to the Board that the ACTO member states “have presented many times in the past years . . . their joint and clear position about the baseline for an agreement, i.e., a shared governance of the TLD.”¹⁴⁴ These letters were identified in the “What materials did the Board review” section to the 15 May 2019 Resolutions.¹⁴⁵

2. The Board considered the alternative governance models suggested by the Requestor and ACTO member states.

The Requestor assumes that because the Board did not accept the alternative governance models, it must not have considered them.¹⁴⁶ The fact that the Board did not accept the proposed joint governance models is not evidence that the Board failed to consider the proposals. As discussed in detail above, the Board did consider the alternative governance models proposed by the Requestor and ACTO member states when it adopted the 15 May 2019 Resolutions.

Further, the alternative governance models were not material to the question before the Board when it adopted the Resolutions. That is, pursuant to the 10 March 2019 Resolutions, the Board was to consider whether the Amazon corporation’s proposal was acceptable, not to compare the Amazon corporation’s proposal with alternatives proposed by other stakeholders.

¹⁴² See <https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-23apr19-en.pdf>.

¹⁴³ See <https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-07may19-en.pdf>.

¹⁴⁴ <https://www.icann.org/en/system/files/correspondence/moreira-to-chalaby-11apr19-en.pdf>.

¹⁴⁵ See, e.g., <https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-23apr19-en.pdf>; <https://www.icann.org/en/system/files/correspondence/glaser-to-chalaby-29apr19-en.pdf>. See also ICANN Reference Materials to Paper No. 2019-05-15-1c, Attachment B (<https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-15may19-en.pdf>) (describing 23 April 2019 letter from the Brazilian government to ICANN); 23 April 2019 letter from Brazilian government to ICANN (<https://www.icann.org/en/system/files/correspondence/zaluar-to-chalaby-23apr19-en.pdf>) (asserting that “the applied-for string would be operated as a closed .BRAND gTLD, which would foreclose the actual sharing of domains under the .AMAZON TLDs for purposes other than the protection and promotion of the brand”).

¹⁴⁶ See Request 19-1, § 8, at Pg. 7.

Based on the foregoing, the BAMC concludes that there is no evidence that the Board failed to consider material information in adopting the 15 May 2019 Resolutions.¹⁴⁷

B. The Board Did Not Adopt the 15 May 2019 Resolutions Based on False or Inaccurate Information.

1. The ICANN Board did not approve Amazon corporation's Specification 13 Applications when it adopted the 15 May 2019 Resolutions.

The Requestor claims that in adopting the 15 May 2019 Resolutions, “[t]he ICANN Board appears to blindly accept Amazon the Company’s representation that operating the contested string under a Specification 13 designation would be consistent with existing ICANN established best practice and would safeguard all parties’ best interests.”¹⁴⁸ According to the Request, “that is not the case,” and is therefore inaccurate information, because “only the trademark owner, its affiliates and licensees are permitted to use domain names in a Specification 13 (aka Brand) TLD,” and the Requestor “cannot see how Amazon Inc’s proposal to permit ACTO members to be beneficial registrants of the domain names is acceptable under the existing ICANN registry contractual framework.”¹⁴⁹

The Board’s determination in the 15 May 2019 Resolutions that ICANN org should “continue processing” the .AMAZON applications “according to the policies and procedures of the New gTLD Program” was not a determination that the Amazon corporation is automatically entitled to move forward to delegation of the .AMAZON TLDs, nor did the Board’s action constitute approval of the Amazon corporation’s Specification 13 applications to operate

¹⁴⁷ In connection with the shared governance model, the Request also asks that “ICANN Org direct SSAC to prepare [a] report for the ICANN Board to address the security and stability concerns raised by Amazon the Company in connection with the concurrent use proposal made by the Colombia government.” Request 19-1, § 9, at Pg. 11. However, a Request for Reconsideration is not the appropriate forum in which to request such relief. *See* Bylaws Art. 4, § 4.2. A Request for Reconsideration is likewise not the appropriate forum for the Requestor’s request that the ICANN Board “be provided with a confidential briefing document on the approximately thirty-seven Specification 13 requests that were either ‘Not Approved or Withdrawn.’” Request 19-1, § 9, at Pg. 11.

¹⁴⁸ Request 19-1, § 8, at Pg.6.

¹⁴⁹ *See id.* § 8, at Pg.6.

as .BRAND TLDs. In adopting the 15 May 2019 Resolutions, the Board acknowledged that the .AMAZON applications still needed to go through the remaining application processes in accordance with the Applicant Guidebook. For example, the Board noted that, “[i]f the .AMAZON applications are able to complete the AGB processes and move forward into delegation, the Board expects that ICANN Contractual Compliance will – as with any other registry agreement – diligently monitor the Amazon corporation’s compliance with the terms of their registry agreements, including the PICs that are essential to today’s decision.”¹⁵⁰

The Board’s 15 May 2019 Resolutions were limited to addressing whether the Amazon corporation’s April 2019 Proposal was “not inconsistent with” the GAC’s 2017 advice to the Board to “facilitate[e] negotiations between [ACTO] member states and the Amazon corporation with a view to reaching a mutually acceptable solution” which would “allow for the use of .amazon as a top level domain name.”¹⁵¹ While the Board was aware of the Amazon corporation’s intention of operating .AMAZON TLDs as .BRAND TLDs,¹⁵² the 15 May 2019 Resolutions did not take a position on the propriety of any Specification 13 application because individual Specification 13 applications are evaluated and approved or denied by ICANN org.¹⁵³ The BAMC notes that the Amazon corporation had not submitted a formal Specification 13 application for the .AMAZON TLDs at the time the Board approved the 15 May 2019 Resolutions. Because the Board did not take a position on the propriety of any Specification 13 application, it did not rely on any “representations” about Specification 13, and therefore those

¹⁵⁰ Resolution 2019.05.15.13 (<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.c>).

¹⁵¹ *Id.*

¹⁵² Letter from Amazon to ICANN Board at Pg. 3, 17 April 2019 (<https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-17apr19-en.pdf>).

¹⁵³ See .BRAND TLD Application Process, Pgs. 6-7 (<https://newgtlds.icann.org/en/applicants/agb/base-agreement-spec-13-application-form-15jul14-en.pdf>).

representations do not support the Requestor's claim that the Board relied on inaccurate information when it enacted the 15 May 2019 Resolutions.

2. Specification 13 status is not necessarily incongruent with the proposed PICs.

The Requestor claims that Amazon corporation's proposed PICs would automatically be incongruent with any Specification 13 application submitted by the Amazon corporation. The BAMC does not agree. Specification 13 requires, among other things, that only the Registry Operator (here, this would be the Amazon corporation), "its Affiliates or Trademark Licensees are registrants of domain names in the TLD and control the DNS records associated with domain names at any level in the TLD."¹⁵⁴ There is no prohibition on allowing third parties to *use* domain names in a .BRAND TLD, which was what the Amazon corporation proposed to do.¹⁵⁵ Specifically, the Amazon corporation proposed to

permit use of the .AMAZON TLD by ACTO through providing nine (9) domain names in the .AMAZON TLD for ACTO's designation to itself and its eight member states as it sees fit, for non-commercial purposes. . . . Registration of the Permitted Domain Names shall be made by Registry Operator through the Registry Operator's chosen registrar[,] . . . will be registered in the name of the Registry Operator[,] . . . and will be delegated onto servers selected and controlled by Registry Operator. . . . The Permitted Domain Names may (i) point to websites hosted by Registry Operator or its Affiliates ("ACT Name Websites") or (ii) redirect to existing websites, where the Registry Operator or its Affiliates host the redirect.¹⁵⁶

The Requestor states that it advised the Board of the conflict between Amazon corporation's Specification 11 and 13 designations in the Requestor's 7 April 2019 Letter. This letter was not addressed to the Board; nevertheless, the BAMC notes that the Requestor actually concedes in

¹⁵⁴ Applications to Qualify for Specification 13 to the Registry Agreement (<https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>).

¹⁵⁵ *See id.*

¹⁵⁶ Letter from Amazon to ICANN Board at Pgs. 9-11, 17 April 2019 (<https://www.icann.org/en/system/files/correspondence/huseman-to-chalaby-17apr19-en.pdf>).

the letter that the proposed PICs do not inherently conflict with Specification 13. That is, the Requestor does *not* assert that the proposed PICs *actually* violate Specification 13, but rather, the Requestor posits that the proposed PICs “violate the spirit of the Specification 13 guidance and the best practice of ICANN Org in approving Specification 13 requests.”¹⁵⁷ Because Specification 13 does not prohibit the type of use (without third-party registration) that the Amazon corporation proposed, the Requestor’s assertions about the “spirit” of Specification 13 are misplaced and not grounds for reconsideration.¹⁵⁸

Finally, the Requestor’s concerns about Specification 13 appear to arise from a belief that, if the Amazon corporation applies for and receives Specification 13 status for the .AMAZON TLDs, such status will nullify or diminish the effect of the PICs.¹⁵⁹ While the BAMC understands the Requestor’s concerns, such fear is unfounded and premature at this stage. Amazon corporation’s Specification 13 status has no bearing on its Specification 11 PICs. The approval of a Specification 13 to an eventual registry agreement and the designation of a TLD as a .BRAND TLD does not nullify the Registry Operator’s Specification 11 PICs. A Registry Operator will be contractually bound by its Specification 11 commitments and its Specification 13 obligations, if applicable. Each Specification has its own enforcement

¹⁵⁷ Request 19-1, Attachment, at Pg. 2.

¹⁵⁸ The Requestor asks that the Board either confirm that the plan proposed by the Amazon corporation is consistent with ICANN’s policies and practices or, alternatively, reconsider the Resolutions if the plan is inconsistent with ICANN’s policies and practices. Request 19-1, §§ 8–9, at Pg. 7, 11. As a preliminary matter, a Request for Reconsideration is not the appropriate forum in which to ask the Board to “confirm” the Board’s determination; in evaluating a Request for Reconsideration, the BAMC and Board consider whether the Board’s action—here, the Resolutions—contradicted ICANN’s established policies and procedures, not whether the Amazon corporation’s proposal contradicted those procedures. *See* Bylaws Art. 4, § 4.2. The BAMC concludes that the Resolutions are consistent with ICANN’s established policies and procedures, and with ICANN’s Bylaws. As a result, Reconsideration is not warranted, and the BAMC concludes that the Board need not issue the requested confirmation in the course of its consideration of Request 19-1.

¹⁵⁹ *See* Request 19-1, § 8, at Pg. 6 (“[W]e cannot see how Amazon Inc’s[] proposal to permit ACTO members to be beneficial registrants of the domain names is acceptable . . . the fact remains that the ACTO members would be the beneficial registrants and would thus violate the terms of Specification 13.”).

mechanisms. A Registry Operator’s failure to operate in compliance with its Specification 11 PICs shall be subject to the Public Interest Commitment Dispute Resolution Procedure.¹⁶⁰ Similarly, upon a Registry Operator’s failure to satisfy the requirements of Specification 13, “(i) the TLD shall immediately cease to be a .BRAND TLD, (ii) Registry Operator shall immediately comply with the provisions of the [Registry] Agreement as no longer modified by [] Specification 13 [] and (iii) the provisions of [the] Specification 13 [] shall thereafter no longer have any effect.”¹⁶¹ Thus, if an actual conflict should arise between the Amazon corporation’s Specifications 11 and 13, there are safeguards in place to address such conflicts.

C. The Board’s Adoption of the Resolutions Was Consistent with ICANN’s Bylaws.

The Requestor claims that the Board adopted the Resolutions in contravention of the ICANN Bylaws because “the agenda for the 15-May-2019 ICANN Board meeting was published one (1) day in advance of the actual meeting.”¹⁶² In the Requestor’s view, this violated Article 3.4 of the ICANN Bylaws, which states, “At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.”¹⁶³

As the Requestor acknowledges, “the bylaws provide some latitude” with respect to this provision by including “qualifiers like ‘as is practicable.’”¹⁶⁴ In this case, the 15 May 2019 meeting was set to address the urgent matter of the GNSO EPDP Recommendations on the

¹⁶⁰ Base Specification 11, updated 31 July 2017 (<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>); Public Interest Commitment Dispute Resolution Procedure (<https://www.icann.org/resources/pages/picdrp-2014-01-09-en>; <http://newgtlds.icann.org/en/applicants/agb/picdrp-19dec13-en.pdf>.)

¹⁶¹ Base Specification 13, updated 31 July 2017 (<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-specification-13-31jul17-en.pdf>).

¹⁶² Request 19-1, § 8, at Pg. 9.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Temporary Specification for gTLD Registration Data, because the Temporary Specification was set to expire.¹⁶⁵ Given the circumstances, the agenda for the meeting was not finalized until 14 May 2019, when it was promptly posted as soon as practicable. Therefore, the timing of when the agenda was posted was consistent with the Bylaws.

D. No Meeting Was Scheduled with the RySG to Discuss a Potential Process to Modify PICs.

The Request asserts that ICANN staff has violated ICANN Bylaws requiring ICANN to “operate to the maximum extent feasible in an open and transparent manner” by “schemul[ing] a session . . . with the ICANN Registry Stakeholder Group at the upcoming [ICANN65]” to discuss a “proposed change process whereby a Registry Operator could amend previously committed to Public Interest Commitments” and by holding the session as a “closed session open only to ICANN staff and the [RySG].”¹⁶⁶ The Request asks that sessions on this topic “be open for observation by interested third parties” and that “ICANN delay any Registry Agreement execution with Amazon the Company until the current PIC modification process underway with the [RySG] is successful[ly] concluded or terminated.”¹⁶⁷

However, the asserted violation and requested relief are based on an incorrect premise, as no such session was scheduled for ICANN65. The meeting with the RySG and ICANN org staff was not scheduled to include discussion of a process for modifying previously agreed to PICs. Instead, the focus of the meeting was the process for *enforcing* PICs (the PIC Dispute Resolution Process, or PICDRP). Accordingly, Request 19-1 does not identify a violation of ICANN Bylaws, policies, or procedures with respect to the meeting with the RySG and ICANN org staff.

¹⁶⁵ <https://www.icann.org/resources/board-material/resolutions-2019-05-15-en#1.b>.

¹⁶⁶ Request 19-1, § 8, at Pg. 10.

¹⁶⁷ *Id.*

VII. Recommendation

The BAMC has considered the merits of Request 19-1 and, based on the foregoing, concludes that neither the Board nor the staff took action without consideration of material information, based on false or inaccurate relevant information, or in contradiction of ICANN's Bylaws. Accordingly, the BAMC recommends that the Board deny Request 19-1.